NORDIC JOURNAL OF EUROPEAN LAW

Volume 3
Issue 1 · 2020

LUND UNIVERSITY
FACULTY OF LAW

ISSN 2003-1785

NORDIC JOURNAL OF EUROPEAN LAW
ISSUE N 1 OF 2020

njel@jur.lu.se

http://journals.lub.lu.se/njel

Lund University

TABLE OF CONTENT

ARTICLES

CASE NOTES

Guest Note on the Impact of the COVID-19 Outbreak on EU Law

Anna Zemskova*

Within the past months, we have all witnessed a rapidly evolving global public health emergency triggered by the COVID-19 pandemic whose massive scale has almost not left any sector of our life untouched, demanding for the introduction of a vast number of diversified measures all over the world. The EU realized the scope of the outbreak and activated various tools capable of alleviating the detrimental effects of the pandemic in the affected fields. Since March 2020, 95 legal acts have been adopted in order to address this exceptional exigency.[1] However, their effectiveness in terms of contributing to combatting the virus and its adverse repercussions remains to be evaluated at the lapse of the time.[2] While the focus of the undertaken measures understandably centers around obtaining short-term objectives by eradicating the shocks of the global health emergency,[3] the momentous implications of the COVID-19 outbreak on the European project and its constitutional foundations, that will define the direction of the future of the European integration, can to some extent be discerned already now.

While constituting a unique and uncommon state of emergency in contrast to the usually encountered ones, the current emergency, being the most serious challenge the Union has ever faced since its creation,[4] has not only shattered the foundations of healthcare systems in the EU. It has also highlighted the unsettled facets of the European project that have been problematic long before the emergence of the COVID-19 pandemic. This category of issues includes allocation of competences, questionable understanding of commonly shared EU democratic values, such as the rule of law and protection of fundamental rights, ambivalent perception of solidarity between the Member States and necessity of clarification of the EU legal framework by means of thorough constitutional litigation. These aspects, remaining to be a golden thread running throughout the EU project, are to be accentuated in this editorial.

Firstly, the COVID-19 pandemic has accentuated the natural limitations of EU law in regard to emergency responses in the field of public health. Even though the TFEU envisages possibilities of EU actions in cases of natural and man-made disasters

*Anna Zemskova, a PhD Candidate in Constitutional Law at Lund University. Her current project deals with examining the adherence to the rule of law in the context of economic emergency.

1 As of the 30th of June 2020.

2 Such as, effectiveness of digital tracing model, see Oreste Pollicino, 'Fighting Covid-19 and Protecting Privacy under EU Law. A Proposal Looking at the Roots of European Constitutionalism' (2020) Weekend Edition 17 EU Law Live <https://eulawlive.com/weekend-edition/weekend-edition-no17/> accessed 29 June 2020.

3 So-called 'containment measures', see Anna Gelpern 'Financial Crisis Containment' (2009) 41 University of Connecticut Law Review 1051.

4 Maja Brkan, René Repasi, Marco Lamandini, Adolfo Martín, Isabelle van Damme, Araceli Turmo, Ana Ramalho, Jorge Piernas, Maria Weimer, Anne-Lise Sibony 'COVID-19 – Making the best out of Europe' (2020) Weekend Edition 17 EU Law Live 2 <https://eulawlive.com/weekend-edition/weekend-edition-no17/> accessed 29 June 2020.

or exceptional occurrences beyond control of Member States,[5] the room for maneuver for the EU in the field of public health is reduced to complementing national policies,[6] whereas the actual health policy is vested in the Member States. As a consequence, Member States have adopted differentiating measures, tailored for their healthcare systems, demonstrating a vividly 'individualistic' approach that lacks unity.[7] Stuck between Scylla and Charybdis, EU actors could only facilitate the resolution of a public health emergency by means of adopting measures within the reach of their existing competences,[8] introducing soft law packages,[9] designed to enhance a more united and coherent approach that is supposed to be shared across the Union. In this respect, the exercise of emergency responses in the context of public health emergencies needs to become more coordinated for its current and potential future application as the globality of public health emergencies is not constrained to one or several Member States as it usually is in case of localized natural disasters or political emergencies, but embraces the whole Union and demands for the shared understanding of the course of actions to undertake.

Secondly, as known, emergencies in general verge on endangering the core values of democratic societies, such as the rule of law[10] and human rights.[11] In the context of the EU, Member States varied from pursuing a relaxed approach towards quarantine framework[12] to invoking 'state of emergency' regimes,[13] creating a mosaic application of different restrictive mechanisms that has resulted in impelled

---

[5] For example, providing 'flexibility' for Member States for adoption of State Aid measures under Article 107(2)(b) and Article 107(3)(b) in light of Commission, 'Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak' (Communication) COM (2020) OJ C 91I and adoption of 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 [2020]OJ L 159 on the basis of Article 122 TFEU, entailing providing financial assistance to a distressed Member State.

[6] Articles 2(5), 6(a), 168 TFEU.

[7] Alessio Pacces, Maria Weimer, 'From Diversity to Coordination: A European Approach to COVID-19' (2020) 11 European Journal of Risk Regulation 283, 284.

[8] 'The Common EU response to COVID-19' <https://europa.eu/european-union/coronavirus-response_en> accessed 29 June 2020.

[9]For instance, Commission, 'Tourism and transport in 2020 and beyond' COM (2020) 550 final; Commission, 'Towards a phased and coordinated approach for restoring freedom of movement and lifting internal border controls — COVID-19 2020/C 169/03' COM (2020) OJ C 169; Commission, 'EU Guidance for the progressive resumption of tourism services and for health protocols in hospitality establishments – COVID-19 2020/C 169/01' COM (2020) OJ C 169; Commission, Recommendation (EU) 2020/648 of 13 May 2020 on vouchers offered to passengers and travellers as an alternative to reimbursement for cancelled package travel and transport services in the context of the COVID-19 pandemic OJ L 151.

[10] Clement Fatovic, 'Emergencies and the Rule of Law'(2019) Oxford Research Encyclopedia of Politics <https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-93> accessed 30 June 2020.

[11] Alan Greene, 'The Ideal State of Emergency' in Alan Greene (ed.) *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis* (Hart, 2016) 20.

[12]Government Offices of Sweden, Prime Minister's Office, 'Strategy in Response to the COVID-19 Pandemic' (6 April 2020) <https://www.government.se/articles/2020/04/strategy-in-response-to-the-covid-19-pandemic/> accessed 29 June 2020.

[13] European Parliament, 'States of Emergency in Response to the Coronavirus Crisis: Situation in Certain Member States' Briefing (4 May 2020); 'States of Emergency in Response to the Coronavirus Crisis: Situation in Certain Member States II' Briefing (13 May 2020); 'States of Emergency in Response to the Coronavirus Crisis: Situation in Certain Member States III' Briefing (17 June 2020).

limitation of fundamental rights in the Member States.[14] Some Member States even invoked a derogation clause under ECHR.[15] While it is expected that once the lockdown restrictions are lifted, limitations of fundamental rights enshrined in the Charter of Fundamental Rights will cease to operate, some of such restrictions might have irreversible consequences for the rule of law and protection of human rights. As for the rule of law, the enacted state of emergency in those Member States, that have already been experiencing backsliding of the rule of law,[16] has given a new, so unfortunately triggered by the pandemic, opportunity to jeopardize the adherence to the principle even more.[17] While in Hungary the state of emergency, originally unlimited in time and allowing the government to rule by decree bypassing the Parliament, ceased to operate last week, the opposition from NGOs has described its termination as nothing more than an 'optical illusion'.[18] Poland, in the meantime, on the threshold of presidential elections, introduced controversial and legally questionable changes into the electoral code allowing to hold presidential elections by post, that was in its turn approved by the Sejm. Facing harsh resistance from the opposition, the presidential elections, allowing for both postal and traditional voting,[19] were postponed until the 28th of June 2020.[20] These deteriorations have already become a worrying topic discussed at plenary sessions of the European Parliament, where triggering a 'nuclear option' against Hungary and Poland is back on the radar.[21] However, effectiveness of recourse to Article 7 TEU remains doubtful, considering

[14] European Union Agency for Fundamental Rights, 'Coronavirus Pandemic in the EU - Fundamental Rights Implications - Bulletin 1' Bulletin 1 (8 April 2020); 'Coronavirus Pandemic in the EU – Fundamental Rights Implications: With A Focus on Contact-Tracing Apps' Bulletin 2 (28 May 2020).
[15] Latvia, Estonia and Romania notified the Council of Europe of declarations of state of emergency and hence the following derogations from the ECHR under Article 15 of ECHR, see also Sean Molloy 'Covid-19 and Derogations Before the European Court of Human Rights'(VerfBlog, 10 April 2020) <https://verfassungsblog.de/covid-19-and-derogations-before-the-european-court-of-human-rights/> accessed 29 June 2020; as of the 22nd of June 2020 all the three Member States have withdrawn their derogations, Latvia (10th of June 2020), Estonia (18th of May 2020), Romania (15th of May 2020).
[16] Kim Lane Scheppele, Laurent Pech, 'What is Rule of Law Backsliding?' (VerfBlog, 2 March 2018) <https://verfassungsblog.de/what-is-rule-of-law-backsliding/> accessed 29 June 2020.
[17] European Parliament, 'Hungary's Emergency Measures: MEPs Ask EU to Impose Sanctions and Stop Payment' Press Release (14 May 2020) <https://www.europarl.europa.eu/news/en/press-room/20200512IPR78917/hungary-s-emergency-measures-meps-ask-eu-to-impose-sanctions-and-stop-payments> accessed 29 June 2020; European Parliament resolution of 17 April 2020 on EU coordinated action to combat the COVID-19 pandemic and its consequences (2020/2616(RSP)) P9_TA(2020)0054 para 46.
[18] 'Coronavirus: Hungary Votes to End Viktor Orban Emergency Powers' BBC News (16 June 2020) <https://www.bbc.com/news/world-europe-53062177> accessed 29 June 2020.
[19] 'Polish Senate Passes Election Bill, Setting Stage for June Vote' Reuters (Warsaw, 2 June 2020) <https://www.reuters.com/article/us-poland-election-senate/polish-senate-passes-election-bill-setting-stage-for-june-vote-idUSKBN2383U3> accessed 29 June 2020.
[20] Marcin Goclowski 'Poland Sets June 28 Date for Rescheduled Presidential Election' Reuters (Warsaw, 3 June 2020) <https://www.reuters.com/article/us-poland-election/poland-sets-june-28-date-for-rescheduled-presidential-election-idUSKBN23A1BY> accessed 29 June 2020.
[21]European Parliament, 'The Pandemic is No Excuse to Weaken Democracy and the Rule of Law, MEPs Say' Press Release (23 April 2020) <https://www.europarl.europa.eu/news/en/press-room/20200419IPR77412/the-pandemic-is-no-excuse-to-weaken-democracy-and-the-rule-of-law-meps-say> accessed 29 June 2020.

the previous attempts to complete the process enshrined therein against the Member States at hand[22] and the current developments in these Member States.

As for fundamental rights, the right to privacy, guaranteed under Article 8 of the Charter of Fundamental Rights, might be one of the most endangered fundamental rights currently as its protection becomes more and more challenging in light of increased recourse to digitalized tools by both public and private actors during the COVID-19 outbreak. The continuous struggle between the alleged effectiveness of the measures, such as using digital contact tracing tools and sharing health data information with the third parties under the aegis of the principle of social responsibility, and personal integrity,[23] remains an unresolved issue. This conundrum has been accentuated by the EU actors, having reflected their positions through soft law mechanisms, prioritizing, among others, the principles of anonymization, data minimization, privacy by design, transparency and accountability.[24]

Thirdly, the COVID-19 pandemic has clearly illustrated the evolving nature of emergencies, capable of triggering unrest in other fields.[25] The world economy has swiftly reacted to the COVID-19 Crisis by entering into a deep economic recession,[26] whose negative effects can hardly be fully estimated now. The EU, envisioning a harsh economic downturn, lunged to keep the EU economy afloat, providing as much flexibility as possible to the affected parties. While the Commission activated the general escape clause of the Stability and Growth Pact,[27] the ECB has instantly come up with the Pandemic Emergency Purchase Programme (PEPP),[28] that has been founded on the legacy of the operable Asset Purchase Programme (APP). The scope of the EU Solidarity Fund was extended to include major public health emergencies,[29]

---

[22] European Parliament, 'Rule of Law in Poland and Hungary Has Worsened' Press Release (16 January 2020) <https://www.europarl.europa.eu/news/en/press-room/20200109IPR69907/rule-of-law-in-poland-and-hungary-has-worsened> accessed 29 June 2020.

[23] Christina Etteldorf, 'Effectiveness versus Integrity – How COVID-19 is Affecting Privacy', (2020) Weekend Edition 17 EU Law Live 13-17 <https://eulawlive.com/weekend-edition/weekend-edition-no17/> accessed 29 June 2020.

[24] Commission Recommendation (EU) 2020/518 of 8 April 2020 on a common Union toolbox for the use of technology and data to combat and exit from the COVID-19 crisis, in particular concerning mobile applications and the use of anonymised mobility data OJ L 114; Commission, 'Guidance on Apps supporting the fight against COVID 19 pandemic in relation to data protection 2020/C 124 I/01' COM (2020) OJ C 124; European Parliament resolution of 17 April 2020 on EU coordinated action to combat the COVID-19 pandemic and its consequences (2020/2616(RSP)) P9_TA(2020)0054; European Data Protection Board, Guidelines 04/2020 on the use of location data and contact tracing tools in the context of the COVID-19 outbreak (21 April 2020).

[25] Alan Greene 'Questioning Executive Supremacy in an Economic State of Emergency' (2015) 35 Legal Studies (Journal of the Society of Legal Scholars) 594, 609.

[26] Gita Gopinath 'The Great Lockdown: Worst Economic Downturn Since the Great Depression' (IMF Blog, 14 April 2020) <https://blogs.imf.org/2020/04/14/the-great-lockdown-worst-economic-downturn-since-the-great-depression/> accessed 29 June 2020.

[27] Commission, 'On the activation of the general escape clause of the Stability and Growth Pact' COM (2020) 123 final.

[28] Decision (EU) 2020/440 of the European Central Bank of 24 March 2020 on a temporary pandemic emergency purchase programme [2020] OJ L 91.

[29] Regulation (EU) 2020/461 of the European Parliament and of the Council of 30 March 2020 amending Council Regulation (EC) No 2012/2002 in order to provide financial assistance to Member States and to countries negotiating their accession to the Union that are seriously affected by a major public health emergency [2020] OJ L 99.

while new instruments, such as SURE,[30] the Coronavirus Response Investment Initiative (CRII)[31] and the Coronavirus Response Investment Initiative Plus (CRII+),[32] have been adopted. The Eurogroup in its turn has eventually agreed upon the use of the European Stability Mechanism (ESM) in the form ESM Pandemic Crisis Support.[33] However, adoption of these extraordinary tools, aimed at facilitating support to economy of the Member States, has showed hampered understanding of the solidarity shared by the members of the Eurozone. A great example in this respect is a process of agreeing on the requirements for the invocation of the ESM that demonstrated highly polar views of Creditor and Debtor Member States in regard to granting financial assistance. Economically strong Member States[34] indicated from the very beginning that the allocation of the ESM funds will only be possible upon compliance with the conditionality attached to the programme. Nevertheless, Member States in distress, that had already been suffering from the 'underlying conditions', insisted on granting financial aid without imposition of any conditionality due to the unforeseen nature of the current emergency.[35] At the end the Eurogroup suggested a route, that, on the one hand, provided a solution that resolved the tension between the confronting Member States, but, on the other hand, narrowed down the operational potential of the financial assistance of the ESM, questioning the practicability of the recourse to it by the Member States whose economy has been significantly hit by the COVID-19 pandemic. The seminal feature of the ESM Credit Line, Pandemic Crisis Support (PCS), consists in introducing the shift from
conditionality to earmarking, that has also been embedded in the 'SURE'.[36] Under the 'PCS' financial assistance is granted for the use for the predefined purposes, in the case of PCS 'to support domestic financing of direct and indirect healthcare, cure and

[30] 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 [2020] OJ L 159.
[31] Regulation (EU) 2020/460 of the European Parliament and of the Council of 30 March 2020 amending Regulations (EU) No 1301/2013, (EU) No 1303/2013 and (EU) No 508/2014 as regards specific measures to mobilise investments in the healthcare systems of Member States and in other sectors of their economies in response to the COVID-19 outbreak (Coronavirus Response Investment Initiative) [2020] OJ L 99.
[32] Regulation (EU) 2020/558 of the European Parliament and of the Council of 23 April 2020 amending Regulations (EU) No 1301/2013 and (EU) No 1303/2013 as regards specific measures to provide exceptional flexibility for the use of the European Structural and Investments Funds in response to the COVID-19 outbreak [2020] OJ L 130.
[33] Eurogroup, 'Report on the Comprehensive Economic Policy Response to the COVID-19 Pandemic', Press Release (9 April 2020) < https://www.consilium.europa.eu/en/press/press-releases/2020/04/09/report-on-the-comprehensive-economic-policy-response-to-the-covid-19-pandemic/> accessed 30 June 2020.
[34] Jorge Valero 'Netherlands, Austria Push for Tougher Conditions for Corona-Loans' (Euractiv, 2 April 2020) <https://www.euractiv.com/section/economy-jobs/news/netherlands-austria-push-for-tougher-conditions-for-corona-loans/> accessed 29 June 2020.
[35] Anna Zemskova, 'ESM in the context of the Coronavirus Crisis – a Much Needed Lifejacket or Another Lead Blanket?' (European Law Blog, 7 April 2020) <https://europeanlawblog.eu/2020/04/07/esm-in-the-context-of-the-coronavirus-crisis-a-much-needed-lifejacket-or-another-lead-blanket/ > accessed 29 June 2020.
[36] Rene Repasi 'A Dwarf in Size, but a Giant in Shifting a Paradigm – The European Instrument For Temporary Support To Mitigate Unemployment Risks (SURE)' 8-14 (2020) Weekend Edition 19 EU Law Live <https://eulawlive.com/weekend-edition/weekend-edition-no19/> accessed 29 June 2020.

prevention related costs due to the COVID-19 crisis'.[37] Recourse to earmarking approach both in the context of PCS and SURE presupposes that the economy of the applicants is technically functioning and has been stable before the occurred public health emergency. The financial aid is only to be provided for the area whose critical condition could not have been foreseen and has been directly caused by the pandemic. Such a construction excludes a possibility for the Member States to 'patch' other sectors of economy that might or might not have been in decay before the emergence of the Coronavirus Crisis. The formulated emergency tools reflect the ambivalent understanding of solidarity in the Union that encapsulates the willingness of the Member States to assist each other in times of distress, but not at the expense of blindness to the preexisting negative conditions in the Member States.[38] The operational potential of both mechanisms, PCS and SURE, corresponding to €240 billion[39] (leaving €170 billion of the available funds at the ESM unused)[40] and €100 billion[41] respectively, is not sufficient for tackling the adverse effects of the COVID-19 pandemic on economy, especially, once it has been in decay long before the pandemic. It is likely that Member States in distress would still have to apply for extra financial resources in the future, subjecting themselves to strict conditionality in return.

Lastly, the massive amount of the adopted measures, together with the highlighted puzzling elements of EU constitutional order indicate that even though the EU has come up with creative resolutions of the current multi-faceted crisis, the chosen schemes in the long run are to become subject to judicial scrutiny, especially due to their controversial effects and minimal level of shared vision among the Member States. However, while during the previous, Euro-Area crisis, emergency, the ECJ could apply light-touch judicial review in regards to crisis responses,[42] under the current circumstances the Court will be expected to thoroughly clarify its approach and solidly substantiate its line of argumentation, while addressing issues of high constitutional importance. The recent ruling of the German Federal Constitutional Court,[43] following *Weiss* judgement,[44] has not just demonstrated the strained judicial dialogue between the German Constitutional Court and the ECJ, but also the questionable compatibility of the broad margin of discretion of EU institutions with a limited standard of judicial review carried out by the ECJ. Although, the FCC explicitly

---

[37] Eurogroup (n 33), para 16.
[38] Neergaard and Vries describe it as a potential 'demonstration of economic accountability of despite of prevailing times of despair and panic' in Ulla Neergaard & Sybe de Vries 'Whatever is Necessary... will be Done'. Solidarity in Europe and the COVID-19 Crisis', (2020) Weekend Edition 14 EU Law Live 27 <https://eulawlive.com/weekend-edition/weekend-edition-no14/≥ accessed 29 June 2020.
[39] Kalin Anev Janse 'Funding Health and Stability' (ESM Blog, 28 April 2020) <https://www.esm.europa.eu/blog/funding-health-and-stability> accessed 29 June 2020.
[40] As of the 16th of March, 2020, the unused lending capacity of the ESM amounted to €410 billion, <https://www.esm.europa.eu/content/what-esm's-lending-capacity> accessed 30 June 2020.
[41] Eurogroup (n 33), para 17.
[42] Xavier Groussot, Anna Zemskova, 'The Rise of Procedural Rule of Law in the European Union - Historical and Normative Foundations' in Antonina Bakardjieva Engelbrekt et al. (eds.) *30 Years After the Fall of the Berlin Wall: Rule of Law in the European Union* (Forthcoming, Hart, 2021), Lund University Legal Research Paper 01/2020 1,16 <https://ssrn.com/abstract=3604220> accessed 29 June 2020.
[43] BVergfG, Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.
[44] Case C-493/17 *Weiss and Others* [2018] EU:C:2018:1000.

stated that its findings do not apply to the PEPP,[45] taking into consideration the even more flexible nature of the PEPP in comparison with PSPP,[46] the future adjudication on the legality of the PEPP together with constitutional challenges of other EU measures is not that far off. Thus, the position of the ECJ will not only define the outcome of the disputes but will be seminal for outlining the dynamic constitutional framework of the EU.

Despite highlighting the challenging facets of the impact of the COVID-19 outbreak on EU law, I would like to conclude on a positive note. While facing an unprecedented emergency, the EU has, however, managed to produce an overarching response to the Coronavirus pandemic, even within its limited competence capacity.[47] Despite experienced difficulties in allocation of competences and ambivalent perception of EU common values, the formulated approach proves great operational potential and significance of the European project. The catastrophic pandemic could act a catalyzer for reloading the enhancement of the European integration, prompting Europe to emerge even stronger that before.[48]

[45]BVergfG, 'ECB Decisions on the Public Sector Purchase Programme Exceed EU Competences', Press Release No. 32/2020 of 05 May 2020, < https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2020/bvg20-032.html> accessed 30 June 2020.

[46] Dimitrios Kyriazis, 'The PSPP Judgement of the German Constitutional Court: an Abrupt Pause to an Intricate Judicial Tango' (European Law Blog, 6 May 2020) <https://europeanlawblog.eu/2020/05/06/the-pspp-judgment-of-the-german-constitutional-court-an-abrupt-pause-to-an-intricate-judicial-tango/> accessed 29 June 2020.

[47]Alberto Alemanno, 'The European Response to COVID-19: From Regulatory Emulation to Regulatory Coordination?' (2020) 11 European Journal of Risk Regulation 307, 316.

[48] Presidents of the European Parliament, European Council and Commission, 'Europe Must Emerge Stronger from this Crisis', Message (9 May 2020), <https://www.europarl.europa.eu/news/en/headlines/eu-affairs/20200507STO78618/europe-must-emerge-stronger-from-this-crisis> accessed 30 June 2020.

EXPLORING THE PLATONIC HEAVEN OF LAW: GENERAL PRINCIPLES OF EU LAW FROM A COMPARATIVE PERSPECTIVE

GIUSEPPE MARTINICO*

The aim of this article is to explore the general principles of EU law from a comparative law perspective. Instead of offering a descriptive overview of the cases where the CJEU has relied on explicit comparison in its case law concerning the general principles. I shall articulate this article as follows: first, I shall recall the reasons why comparative law is on paper of crucial importance to the CJEU when interpreting the general principles. Second, I shall mention the different methodological options possible for the CJEU in this field. Third, I shall look at comparative law as a source of transparency in the legal reasoning of the Court by recalling some problematic cases, where the lack of explicit comparison caused harsh criticism for the case law of the Luxembourg Court.

> '[I]t lies in the nature of general principles of law, which are to be sought rather in the Platonic heaven of law than in the law books, that both their existence and their substantive content are marked by uncertainty'.[1]

1 GOALS OF THE ARTICLE

The aim of this article is to explore the general principles of EU law from a comparative perspective. In comparative law, the idea of general principles is frequently associated with that of openness, being general principles open norms in at least three senses. First of all principles are characterised by what Betti defined a 'surplus of axiological meaning' [eccedenza di contenuto assiologico],[2] because of their *vis expansiva* and their indefinite content when compared to the other norms. Second, principles are also open since they often act as a bridge between two different normative systems (law and morality) by connecting positive law and natural law.[3] Finally, they are open because they link the domestic and international legal systems, especially after World War II. Openness is precisely one of the most evident features that characterise many constitutional texts in Europe,[4] and it is possible to find the roots of this phenomenon even earlier, looking back

* Associate Professor of Comparative Public Law at the Scuola Universitaria Superiore Sant'Anna, Pisa. I would like to thank Monica Claes, Egle Dagilyte, Katja Ziegler, Marcus Klamert, Jule Mulder and Clara Rauchegger for their comments. All websites accessed on 6 May 2020.

1 Opinion of AG Mazàk in Case C-411/05 *Félix Palacios de la Villa* EU:C:2007:604, para 86.

2 Emilio Betti, *Teoria generale della interpretazione* (Giuffrè, 1955) 850.

3 On this debate see Ronald Dworkin *Taking Rights Seriously* Harvard University Press, 1977).

4 Eric Stein, 'International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?' (1994) 88 American Journal of International Law 427, 429; Alejandro Saiz Arnaiz, *La apertura constitucional al derecho internacional y europeo de los derechos humanos. El artículo 10.2 de la Constitución española* (Consejo General del Poder Judicial, 1999); Paolo Carrozza, 'Constitutionalism's Post-modern Opening' in

at what, in the 1930s, Mirkine- Guetzévitch called the 'internationalisation of modern constitutions'.[5] In other words, openness belongs within the core of the 'nouvelles tendances du droit constitutionnel'.[6]

However, if general principles have traditionally been associated with the idea of openness, comparative law shows that this was not always the case.[7] The debate on codifications in Continental Europe clearly shows that there was a period when the general principles were associated with the necessary closure of a legal system, especially in those jurisdictions where the Civil Codes were conceived as an expression of legal nationalism.[8] The debate on the general principles of law in the Italian Civil Code (dated 1942 and drafted under the fascist regime) is emblematic from this point of view.[9]

The provision of Art. 12 of the preliminary provisions to the Italian Civil Code (listing the interpretative criteria available to the interpreter) was conceived to impede a reference to the principles of natural law.[10] When commenting on this provision, Guastini argued that originally the role reserved to systematic interpretation was very limited for the interpreter.[11] Because of that, systematic interpretation was seen like a sort of *extrema ratio* exploitable only in exceptional cases. When looking at it, scholars also said that according to the original scheme of the Italian Civil Code systematic interpretation was seen as an act of integration rather than as an act of interpretation *stricto sensu* understood.[12] After the entry into force of the Italian Constitution many of the provisions of the same Civil Code (including Art. 12 of its preliminary provisions) were interpreted in light of the new constitutional principles and this has changed the role of the general principles as well.[13] If once they were seen before as the moment of closure for a legal system (nothing out of the Code, no reference to natural law was allowed), today, general principles are perceived as the moment of openness for a legal order that connects domestic and international law. As a consequence, systematic interpretation (often combined with consistent interpretation[14]) is no longer seen as a last resort for the interpreter. In the EU context, there is another level of complexity that should be emphasised: as we will see, there are principles that are frequently seen as shared norms which belong to both the national and the supranational legal systems. This explains why frequently the interpretation of a general principle of EU law inferred from the constitutional traditions common to the member states results in creating conflicts due to the interpretative competition existing between the Court of Justice of the EU (CJEU) and the national constitutional courts. Cordero Alonso and Mangold are emblematic of this trend (*infra*).

Martin Loughlin, Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, 2007) 169.

[5] Boris Mirkine- Guetzévitch, *Les Nouvelles tendances du droit constitutionnel* (Giard, 1931) 48.

[6] ibid.

[7] Giorgio Del Vecchio, 'Les bases du droit comparé et les principes généraux du droit' (1960) 12 Revue internationale de droit comparé 493.

[8] Paolo Grossi, *A History of European Law* (Blackwell Malden 2010) 154.

[9] Livio Paladin, 'Costituzione, preleggi e codice civile' (1993) Rivista di diritto civile 19, 23.

[10] ibid.

[11] Riccardo Guastini, *Le fonti del diritto. Fondamenti teorici* (Giuffrè, 2010) 347.

[12] ibid.

[13] Paladin (n 9).

[14] Roberto Bin, 'L'interpretazione conforme. Due o tre cose che so di lei' (2015) Rivista AIC 1. http://www.rivistaaic.it/download/1hafJKHFcYv_JgI3rYOwnyoMtsDqwTgP48qIgNjX4t4/1-2015-bin.pdf

A couple of preliminary clarifications are necessary at this point to explain what this article is not about. First of all, here I am not going to enter into the very old debate about the nature of comparative law – discussing whether it is a method or an autonomous discipline[15] – in this essay comparative law will be understood as a critical exercise characterised by a subversive function and serving as an 'antidote to uncritical faith in legal doctrine'.[16]

Second, although, as we will see later, sometimes it is possible to find reference to the idea of 'evaluative comparative law' in the Opinions of some Advocates General (*infra*), here I shall not deal (directly, at least) with the never-ending discussion about the functions of comparative law.[17]

Generally speaking, comparative law is certainly relevant both for the genesis of the general principles of EU law and for their interpretation.[18] Although this is not a piece on the use of comparative law in the case law of the CJEU, the traditional reluctance of the Luxembourg Court to engage in explicit legal comparison[19] will inevitably have an impact on the subject of this article. In this sense it has been suggested that the CJEU does a lot of implicit comparison,[20] but hardly this will explicitly feature in the final text of its decisions.[21] Another caveat is given by the very well-known style of the decisions of the Court:

---

[15] See, eg., Otto Kahn Freund, 'Comparative Law as an Academic Subject' (1966)82 Law Quarterly Review 40; Basil Markesinis, 'Comparative Law. A Subject in Search of an Audience' (1990) 53 Modern Law Review 1; Otto Pfersmann, 'Le droit comparé comme interprétation et comme théorie du droit' (2001) 53 Revue international de droit comparé 275 ; Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law' (1991) 39 American Journal of Comparative Law 1 (Part I), 343 (Part II).

[16] Konrad Zweigert, Hein Kötz, *An Introduction to Comparative Law* (Oxford University Press, 1998) 22.

[17] For instance, Michaels identified seven functions '(1) the epistemological function of understanding legal rules and institutions, (2) the comparative function of achieving comparability, (3) the presumptive function of emphasizing similarity, (4) the formalizing function of system building, (5) the evaluative function of determining the better law, (6) the universalizing function of preparing legal unification, and (7) the critical function of providing tools for the critique of law', Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006) 339, 363.

[18] See for instance the examples provided by Lenaerts and Gutiérrez-Fons with regard to concepts such as 'spouse" or 'married official' (respectively Case C-59/85 *Netherlands v Reed* EU:C:1986:157and Joined Cases C-122/99 P and C-125/*99* P *D and Sweden v Council* EU:C:2001:304) 'apart from the fact that the comparative law method provides an analytical support for the discovery and development of general principles of EU law, it may also be relied upon with a view to clarifying specific provisions of EU law', Koen Lenaerts, José A. Gutiérrez-Fons, 'To say what the law of the EU is : methods of interpretation and the European Court of Justice' (2013) EUI Working Paper, Distinguished Lecture delivered on the occasion of the XXIV Law of the European Union course of the Academy of European Law, on 6 July 2013. http://cadmus.eui.eu/handle/1814/28339, then published in Columbia Journal of European Law (2013) 64 841.

[19] Koen Lenaerts, Kathleen Gutman, 'The Comparative Law Method and the European Court of Justice: Echoes Across the Atlantic' (2016) 64 American Journal of Comparative Law 84; Fernanda Nicola, 'National Legal Traditions at Work in the Jurisprudence of the Court of Justice of the European Union' (2016) 64 American Journal of Comparative Law 866, 869. According to whom: 'The absence of a comparative law method in EU law led scholars to rely on a theory of legal origins, based on an economic account of legal systems which is widely criticized among comparative lawyers' See also Hélène Ruiz Fabri, 'Principes généraux du droit communautaire et droit comparé' (2007) 45 Droits 127.

[20] Giuseppe de Vergottini, *Oltre il dialogo tra le Corti. Giudici, diritto straniero, comparazione* (Il Mulino, 2010) 144.

[21] Although something has been changing over recent years. See Lenaerts, Gutman (n 19). See also Giuseppe de Vergottini, "Tradizioni costituzionali comuni e Costituzione europea' (2006), http://www.forumcostituzionale.it/wordpress/wp-content/uploads/pre_2006/135.pdf; Luigi Cozzolino, 'Le tradizioni costituzionali comuni nella giurisprudenza della Corte di giustizia delle Comunità europee' in Paolo Falzea, Antonino Spadaro, Luigi Ventura (eds.), *La Corte Costituzionale e le Corti d'Europa* (Giappichelli 2003) 3.

although the style of its judgments has changed over the years,[22] even recently, the CJEU condensed the legal reasoning of very revolutionary cases in pretty short decisions.[23] This makes it very difficult to understand the real importance of the comparative argument in the economy of the judicial outcome and introduces another element of non-transparency in the legal reasoning. Finally, another factor to be taken into account is the uncertain content of the general principles, as AG Mazàk beautifully suggested:

> 'The approach adopted by the Court in Mangold has received serious criticism from academia, the media and also from most of the parties to the present proceedings and certainly merits further comment. First of all, it should be emphasised that the concept of general principles of law has been central to the development of the Community legal order. By formulating general principles of Community law – pursuant to its obligation under Article 220 EC to ensure observance of the law in the interpretation and application of the Treaty – the Court has actually added flesh to the bones of Community law, which otherwise – being a legal order based on a framework treaty – would have remained a mere skeleton of rules, not quite constituting a proper legal 'order'. This source of law enabled the Court – often drawing inspiration from legal traditions common to the Member States, and international treaties – to guarantee and add content to legal principles in such important areas as the protection of fundamental rights and administrative law. However, it lies in the nature of general principles of law, which are to be sought rather in the Platonic heaven of law than in the law books, that both their existence and their substantive content are marked by uncertainty'.[24]

Considerations like these allow me to introduce the structure of this work. Instead of offering a descriptive overview of the cases where the CJEU has relied on explicit comparison in its case law concerning the general principles, I shall articulate this article as follows: first, I shall recall the reasons why comparative law is on paper of crucial importance to the CJEU when interpreting the general principles.[25] Second, I shall mention the different methodological options possible for the CJEU in this field. Third, I shall look at comparative law as a source of transparency in the legal reasoning of the Court by recalling some problematic cases, where the lack of explicit comparison caused harsh criticism for the case law of the Luxembourg Court.

The analysis proposed is case law-based, which means that instead of framing all these issues from a purely theoretical point of view I shall deal with them by looking at some concrete cases decided by the CJEU and at the Opinions delivered by the Advocates General.

---

[22] Mitchel Lasser, 'Anticipating Three Models of Judicial Control, Debate and Legitimacy: The European Court of Justice, the Cour de cassation and the United States Supreme Cour' (2003) Jean Monnet Working Paper 1/03, https://jeanmonnetprogram.org/archive/papers/03/030101.pdf. See also Nicola (n 18).

[23] Although it does not much to do with the use of comparative law *Zambrano* is an emblematic example of this trend. Case C-34/09 *Ruiz Zambrano* EU:C:2011:124. Loïc Azoulai, '"Euro-Bonds" The Ruiz Zambrano judgment or the Real Invention of EU Citizenship' (2011) 3 Perspectives on Federalism 31.

[24] Opinion of AG AG Mazàk in Case C-411/05, *Félix Palacios de la Villa* EU:C:2007:106, paras 83- 86.

[25] For the purpose of this essay I shall not look at the case law of the General Court.

This article focuses on how the CJEU considers domestic legal materials when constructing the general principles of EU Law. [26] Hauer[27] was described by Lenaerts and Gutiérrez-Fons as 'a paradigmatic example of a case where the CJEU adopted a comparative law method',[28] since in order to respond to the question raised by the referring court the CJEU offered a comparative analysis of the relevant options present at national level:

> 'It is necessary to consider also the indications provided by the constitutional rules and practices of the nine Member States. One of the first points to emerge in this regard is that those rules and practices permit the legislature to control the use of private property in accordance with the general interest. Thus some constitutions refer to the obligations arising out of the ownership of property (German Grundgesetz, Article 14 (2), first sentence), to its social function (Italian constitution, Article 42 (2)), to the subordination of its use to the requirements of the common good (German Grundgesetz, Article 14 (2). second sentence, and the Irish constitution, Article 43.2.2°), or of social justice (Irish constitution, Article 43.2.1°). In all the Member States, numerous legislative measures have given concrete expression to that social function of the right to property. Thus in all the Member States there is legislation on agriculture and forestry, the water supply, the protection of the environment and town and country planning, which imposes restrictions, sometimes appreciable, on the use of real property'.[29]

The topic of this article is still burning since the binding nature of the Charter of Fundamental Rights of the EU[30] has not made the general principles '*démodé*'[31]. On the

---

[26] See Anthony Arnull, 'What is a General Principle of EU Law?' in Stefan Vogenauer (ed), *Prohibition of Abuse of Law A New General Principle of EU Law?*, (Hart, 2017) 7, 9. See also Lenaerts, Gutiérrez-Fons (n 18)

[27] Case C-44/79 *Hauer* EU:C:1979:290.

[28] Lenaerts, Gutiérrez-Fons (n 18).

[29] *Hauer* (n 27). In light of that the Court stated that: 'All the wine-producing countries of the Community have restrictive legislation, albeit of differing severity, concerning the planting of vines, the selection of varieties and the methods of cultivation. In none of the countries concerned are those provisions considered to be incompatible in principle with the regard due to the right to property.', para 21.

[30] On the complicated relationship between the general principles of EU law and the provisions of the Charter of Fundamental Rights of the EU see also the Opinions of AG Maduro in Case C-305/05 *Ordre des barreaux francophones et Germanophone and Others* EU:C:2006:788, para 48 and in Case C-465/07 *M. Elgafaji, N. Elgafaji v Staatssecretaris van Justitie* ECLI:EU:C:2009:94, para. 21. On this see Stefania Ninatti, 'Ieri e oggi delle tradizioni costituzionali comuni: le novità nella giurisprudenza comunitaria' in Giuseppe D' Elia, Giulia Tiberi, Maria Paola Viviani Schlein (eds.), *Scritti in memoria di Alessandra Concaro* (Giuffrè 2012)533, 545 and Oreste Pollicino, 'Della sopravvivenza delle tradizioni costituzionali comuni alla Carta di Nizza: ovvero del mancato avverarsi di una (cronaca di una) morte annunciata' (2016) Il diritto dell'Unione Europea 253.

[31] Takis Tridimas, 'Fundamental Rights, General Principles of EU Law, and the Charter' (2014) 16 Cambridge Yearbook of European Legal Studies 361. Compare with Frédéric Sudre, 'Le renforcement de la protection des droits de l'homme au sein de l'Union européenne' in Joël Rideau (ed.), *De la Communauté de droit à l'Union de droit. Continuité et avatars européens* (LGDJ 2000) 218. On this see: Gabriela-Adriana Rusu, 'Les traditions constitutionnelles communes aux Etats membres, source matérielle des droits fondamentaux dans l'Union européenne' (2011), <http://www.umk.ro/fr/buletin-stiintific-cercetare/arhiva-buletinstiintific/203-volumul-mesei-rotunde-internationale-2011/1153-les-traditions-constitutionnelles-communes-aux-etats-membres-

contrary, there have been cases where the CJEU has relied on a general principle because of the slightly different meaning that is has when compared to the provisions codified in the Charter.[32] Sometimes this can be explained taking into account the limited scope of application of the Charter.[33]

2 THE STRUCTURE OF EU LAW: THE IMPORTANCE OF COMPARATIVE LAW (IN THEORY AT LEAST)

The CJEU has been criticised for not making its sources of inspiration transparent when interpreting the Treaties, despite having the occasion to do so. This is a result of the many interpretative opportunities provided by the wording of the Treaties.[34] Indeed, there are "structural" reasons that would suggest a more explicit use of comparative law by the CJEU, especially considering the open nature of the Treaties.

In this respect, as noticed by Arnull[35], among others, the Maastricht Treaty has been a turning point in clarifying the importance of national constitutional traditions in the genesis and interpretation of the general principles of Union law. Since then the EU Treaties have progressively referred to national legal (sometimes even constitutional) materials, norms such as Art. 6 TEU (in all its versions) and even more recently Art. 4 TEU[36] can be traced back to this trend. The model of Art. 4 TEU is undoubtedly represented by Art. 6 TEU (pre-Lisbon version[37]), which described the closeness between common constitutional traditions and national fundamental principles. In that provision, in fact, these two kinds of legal sources (common constitutional traditions[38] and national

source-materielle-des-droits-fondamentaux-dans-lunion-europeenne.html>.

32 This is the example of the case law on right to good administration or Right to an effective remedy and to a fair trial: Herwig Hofmann and Bucura Mihaescu, 'The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case' (2013) 9 European Constitutional Law Review 73; Xavier Groussot, Jörgen Hettne and Gunnar Thor Petursson, 'General Principles and the Many Faces of Coherence: Between Law and Ideology in the European Union' in Stefan Vogenauer, Stephen Weatherill (eds.), *General Principles of Law European and Comparative Perspectives* (Hart 2017) 77.

33 Marek Safjan, 'Areas of application of the Charter of application of the European Union: fields of conflicts?' (2012) EUI Working Paper LAW 2012/22, <http://cadmus.eui.eu/bitstream/handle/1814/23294/LAW-2012-22.pdf>; See also Filippo Fontanelli, 'The Implementation of European Law by Member States under Article 51(1) of the Charter of Fundamental Rights' (2014) 20 Columbia Journal of European Law 193.

34 Roman Herzog, Lüder Gerken, '[Comment] Stop the European Court of Justice' (2008) https://euobserver.com/opinion/26714

35 Arnull (26). He also noticed the curious wording of Art. F (2) which maintained the formula "general principles of Community Law' instead of declaring them principles of European Union Law.

36 Armin von Bogdandy, Stephan Schill, 'Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty' (2011) 48 Common Market Law Review 1417. For a different understanding of this clause see: Gerhard van der Schyff, "The Constitutional Relationship between the European Union and its Member States: The Role of National Identity in Article 4(2) TEU" (2012) 37 European Law Review 563.

37 See also what AG Maduro said in his Opinion in Case C-127/07 *Société Arcelor* EU:C:2008:728, para. 17. On Arcelor see Oreste Pollicino, 'Conseil d'Etat: Decision No. 287110 of 8 February 2007, Société Arcelor Atlantique et Lorraine and others' (2008) 45 Common Market Law Review 1519.

38 About the common constitutional traditions as "sources" of EU law, see Alessandro Pizzorusso, 'Common constitutional traditions in Europe as a source of Community law' (2008) STALS (Sant'Anna Legal Studies) Research Paper, 1/2008, www.stals.sssup.it/files/stals_Pizzorusso.pdf See also: Alessandro Pizzorusso, *Il patrimonio costituzionale europeo* (Il Mulino, 2002).

fundamental principles – via the reference to the 'national identities of its Member States') were mentioned in two subsequent paragraphs, as Ruggeri noticed.[39] It is sufficient here to recall the reference made in Art. 6.2 TEU (pre- Lisbon version) to the common constitutional traditions, and the reference to the "national identities" of its Member States in Art. 6.3 TEU (pre- Lisbon version).

Another example of the openness the EU legal system is given by the Charter of the Fundamental Rights of the EU (EUCFR) and by those clauses of the Charter that refer to 'national laws and practices'.[40] This confirms the open nature of EU law, an element already stressed by Häberle who defined the national and EU legal systems as provided with two partial constitutions.[41]

There are of course other provisions in the Treaties which *expressis verbis* refer to national legal materials, this is the case of former Art. 215 ECT which was recalled in Brasserie du Pecheur and Factortame.[42] This confirms the openness characterising the EU Treaties, since all these norms offer proof of the decision to open up the Treaties to the influence of national legal systems.

Also, current and former members of the Luxembourg Court confirmed the importance of comparative law in the activity of the CJEU.[43] Nevertheless, in spite of all these references to national legal materials, the CJEU has been traditionally reluctant to engage in explicit comparison and this has affected the transparency of its legal reasoning as we will see. Indeed, while the idea of 'the general principles of comparative laws of the Member States' has frequently been employed by the CJEU in its case law,[44] the Luxembourg Court rarely shows its cards, by making these comparative references explicit, with very few exceptions such as the very well-known Algera[45] and Hauer[46] cases and, more

---

[39] Antonio Ruggeri, 'Tradizioni costituzionali comuni' e "controlimiti", tra teoria delle fonti e teoria dell'interpretazione' (2003) Diritto pubblico comparato ed europeo 101.

[40] See, for instance, Art. 9, 10(2), 14(3), 27, 28, 30, and 34–36. Title IV, devoted to 'Solidarity', is particularly rich in such references and perhaps that is no coincidence, since in this field the EUCFR is more innovative than in other cases compared with the ECHR.

[41] Peter Häberle, 'Dallo Stato nazionale all'Unione europea: evoluzioni dello Stato costituzionale. Il Grundgesetz come Costituzione parziale nel contesto della Unione europea: aspetti di un problema' (2002) Diritto pubblico comparato ed europeo 455.

[42] Case C-46 and 48/93 *Brasserie du Pecheur and Factortame* EU:C:1996:79.

[43] Hans Kutscher, 'Methods of Interpretation as Seen by a Judge at the Court of Justice' in Reports of a Judicial and Academic Conference held in Luxemburg on 27-28 September 1976, <http://aei.pitt.edu/41812/1/A5955.pdf,> 1. See also Lenaerts, Gutiérrez-Fons (n 18) 'The ECJ also interprets EU law in light of the legal principles common to the Member States by applying a comparative law method. In so doing, the ECJ does not try to find the "lowest common denominator", but rather those national solution(s) that would best fulfil the objectives pursued by the EU or that would best give expression to a growing trend in the constitutional laws of the Member States where such a trend can be identified.' On this see also Patrick Kelly, *Law in a law-governed union (Recht in einer Rechtsunion): The Court of Justice of the European Union and the free law doctrine* (2015) PhD thesis, Birkbeck, University of London, 44, <http://bbktheses.da.ulcc.ac.uk/136/1/cp_Fullversion-2014KellyPphdBBK.pdf>.

[44] Especially to justify the protection of fundamental rights. See also the case law of the CJEU on social rights: among Case C-341/05, *Laval un Partneri Ltd contro Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan e Svenska Elektrikerförbundet* ECLI:EU:C:2007:809, para. 91. On this Stefania Ninatti (n 30) 546.

[45] Joined Cases C-7/56, 3/57 to 7/57 *Algera* EU:C:1957:7, para. 55: 'The possibility of withdrawing such measures is a problem of administrative law, which is familiar in the case-law and learned writing of all the countries of the Community, but for the solution of which the Treaty does not contain any rules. Unless the Court is to deny justice it is therefore obliged to solve the problem by reference to the rules acknowledged by

recently, some cases dealing with plurilingualism in European law.[47] A good example of this implicit comparative approach is Berlusconi[48], where the CJEU – in the words of his current President- has 'implicitly relied on the comparative study undertaken by AG Kokott who stressed the fact that "[that principle is] established in the (…) legal systems of almost [all Member States]'.[49]

The same can be said with regard to Audiolux in spite of the excellent (from a methodological point of view) Opinion of AG Trstenjak.

As recalled by Arnull, this implicit comparison and the consequent lack of transparency give wide margins of manoeuvre to the CJEU and provokes 'scepticism about how conscientiously the Court of Justice has actually examined national and international law and expose it to criticism that it is, in reality, pursuing an agenda of its own'.[50]

3 THE METHODOLOGY FOLLOWED BY THE CJEU WHEN DEALING WITH GENERAL PRINCIPLES

As pointed out by Rusu, it is possible to notice a certain variety of terminology in this field[51] and in theory the CJEU embarks on comparative law every time it uses formulae like 'constitutional traditions common to the Member States',[52] 'principles and concepts common to the laws of the States';[53] and 'principle[s] common to the laws of the Member States'.[54] However, the lack of transparency in the case law of the CJEU makes it very difficult to understand how the Luxembourg Court proceeds when coming up with a general principle of EU law. Which legal orders should the CJEU consider? Are the national materials sources of EU law? Is it necessary to have a sort of unanimous consensus over a given norm in order to qualify it as common constitutional tradition? If this is not the case, how should the CJEU decide?

In theory there are different approaches available, as recalled by AG Maduro in his Opinion in the Fiamm and Fedon case:

---

the legislation, the learned writing and the case-law of the member countries. It emerges from a comparative study of this problem of law that in the six Member States an administrative measure conferring individual rights on the person concerned cannot in principle be withdrawn, if it is a lawful measure; in that case, since the individual right is vested, the need to safeguard confidence in the stability of the situation thus created prevails over the interests of an administration desirous of reversing its decision. This is true in particular of the appointment of an official'.

[46] *Hauer* (n 27).

[47] Tadas Klimas, Jurate Vaiciukaité 'Interpretation of European Union Multilingual Law' (2005) International Journal of Baltic Law 1.

[48] Case C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* EU:C:2005:270.

[49] Koen Lenaerts, The Court of Justice and the Comparative Law Method' (2016), <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/General_Assembly/2016/K._Lenaerts_ELI_AC_2016.pdf>. Even before, it is interesting to see how in Orkem the Court relied on the comparative analysis carried out by AG Darmon in Case C-374/87 *Orkem v Commission of the European Communities* EU:C:1989:207, para 29) as noticed by Stefania Ninatti(n 30) 539.

[50] Arnull (n 26) 10. See also Adelina Adinolfi, 'I principi generali nella giurisprudenza comunitaria e la loro influenza sugli ordinamenti degli Stati membri' (2004) Rivista Italiana di Diritto Pubblico Comunitario 521.

[51] Rusu, (n 31).

[52] Case C-4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung* EU:C:1974:51, para. 13.

[53] Case C-155/79, *AM & S Europe Limited v Commission of the European Communities. Legal privilege* EU:C:1982:157, para. 18.

[54] Case C-46/87 *Hoechst AG v Commission of the European Communities* EU:C:1989:337, para. 17.

> 'Can the discovery of a 'general principle common to the laws of the Member States' stem only from the almost mechanistic superimposition of the law of each Member State and the retention of only the elements that match exactly? I do not think so. Such a mathematical logic of the lowest common denominator would lead to the establishment of a regime for Community liability in which the victims of damage attributable to the institutions would have only a very slim chance of obtaining compensation. Although the Court of Justice must certainly be guided by the most characteristic provisions of the systems of domestic law, it must above all ensure that it adopts a solution appropriate to the needs and specific features of the Community legal system. In other words, the Court has the task of drawing on the legal traditions of the Member States in order to find an answer to similar legal questions arising under Community law that both respects those traditions and is appropriate to the context of the Community legal order. From that point of view, even a solution adopted by a minority may be preferred if it best meets the requirements of the Community system'.[55]

This quotation reveals a kind of 'functional approach'[56] followed by the AG when selecting the sources of inspiration for a general principle of EU law. On that occasion the CJEU excluded the existence of a convergence 'as regards the possible existence of a principle of liability in the case of a lawful act or omission of the public authorities, in particular where it is of a legislative nature'.[57] This is an element that somehow finds confirmation in what some former judges of the Luxembourg Court wrote in some academic articles many years ago:

> 'There is complete agreement that when the Court interprets or supplements Community law on a comparative-law basis it is not obliged to take the minimum which the national solutions have in common, or their arithmetical mean or the solution produced by a majority of the legal systems as the basis of its decision. The Court has to weigh up and evaluate the particular problem and search for the 'best' and 'most appropriate' solution. The best possible solution is the one which meets the specific objectives and basic principles of the Community […] the most satisfactory way'.[58]

Another evidence of this functional approach can be found in the words of AG Roemer in the Wilhelm Werhahn Hansamühle case:

---

[55] Opinion AG Maduro in Joined Cases C-120/06 P and C-121/06 P *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM), Fabbrica italiana accumulatori motocarri Montecchio Technologies Inc. (FIAMM Technologies) v Council of the European Union, Commission of the European Communities and Giorgio Fedon & Figli SpA, Fedon America, Inc. v Council of the European Union, Commission of the European Communities* EU:C:2008:98, para. 55.

[56] On the so-called functional method in comparative law see Zweigert and Kötz (n 16) 32. See also Michaels (n 17).

[57] See Joined Cases C-120/06 P and C-121/06 P, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM), Fabbrica italiana accumulatori motocarri Montecchio Technologies Inc. (FIAMM Technologies) v Council of the European Union, Commission of the European Communities and Giorgio Fedon & Figli SpA, Fedon America, Inc. v Council of the European Union, Commission of the European Communities* EU:C:2008:476, para.175.

[58] Kutscher (n 43) 1.

> 'What is important in ascertaining the law under Article 215, second paragraph, is not the unanimity of the legal systems of all Member States, nor a kind of vote ending in a majority finding; no, it is rather a matter of looking at what eminent legal writers (e.g., Zweigert) have called evaluative comparative law ('Wertende Rechtsvergleichung'). In this connexion — as has already been argued in the Opinion in Case 5/71 — what may be highly relevant is to ascertain which legal system emerges as the most carefully considered (Vide — Zweigert, cited by Heldrich in 'Europarecht' 1969, 346)'.[59]

Even before, also AG Lagrange had noticed something similar by arguing that:

> 'In this way the case law of the Court, in so far as it invokes national laws (as it does to a large extent) to define the rules of law relating to the application of the Treaty, is not content to draw on more or less arithmetical 'common denominators' between the different national solutions, but chooses from each of the Member States those solutions which, having regard to the objects of the Treaty, appear to it to be the best or, if one may use the expression, the most progressive. That is the spirit, moreover, which has guided the Court hitherto'.[60]

What is interesting to us here is to notice how this approach also opens the door for a non-perfect correspondence between the way in which a certain principle is understood in domestic law and the meaning given to it by the Court of Justice. In this respect, as AG Slynn wrote in his Opinion in the AM v. Commission: 'Such a course is followed not to import national laws as such into Community law, but to use it as a means of discovering an unwritten principle of Community law'.[61] This is consistent with the traditional approach of the Court which tends to treat concepts and principles borrowed from national legal systems as autonomous concepts of its own law. This is also what Tridimas meant when he wrote the general principles were 'children of national law, but as brought in front of the Court, they became enfants terribles'.[62] A clear example of that is the development of the EU principle of proportionality. The principle of proportionality was 'extracted' from the German legal tradition, although the classic three-step partition (*Geeignetheit*, *Erforderlichkeit*, *Verhältnismäßigkeitsprüfung im engeren Sinne*) elaborated by the German judges is rarely respected by the CJEU.[63] Very recently, in its decision on the European Central Bank's Public Sector Purchase Programme (PSPP)[64] the German

---

[59] Opinion AG Roemer in Joined Cases C-63/72 to 69/72 *Wilhelm Werhahn Hansamühle and others v. Council of the European Communities* EU:C:1973:95, 1259-1260. See also the Opinion AG Roemer in Case C-5/71 *Zuckerfabrik Schöppenstedt v Council* EU:C:1971:116.

[60] Opinion AG Lagrange Case C-14/61 *Hoogovens v High Authority* EU:C:1962:19, 283-284.

[61] Opinion AG Slynn in C-155/79 *AM & S Europe Limited v Commission of the European Communities. Legal privilege.* EU:C:1982:17, 1649.

[62] Takis Tridimas, *The General Principles of EC Law* (Oxford University Press,1998) 4. As Ninatti (n 30) 553 this is also connected to the 'transformative function' of the common constitutional traditions, on this see also: Francesco Belvisi, 'The "Common Constitutional Traditions and the Integration of the EU"' (2006) Diritto e Questioni Pubbliche, http://www.dirittoequestionipubbliche.org/page/2006_n6/mono_02_Belvisi.pdf

[63] Case C-96/03 and C-97/03, *A. Tempelman* and *Coniugi T.H.J.M. van Schaijk v. Directeur van de Rijksdienst voor de keuring van Vee en Vlees* EU:C:2005:145.

[64] 2 BvR 859/15,
<https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr0

Constitutional Court somehow confirmed that by questioning the way in which the CJEU had carried out the proportionality test in Weiss.[65] In the German Constitutional Court's words:

> 'The specific manner in which the CJEU applies the principle of proportionality in the case at hand renders that principle meaningless for the purposes of distinguishing, in relation to the PSPP, between monetary policy and economic policy, i.e. between the exclusive monetary policy competence conferred upon the EU (Art. 3(1) lit. c TFEU) and the limited conferral upon the EU of the competence to coordinate general economic policies, with the Member States retaining the competence for economic policy at large (Art. 4(1) TEU; Art. 5(1) TFEU)'. [66]

This judgment is very telling of the unexpected consequences of the current scenario. Indeed, the risk of collision when handling these 'shared' sources (indeed general principles could be defined as 'multi-sourced equivalent norms')[67] is evident as judgments like Cordero Alonso[68] show and this perhaps explains one of the most ambivalent judgments in the history of EU law, namely[69] Internationale Handelsgesellschaft. In that decision the CJEU first stated its understanding of absolute primacy (primacy even over national constitutional norms) and later added that some of these constitutional norms might inspire the general principles of EU law. However, it also acknowledged that:

> '[R]ecourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law' [70].

The risk of conflict between national systems and EU law and the need to reserve the autonomy of EU law are also recalled by AG Maduro in Opinion in Arcelor:

> 'In that connection, the Conseil d'État is correct in assuming that the fundamental values of its constitution and those of the Community legal order are identical. It must be pointed out, however, that that structural congruence can be guaranteed

85915en.html;jsessionid=F892FE5330900A9A29FDCBEF992814FE.2_cid392>

[65] Case C-493/17, *Weiss and Others* EU:C:2018:1000.

[66] 2 BvR 859/15, para. 127, <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html;jsessionid=F892FE5330900A9A29FDCBEF992814FE.2_cid392>. On this see: Toni Marzal, 'Is the BVerfG PSPP decision "simply not comprehensible?' A critique of the judgment's reasoning on proportionality" (2020),<https://verfassungsblog.de/is-the-bverfg-pspp-decision-simply-not-comprehensible/#comments>.

[67] For this concept in international law see Tomer Broude, Yuval Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart 2011).

[68] Case C-81/05 *Cordero Alonso* EU:C:2006:529. 'Since the general principle of equality and non-discrimination is a principle of Community law, Member States are bound by the Court's interpretation of that principle. That applies even when the national rules at issue are, according to the constitutional case-law of the Member State concerned, consistent with an equivalent fundamental right recognised by the national legal system', para. 41.

[69] Case C-11/70 *Internationale Handelsgesellschaft mbH contro Einfuhr- und Vorratsstelle für Getreide und Futtermittel* EU:C:1970:114.

[70] ibid, paras 3-4.

> only organically and only at the Community level, through the mechanisms provided for by the Treaty. It is that organic identity which is referred to in Article 6 TEU and which ensures that national constitutions are not undermined, even though they can no longer be used as points of reference for the purpose of reviewing the lawfulness of Community acts. If they could, in so far as the content of the national constitutions and the instruments for protecting them vary considerably, the application of Community acts could the subject of derogations in one Member State but not in another. Such an outcome would be contrary to the principles set out in Article 6 TEU and, in particular, to the understanding of the Community as a community based on the rule of law. In other words, the effect of being able to rely on national constitutions to require the selective and discriminatory application of Community provisions in the territory of the Union would, paradoxically, be to distort the conformity of the Community legal order with the constitutional traditions common to the Member States'.[71]

In Audiolux the CJEU denied the existence of a general principle of equal treatment of shareholders. While, as usual, the CJEU did not make its comparative analysis explicit, the Opinion of AG Trstenjak[72] is really important, since there the AG recognised the ambiguity of the case law of the Court in this ambit[73] and offered some clarifications about the methodology to be followed by the Court when ascertaining the existence of a general principle, the relevant sources to be taken into account ('primary law', 'international guidelines', 'acts of EU institutions'), the functions of the general principles[74] and the status of the general principles within the hierarchy of EU legal sources.

In her Opinion, AG Trstenjak made an interesting distinction between two categories of general principles:

> 'In principle, a distinction can be drawn between general principles of Community law in the narrow sense, namely those which are developed exclusively from the spirit and system of the EC Treaty and relate to specific points of Community law, and those general principles which are common to the legal and constitutional orders of the Member States. Whereas the first category of general

---

[71] Opinion AG Maduro in Case C-127/07 *Société Arcelor Atlantique et Lorraine Société Sollac Méditerrannée Société Arcelor Packaging International Société Ugine & Alz FranceSociété Industeel Loire Société Creusot Métal Société Imphy Alloys Arcelor SA V Premier ministre Ministre de l'Écologie et du Développement durable Ministre de l'Économie, des Finances et de l'Industrie* EU:C:2008:292, para 16.

[72] Opinion AG Trstenjak in Case C-101/08 *Audiolux SA e.a v Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Others* EU:C:2009:410.

[73] ibid, para. 67: 'However, even today the concept of general principles is a thorny issue. The terminology is inconsistent both in legal literature and in the case-law. To some extent there are differences only in the choice of words, such as where the Court of Justice and the Advocates General refer to a generally-accepted rule of law, a principle generally accepted, a basic principle of law, a fundamental principle, a principle, a rule, or a general principle of equality which is one of the fundamental principles of Community law'

[74] ibid para. 68: 'There is agreement in any case that the general principles have considerable importance in the case-law in filling gaps and as an aid to interpretation, not least because the Community legal order is a developing legal order which inevitably has gaps and requires interpretation on account of its openness in respect of integrational development. On the basis of such recognition the Court also appears to have opted not to undertake a precise classification of the general principles in order to retain the flexibility it needs in order to be able to decide on substantive matters which arise regardless of terminological discrepancies.'

> principles can be derived directly from primary Community law, the Court essentially uses a critical legal comparison in order to determine the second category, which does not, however, amount to using the lowest common denominator method. Nor is it regarded as necessary for the legal principles developed in this way in their specific expression at Community level always to be present at the same time in all the legal orders under comparison'.[75]

With regard to the second group of general principles, AG Trstenjak rejected the lowest common denominator method. After a detailed analysis AG Trstenjak concluded that "there is no general principle of equal treatment of shareholders which protects a company's minority shareholders in the event of acquisition of control by another company, in such a way that they are entitled to dispose of their securities on conditions identical to those of all other shareholders".[76]

These considerations resurfaced in another Opinion of AG Trstenjak given in the Dominguez case:

> 'Finally, the law of the Member States themselves has to be considered. Recourse to the comparative law approach often taken by the Court could shed light on whether, according to constitutional traditions or in any event the core provisions of national employment law, such a right is afforded a pre-eminent place in national legal systems […] The comparative law review set out above does indeed show that the idea that an employee is entitled to periodic rest time permeates the legal systems of both the EU and its Member States. The fact that this idea has constitutional status both at EU level and within several Member States is indicative of the prominent position afforded to that right, which suggests its classification as a general principle of EU law. The fact that not all Member States grant it constitutional status within their legal systems is not detrimental, however, as it is in any event considered a core element of national law irrespective of whether an employment relationship is one governed by private or public law; this has also been recognised in the Court's case-law'[77].

Finally, it is interesting to recall an Opinion given by AG Kokott in the *Akzo Nobel* case where the AG argued that:

> '[S]uch recourse to common constitutional traditions or legal principles is

---

[75] ibid, para. 69.

[76] ibid, para. 115. 'In the light of that conclusion, I do not think it necessary to examine the judgment in Mangold. For that case-law to be applied to the present case it would be necessary to identify beyond doubt a general principle of Community law, which would enable that general principle to be applied even before the entry into force of a specific provision of secondary law with essentially the same normative content. Thus, in Mangold the Court found that Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation. The Court based that conclusion on the finding that the source of the prohibition of discrimination on grounds of age is found in various international instruments and in the constitutional traditions common to the Member States. However, that condition is not satisfied in the present case'.

[77] Opinion AG Trstenjak in Case C-282/10, *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*, ECLI: EU:C:2011:559, paras 111-112.

> not necessarily subject to the precondition that the practice in question should constitute a tendency which is uniform or has clear majority support. It depends rather on an evaluative comparison of the legal systems which must take due account, in particular, not only of the aims and tasks of the European Union but also of the special nature of European integration and of EU law'.[78]

This reveals that comparative law and teleological interpretation have been used in a combined manner, since comparison is sometimes used to detect the existence of a consensus at national level on a certain issue.[79] It should not come as a surprise, since as I mentioned at the beginning of the article comparative law might serve different functions.

4 LACK OF EXPLICIT COMPARISON AS CAUSE OF CRITICISM: THE MANGOLD CASE AND ITS LEGACY

So far, we have seen that the CJEU frequently relies on implicit comparison. In this section I shall deal with the consequences of such a lack of transparency. The Mangold[80] case offers an example of the problematic use of comparative law by the Court. On that occasion the CJEU concluded its reasoning by recalling the duty to disapply of the national judge:

> 'It is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law […] It is the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law which may conflict with Community law, even where the period prescribed for transposition of that directive has not yet expired'.[81]

Haztopoulos, one of the first commentators of the judgment, read it together with other cases like Carpenter[82] and Karner[83]: all these cases are characterised by the reference to the legal material of the ECHR and to the general principles. The conclusion reached by

---

[78] Opinion AG Kokott in Case C-550/07 P *Akzo Nobel Chemicals and Akcros Chemicals v Commission and Others* EU:C:2010:229, para. 94.

[79] As Lenaerts, Gutiérrez-Fons (n 18) pointed out: 'Accordingly, for the Advocate General, even if a principle is only recognised in a minority of Member States, it may still constitute a general principle of EU law in so far as it reflects a mission with which the authors of the Treaties have entrusted the EU, or mirrors a trend in the constitutional law of the Member States. However, AG Kokott found that those two elements were missing in Akzo'.

[80] Case C-144/04 *Mangold* [2005] EU:C:2005:709. See Roberta Calvano, 'Il caso "Mangold": la Corte di giustizia afferma (senza dirlo) l'efficacia orizzontale di una direttiva comunitaria non scaduta?' (2006) http://archivio.rivistaaic.it/cronache/giurisprudenza_comunitaria/mangold/index.html

[81] *Mangold* (n 80) para. 77- 78.

[82] Case C-60/00 *Carpenter* EU:C:2002:434.

[83] Case C-71/02 *Karner* EU:C:2004:181.

Hatzopoulos is that the reference to the general principles sometimes risks affecting the quality of the legal reasoning of the CJEU. In Mangold this problem was even increased by the mix between hard and soft law sources:

> 'Since EC hard legislation will be rare in fields in which some EU coordination takes place, the Court will be obliged to control national measures by reference to general principles and fundamental rights, in order to effectively protect the latter. This, however, is not a commendable development, at least by currently applicable legal standards, and all the judgments above have been strongly criticised'.[84]

What it is interesting to us is the way in which the CJEU took inspiration from the national constitutional materials in order to construct a general principle of non-discrimination based on age.

Some German scholars harshly reacted to Mangold by questioning the possibility of inferring such a principle from the constitutional traditions common to the Member States:

> 'This "general principle of community law" was a fabrication. In only two of the then 25 member states namely Finland and Portugal is there any reference to a ban on age discrimination, and in not one international treaty is there any mention at all of there being such a ban, contrary to the terse allegation of the ECJ. Consequently, it is not difficult to see why the ECJ dispensed with any degree of specification or any proof of its allegation. To put it bluntly, with this construction which the ECJ more or less pulled out of a hat, they were acting not as part of the judicial power but as the legislature'.[85]

Mangold is thus emblematic of an 'octroyée methodology of construing common constitutional traditions'[86] according to which the CJEU has been jeopardising the interpretative sovereignty of national constitutional courts. As Arnull pointed out: 'The Court of Justice itself was initially rather coy about mentioning Mangold or the general principle of equality'.[87]

However, later on, the CJEU recalled Mangold in Kücükdeveci,[88] confirming the existence of a general principle of non-discrimination based on age and conceiving this general principle as its parameter. Although, the implementation period for the directive had already expired at that time and the EU Charter of Fundamental Rights was recalled only to 'prove' the later codification of this general principle, despite the fact that the EU Charter was already in force at that time.

---

[84] Vassilis Hatzopoulos, 'Why the Open Method of Coordination is Bad for You: A Letter to the EU' (2007) 13 *European Law Journal* 309 337.
[85] Herzog and Gerken (n 34).
[86] Marco Dani, 'Tracking Judicial Dialogue-The Scope for Preliminary Rulings from the Italian Constitutional Court' (2009) 16 *Maastricht journal of European and comparative law* 149.
[87] Arnull (n 26) 15. Arnull refers to Chacon Navas (Case C-13/05 *Sonia Chacón Navas v. Eurest Colectividades SA* EU:C:2006:456) and Palacios de la Villa (CaseC-411/05 *Palacios de la Villa* EU:C:2007:604), Lindorfer v Council (Case 227/04 P *Maria-Luise Lindorfer v Council of the European Union* EU:C:2007:490) and Bartsch (Case C-427/06 *Bartsch* EU:C:2008:517). See also the Opinion AG Mazák in Case C-411/05 *Félix Palacios de la Villa* EU:C:2007:604, paras 88- 94; Opinion AG Trstenjak in Case C-282/10 *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre* EU:C:2011:559, paras 140- 141.
[88] Case C-555/07 *Kücükdeveci* EU:C:2010:21.

More recently the CJEU recalled Mangold also in his Dansk Industri case[89] where the Court reiterated the duty of disapplication in case of violation of the general principle of non-discrimination on grounds of age:

> 'In order to answer that question, it is appropriate first of all to note that the source of the general principle prohibiting discrimination on grounds of age, as given concrete expression by Directive 2000/78, is to be found, as is clear from recitals 1 and 4 of the directive, in various international instruments and in the constitutional traditions common to the Member States (see judgments in Mangold, C-144/04, EU:C:2005:709, paragraph 74, and Kücükdeveci, C-555/07, EU:C:2010:21, paragraphs 20 and 21). It is also apparent from the Court's case-law that that principle, now enshrined in Article 21 of the Charter of Fundamental Rights of the European Union, must be regarded as a general principle of EU law (see judgments in Mangold, C-144/04, EU:C:2005:709, paragraph 75, and Kücükdeveci, C-555/07, EU:C:2010:21, paragraph 21)'.[90]

Mangold still creates mixed feelings. Looking at the national level, it is no coincidence that after Mangold, the German Constitutional Court indirectly responded to the CJEU with the famous Lisbon decision[91] and then directly with the Honeywell[92] decision before raising its first preliminary question ex Art. 267 TFEU in the famous Gauweiler case.[93] The tip of the iceberg was reached in the already mentioned decision on the Public Sector Purchase Programme (PSPP),[94] where the German Constitutional Court declared that the CJEU had acted *ultra vires* because of the way in which the Luxembourg Court had exercised the proportionality review. Even before this decision, scholars[95] had already warned about the 'bad example'[96] offered by the German judges, especially after that, in 2012, the Czech Constitutional Court[97] declared the CJEU's judgment in C-399/09 Landtová 'ultra vires'. The Czech case represented the first example of the application of the *ultra vires* doctrine. However, now it is different because of the prestige and charisma of the German Constitutional Court and indeed the risk of a *domino* effect is now very high.

One can also trace another decision back to this trend. Indeed, the Danish Supreme

---

89 Case C-441/14, *Dansk Industri* (DI) EU:C:2016:278. See also the distinguishing made by the CJEU in Bartsch, Case C-427/06, *Bartsch* EU:C:2008:517, para 24.
90 *Dansk Industri* (n 89), para. 22.
91 BVerfGE 123, 267 <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html>.
92 2 BvR 2661/06, <www.bundesverfassungsgericht.de/entscheidungen/rs20100706_2bvr266106.html.>.
93 2 BvR 2728/13, para 29. See also : Case C-62/14 *Gauweiler* EU:C:2015:400.
94 2 BvR 859/15, <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html;jsessionid=F892FE5330900A9A29FDCBEF992814FE.2_cid392>.
95 Gabor Halmai, 'Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law' (2018) 43 Review of Central and East European Law 23.
96 Oreste Pollicino, 'Metaphors and Identity Based Narrative in Constitutional Adjudication: When Judicial Dominance Matters' (2019), <https://blog-iacl-aidc.org/2019-posts/2019/2/27/metaphors-and-identity-based-narrative-in-constitutional-adjudication-when-judicial-dominance-matters>.
97 Pl. ÚS 5/12, https://www.usoud.cz/en/decisions/20120131-pl-us-512-slovak-pensions/

Court in Ajos[98] also took the chance to delimit the competences of the EU. On that occasion also the Danish Supreme Court rejected the Mangold case law by using the *ultra vires* doctrine.[99] Although the lack of transparency in its legal reasoning does not represent the only ground for criticism to this decision, Mangold and its legacy are also an example of the harsh reactions that have been caused by a decision characterised by a questionable use of the comparative method. As we saw the fact that the CJEU has not followed the 'mathematical logic of the lowest common denominator' in the reconstruction of a general principle does not represent *per se* an issue, but the lack of transparency in revealing the domestic sources considered for that purpose triggered tensions and conflicts with national courts. Decisions like Mangold[100] have been perceived as a bad move from national constitutional courts and commentators[101] and if the CJEU wants to remedy that it must make sure to involve those constitutional courts that are eager to have a proper and loyal dialogue[102]. Indeed, even traditionally cooperative constitutional courts – such as the Austrian one – have been sending warnings lately, and this tension has later caused important cases like A. v. B.[103] Indeed, in an important decision the Austrian constitutional court clarified:

> 'In light of the fact that Article 47(2) CFR recognises a fundamental right which is derived not only from the ECHR but also from constitutional traditions common to the Member States, it must be heeded also when interpreting the constitutionally guaranteed right to effective legal protection (as an emanation of the duty of interpreting national law in line with Union law and of avoiding situations that discriminate nationals).
> Conversely, the interpretation of Article 47(2) CFR must heed the constitutional traditions of the Member States and therefore the distinct characteristics of the rule of law in the Member States. This avoids discrepancies in the interpretation of constitutionally guaranteed rights and of the corresponding Charter rights'.[104]

---

[98] Højesteret, decision no. 15/2014 Dansk Industri (DI) acting for Ajos A/S vs. The estate left by A., <https://domstol.dk/hoejesteret/english/supremecourt/nyheder/pressemeddelelser/Documents/Judgment%2015-2014.pdf>.

[99] Nicole Lazzerini, *La Carta dei diritti fondamentali dell'Unione europea: I limiti di applicazione* (Franco Angeli 2018) 131. Zaccaroni argued that on that occasion the Danish Supreme Court basically asked 'the Court of Justice to withdraw from its Kücükdeveci and Mangold case law and to go back to its Dominguez decision', Giovanni Zaccaroni, 'Dialogue and conflict between supreme European courts in Dansk Industri', 2018, https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=36201.

[100] *Mangold* (n 80).

[101] Herzog and Gerken (n 34).

[102]According to the examples offered by A. Torres Pérez, *Conflicts of Rights in the European Union A Theory of Supranational Adjudication* (Oxford University Press, 2009) 118.

[103] Case C-112/13, *A v. B and others*, EU:C:2014:2195. See also Italian Constitutional Court, judgment 269/2017, on that. Daniel Sarmiento, *Adults in the (Deliberation) Room. A comment on M.A.S.*, *Quaderni costituzionali* 228 (2018).

[104] U 466/11-18, U 1836/11-13 14.03.2012, para. 59, <https://www.vfgh.gv.at/downloads/VfGH_U_466-11__U_1836-11_Grundrechtecharta_english.pdf>. On this see Giacomo Delledonne, 'Carta di Nizza e corti costituzionali nazionali: quali prospettive?' (2013) Rivista trimestrale diritto pubblico 449 and Andrea Guazzarotti, 'Rinazionalizzare i diritti fondamentali? Spunti a partire da Corte di Giustizia UE, A c. B e altri, sent. 11 settembre 2014, C-112/13' (2014), <http://www.dirittocomparati.it/rinazionalizzare-i-diritti-fondamentali-spunti-a-partire-da-corte-di-giustizia-ue-a-c-b-e-altri-sent/>.

This Austrian decision was also recalled by the Italian Constitutional Court in an *obiter dictum* included in judgment 269/2017,[105] a case that has opened a new season in its relationship with the CJEU. All these dangerous signals represent the price the CJEU is paying after problematic decisions like Mangold and could jeopardise the inter-judicial cooperation in the long run. Unfortunately, the recent bad news coming from Karlsruhe with the decision on the PSPP[106] seems to confirm this risk.

[105] Corte costituzionale, decision 269/2017, www.cortecostituzionale.it: 'Therefore, violations of individual rights posit the need for an erga omnes intervention by this Court, including under the principle that places a centralized system of the constitutional review of laws at the foundation of the constitutional structure (Article 134 of the Constitution). The Court will make a judgment in light of internal parameters and, potentially, European ones as well (per Articles 11 and 117 of the Constitution), in the order that is appropriate to the specific case, including for the purpose of ensuring that the rights guaranteed by the aforementioned Charter of fundamental rights are interpreted in a way consistent with constitutional traditions, which are mentioned in Article 6 of the Treaty on European Union and by Article 52(4) of the EUCFR as relevant sources in this area. Other national constitutional courts with longstanding traditions have followed an analogous line of reasoning (see, for example, the decision of the Austrian Constitutional Court, Judgment U 466/11-18; U 1836/11-13 of 14 March 2012)',. On this decision see Giuseppe Martinico, Giorgio Repetto, 'Fundamental Rights and Constitutional Duels in Europe: An Italian Perspective on Case 269/2017 of the Italian Constitutional Court and Its Aftermath' (2019) 15 European Constitutional Law Review 731.

[106] 2 BvR 859/15, <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html;jsessionid=F892FE5330900A9A29FDCBEF992814FE.2_cid392>; Antonia Baraggia, Giuseppe Martinico 'Who is the Master of the Treaties? The Compact Theory in Karlsruhe' (2020), <https://www.diritticomparati.it/who-is-the-master-of-the-treaties-the-compact-theory-in-karlsruhe/>.

LIST OF REFERENCES

Adinolfi A, "I principi generali nella giurisprudenza comunitaria e la loro influenza sugli ordinamenti degli Stati membri" (1994) *Rivista Italiana di Diritto Pubblico Comunitario* 521

Arnull A, 'What is a General Principle of EU Law?' In Vogenauer S (ed), *Prohibition of Abuse of Law A New General Principle of EU Law?* (Hart, 2017) 7
DOI: https://doi.org/10.5040/9781472565570.ch-002

Azoulai L, '"Euro-Bonds' The Ruiz Zambrano judgment or the Real Invention of EU Citizenship' (2011) 3 *Perspectives on Federalism* 31

Baraggia A, Martinico G, "Who is the Master of the Treaties? The Compact Theory in Karlsruhe", 2020, <https://www.dirittocomparati.it/who-is-the-master-of-the-treaties-the-compact-theory-in-karlsruhe/>

Belvisi F, 'The "Common Constitutional Traditions and the Integration of the EU' *Diritto e Questioni Pubbliche* (2006),
<http://www.dirittoequestionipubbliche.org/page/2006_n6/mono_02_Belvisi.pdf>

Betti E, *Teoria generale della interpretazione* (Giuffrè, 1955)

Bin R, "L'interpretazione conforme. Due o tre cose che so di lei" *Rivista AIC* 1 (2015), <http://www.rivistaaic.it/download/1hafJKHFcYv_JgI3rYOwnyoMtsDqwTgP48qIgNjX4t4/1-2015-bin.pdf>

von Bogdandy A, Stephan Schill, 'Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty' (2011) 48 *Common Market Law Review* 1417

Broude T, Shany Y (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart, 2011)
DOI: https://doi.org/10.5040/9781472565457

Calvano R, 'Il caso "Mangold": la Corte di giustizia afferma (senza dirlo) l'efficacia orizzontale di una direttiva comunitaria non scaduta?' (2006)
<http://archivio.rivistaaic.it/cronache/giurisprudenza_comunitaria/mangold/index.html>

Carrozza p, "Constitutionalism's Post-modern Opening", in Loughlin L, Walker N (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, 2007) 169
DOI: https://doi.org/10.1093/acprof:oso/9780199552207.003.0010

Cozzolino L, 'Le tradizioni costituzionali comuni nella giurisprudenza della Corte di giustizia delle Comunità europee', in Falzea P, Spadaro A, Ventura L (eds.), *La Corte Costituzionale e le Corti d'Europa* (Giappichelli, 2003) 3

Dani M, 'Tracking Judicial Dialogue-The Scope for Preliminary Rulings from the Italian Constitutional Court' (2009) 16 *Maastricht journal of European and comparative law* 149
DOI: https://doi.org/10.1177/1023263x0901600202

Delledonne G, "Carta di Nizza e corti costituzionali nazionali: quali prospettive?" (2013) *Rivista trimestrale diritto pubblico* 449

Del Vecchio G, 'Les bases du droit comparé et les principes généraux du droit' (1960) 12 *Revue internationale de droit comparé* 493

de Vergottini G, "Tradizioni costituzionali comuni e Costituzione europea", 2006, <http://www.forumcostituzionale.it/wordpress/wp-content/uploads/pre_2006/135.pdf>

— *Oltre il dialogo tra le Corti. Giudici, diritto straniero, comparazione* (Il Mulino, 2010)

Dworkin R, *Taking Rights Seriously* (Harvard University Press, 1977).

Grossi P, *A History of European Law* (Blackwell Malden, 2010)
DOI : https://doi.org/10.1002/9781444319248

Groussot X, J, Hettne J and Petursson GT, 'General Principles and the Many Faces of Coherence: Between Law and Ideology in the European Union' in Vogenauer S, Weatherill S(eds.), *General Principles of Law European and Comparative Perspectives* (Hart, 2017) 77
DOI: https://doi.org/10.5040/9781509910724.ch-006

Guastini R, *Le fonti del diritto. Fondamenti teorici.* (Giuffrè, 2010)

Fontanelli F, 'The Implementation of European Law by Member States under Article 51(1) of the Charter of Fundamental Rights' (2014) 20 *Columbia Journal of European Law* 193

Guazzarotti A, 'Rinazionalizzare i diritti fondamentali? Spunti a partire da Corte di Giustizia UE, A c. B e altri, sent. 11 settembre 2014, C-112/13.', 2014, <http://www.dirittocomparati.it/rinazionalizzare-i-diritti-fondamentali-spunti-a-partire-da-corte-di-giustizia-ue-a-c-b-e-altri-sent/>

Häberle P, 'Dallo Stato nazionale all'Unione europea: evoluzioni dello Stato costituzionale. Il Grundgesetz come Costituzione parziale nel contesto della Unione europea: aspetti di un problema' (2002) *Diritto pubblico comparato ed europeo* 455

Halmai G, 'Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law' (2018) 43 *Review of Central and East European Law* 23

DOI: https://doi.org/10.1163/15730352-04301002

Hatzopoulos V, 'Why the Open Method of Coordination is Bad for You: A Letter to the EU' (2007) 13 *European Law Journal* 309
DOI : https://doi.org/10.1111/j.1468-0386.2007.00368.x

Herzog R, Gerken L, '[Comment] Stop the European Court of Justice', 2008, <https://euobserver.com/opinion/26714>

Hofmann H and Mihaescu B, 'The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case' (2013) 9 *European Constitutional Law Review* 73
DOI: https://doi.org/10.1017/s1574019612001046

Kelly P, *Law in a law-governed union (Recht in einer Rechtsunion): The Court of Justice of the European Union and the free law doctrine*. PhD thesis, Birkbeck, University of London, 2015, 44, <http://bbktheses.da.ulcc.ac.uk/136/1/cp_Fullversion-2014KellyPphdBBK.pdf>

Kahn Freund O, "Comparative Law as an Academic Subject" 82 *Law Quarterly Review* 40 (1966)

Klimas T, Vaiciukaité J, 'Interpretation of European Union Multilingual Law' (2005) *International Journal of Baltic Law* 1

Kutscher H, 'Methods of Interpretation as Seen by a Judge at the Court of Justice' in *Reports of a Judicial and Academic Conference held in Luxemburg on 27-28 September 1976*, <http://aei.pitt.edu/41812/1/A5955.pdf>

Lasser M, 'Anticipating Three Models of Judicial Control, Debate and Legitimacy: The European Court of Justice, the Cour de cassation and the United States Supreme Court' (2003) Jean Monnet Working Paper 1/03
<https://jeanmonnetprogram.org/archive/papers/03/030101.pdf>

Lazzerini N, *La Carta dei diritti fondamentali dell'Unione europea: I limiti di applicazione* (Franco Angeli, 2018)

Lenaerts K, 'The Court of Justice and the Comparative Law Method', 2016, <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/General_Assembly/2016/K._Lenaerts_ELI_AC_2016.pdf>

Lenaerts K, Gutman K, 'The Comparative Law Method and the European Court of Justice: Echoes Across the Atlantic' (2016) 64 *American Journal of Comparative Law* 841
DOI: https://doi.org/10.1093/ajcl/avw017

Lenaerts J, Gutiérrez-Fons JA, 'To say what the law of the EU is : methods of interpretation and the European Court of Justice', EUI Working Paper, Distinguished Lecture delivered on the occasion of the XXIV Law of the European Union course of the Academy of European Law, on 6 July 2013. http://cadmus.eui.eu/handle/1814/28339, then published in (2103) 64 *Columbia Journal of European Law* 841

Markesinis B, 'Comparative Law. A Subject in Search of an Audience' (1990) 53 *Modern Law Review* 1
DOI: https://doi.org/10.1111/j.1468-2230.1990.tb01788.x

Martinico M, Repetto G, 'Fundamental Rights and Constitutional Duels in Europe: An Italian Perspective on Case 269/2017 of the Italian Constitutional Court and Its Aftermath' (2019) 15 *European Constitutional Law Review* 731
DOI: https://doi.org/10.1017/s1574019619000397

Michaels R, 'The Functional Method of Comparative Law' in Reimann M and Zimmermann R (eds.), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006) 339
DOI : https://doi.org/10.1093/oxfordhb/9780198810230.013.11

Mirkine- Guetzévitch B, *Les Nouvelles tendances du droit constitutionnel* (Giard, 1931)

Nicola F, 'National Legal Traditions at Work in the Jurisprudence of the Court of Justice of the European Union' (2016) 64 *American Journal of Comparative Law* 866
DOI: https://doi.org/10.1093/ajcl/avw015

Ninatti S, *Ieri e oggi delle tradizioni costituzionali comuni: le novità nella giurisprudenza comunitaria*, in D' Elia G, Tiberi G, Viviani Schlein MP (eds.), *Scritti in memoria di Alessandra Concaro* (Giuffrè, 2012) 533

Paladin L, 'Costituzione, preleggi e codice civile' (1993) *Rivista di diritto civile* 19

Pizzorusso A, 'Common constitutional traditions in Europe as a source of Community law' (2008) *STALS (Sant'Anna Legal Studies) Research Paper* 1/2008
<www.stals.sssup.it/files/stals_Pizzorusso.pdf>

—— *Il patrimonio costituzionale europeo* (Il Mulino, 2002)

Pfersmann O, 'Le droit comparé comme interprétation et comme théorie du droit' (2001) 53 *Revue international de droit comparé* 275

Pollicino O, 'Metaphors and Identity Based Narrative in Constitutional Adjudication: When Judicial Dominance Matters', 2019, <https://blog-iacl-aidc.org/2019-posts/2019/2/27/metaphors-and-identity-based-narrative-in-constitutional-adjudication-when-judicial-dominance-matters>

— 'Della sopravvivenza delle tradizioni costituzionali comuni alla Carta di Nizza: ovvero del mancato avverarsi di una (cronaca di una) morte annunciata' (2016) *Il diritto dell'Unione Europea* 253

— 'Conseil d'Etat: Decision No. 287110 of 8 February 2007, Société Arcelor Atlantique et Lorraine and others' (2008) 45 *Common Market Law Review* 1519

Ruggeri A, '"Tradizioni costituzionali comuni' e 'controlimiti', tra teoria delle fonti e teoria dell'interpretazione' (2003) *Diritto pubblico comparato ed europeo* 101

Ruiz Fabri H, 'Principes généraux du droit communautaire et droit compare' (2007) 45 *Droits* 127
DOI : https://doi.org/10.3917/droit.045.0127

Rusu GA, 'Les traditions constitutionnelles communes aux Etats membres, source matérielle des droits fondamentaux dans l'Union européenne', 2011, <http://www.umk.ro/fr/buletin-stiintific-cercetare/arhiva-buletinstiintific/203-volumul-mesei-rotunde-internationale-2011/1153-les-traditions-constitutionnelles-communes-aux-etats-membres-source-materielle-des-droits-fondamentaux-dans-lunion-europeenne.html>

Saiz Arnaiz A, *La apertura constitucional al derecho internacional y europeo de los derechos humanos. El artículo 10.2 de la Constitución española* (Consejo General del Poder Judicial, Madrid 1999)

Sacco R, 'Legal Formants: A Dynamic Approach to Comparative Law' (Part I) (1991) 39 *American Journal of Comparative Law* 1
DOI: https://doi.org/10.2307/840669

— 'Legal Formants: A Dynamic Approach to Comparative Law' (Part II) (1991) 39 *American Journal of Comparative Law* 343
DOI: https://doi.org/10.2307/840784

Sarmiento D, *Adults in the (Deliberation) Room. A comment on M.A.S.* (2018) *Quaderni costituzionali* 228

Stein E, 'International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?' (1994) 88 *American Journal of International Law* 427
DOI: https://doi.org/10.2307/2203712

Sudre F, 'Le renforcement de la protection des droits de l'homme au sein de l'Union européenne' in Rideau J (ed.), *De la Communauté de droit à l'Union de droit. Continuité et avatars européens* (LGDJ, 2000) 218

Safjan M, 'Areas of application of the Charter of application of the European Union: fields of conflicts?' (2012) EUI Working Paper LAW 2012/22, <http://cadmus.eui.eu/bitstream/handle/1814/23294/LAW-2012-22.pdf>
Tridimas T, 'Fundamental Rights, General Principles of EU Law, and the Charter' (2014) 16 *Cambridge Yearbook of European Legal Studies* 361

— *The General Principles of EC Law* (Oxford University Press, 1998)

van der Schyff G, 'The Constitutional Relationship between the European Union and its Member States: The Role of National Identity in Article 4(2) TEU' (2012) 37 *European Law Review* 563

Zaccaron Gi, 'Dialogue and conflict between supreme European courts in Dansk Industri' (2018) <https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=36201>

Zweigert K, Kötz H, *An Introduction to Comparative Law* (Oxford University Press, 1998)

JURISDICTION AND ENFORCEMENT POST BREXIT

ERIK LAGERLÖF*

In the context of international business and commercial transactions, it is vital that the judgments of one State are enforced by the courts in another. EU law has played a significant role in revolutionising the rules applicable to jurisdiction and enforcement in a cross-border context. As a Member State, the UK has benefitted from these rules and they have contributed to the position of the UK and, in particular, London as the leading centre for dispute resolution in Europe, if not worldwide. With the purpose of contributing to the ongoing discussion concerning common EU and UK rules on jurisdiction and enforcement of judgments post Brexit more broadly, this article provides an updated view of the major issues involved. In doing so, it also underlines the importance of a common EU-UK framework in this regard and the urgency for the EU and UK negotiators to agree on a sensible way forward.

1 INTRODUCTION

The effective enforcement of judgments is fundamental to a functioning society and necessary for the rule of law to exist. If a contract cannot ultimately be enforced, it becomes a meaningless piece of paper. In the context of international business and commercial transactions, it is vital that the judgments of one State are enforced by the courts in another. EU law has played a significant role in revolutionising the rules applicable to jurisdiction and enforcement in a cross-border context.[1] These rules have helped the UK to export the use of its judicial system and the decisions resulting from their courts. Thus, as a Member State, the UK has benefitted from these rules and they have contributed to the position of the UK and, in particular, London as the leading centre for dispute resolution in Europe, if not worldwide.

The rules governing jurisdiction and enforcement amongst EU Member States are presently governed by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1 (the BIR (Recast)).[2] The EU is also a party to international agreements governing jurisdiction and enforcement with third countries, notably the Lugano Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano Convention 2007) and the Hague Convention of 30 June 2005 on Choice of Court Agreements (Hague Convention). Following the British decision to leave the EU, with the UK no longer subject to EU law and not covered by international agreements concluded by the EU alone, the future application of these rules to the UK are uncertain. Without an

*Senior Manager at Vinge, Adjunct Professor of Law at the Stockholm School of Economics, Visiting Fellow at St Edmund's College (Cambridge University).

1 The term "jurisdiction" is here used in a private international law context, referring to the power of courts, as opposed to the public international law concept of jurisdiction, which essentially encompasses any exercise of regulatory power.

2 Denmark is subject to the BIR (Recast) through an international agreement (see further text to n 13 below).

effective legal framework for jurisdiction and the enforcement of judgments to govern relationships between the EU and the UK, there is a serious risk to UK citizens, businesses, institutions and the UK government to have judgments which they have obtained in the UK courts effectively enforced, and to have the jurisdiction of UK courts recognised, throughout the EU. Such a development may well affect the premier position enjoyed by the UK, with the economic consequences that follow. An effective regime to govern jurisdiction and enforcement between the parties is also in the interest of EU Member States and their citizens and businesses engaged in trading and interacting with the UK.

This contribution considers the impact of Brexit on the BIR (Recast), the Lugano Convention 2007 and the Hague Convention, including how they are affected by the Agreement of 19 October 2019 on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (Withdrawal Agreement). The purpose is not to provide a detailed picture of these instruments, but to give the reader an understanding of their current and future post Brexit status and some of their key characteristics in order to portray the issues involved.In addition to these three instruments, the standing of the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Brussels Convention), a predecessor to the BIR (Recast), will be considered. In view of the uncertainty surrounding private international law post Brexit, several prominent commentators have argued that the Brussels Convention has been revived upon the British exit such that the EU Member States would be bound to recognise and enforce judgments under this convention vis-à-vis the UK (a similar argument could be made with regard to the Lugano Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters (Lugano Convention 1988)).[3] In this article, it is argued that the Brussels Convention has not been brought back to life by Brexit and cannot be considered as an alternative future legal framework.

With the purpose of contributing to the ongoing discussion concerning common EU and UK rules on jurisdiction and enforcement of judgments post Brexit more broadly, this article provides an updated view of the major issues involved. In doing so, it also underlines the importance of a common EU-UK framework in this regard and the urgency for the EU and UK negotiators to agree on a sensible way forward.

2 THE WITHDRAWAL AGREEMENT DOES NOT PROVIDE SUFFICIENT CLARITY

The EU and the UK agreed on a revised Withdrawal Agreement on 17 October 2019 and the UK Parliament, after having rejected the previous version of the agreement on three occasions, passed it on 20 December 2019. The Withdrawal Agreement regulates the arrangements for the withdrawal of the UK from the EU and provides for a transition period

[3] Richard Aikens and Andrew Dinsmore, 'Jurisdiction, Enforcement and the Conflict of Laws in Cross-Border Commercial Disputes: What Are the Legal Consequences of Brexit?' (2016) 27(7) European Business Law Review 903, 908, Sara Masters
QC and Belinda McRae, 'What does Brexit Mean for the Brussels Regime?' (2016) 33 Journal of International Arbitration, Special Issue, 483, 492-494 and Andrew Dickinson, 'Back to the Future: The UK's EU Exit and the Conflict of Laws' (2016) 12 Journal of Private International Law 195, 201-203.

during which EU law will continue to apply to and in the UK ("the Transition Period").[4] During this period, EU law is meant to produce the same legal effects in the UK as those which it produces within the EU and it shall be interpreted and applied in accordance with the same methods and general principles as those applicable within the EU.[5] The Transition Period is set to end on 31 December 2020,[6] although it may be extended for a period up to two years.[7]

In accordance with the terms of the Transition Period, the BIR (Recast) remains applicable to and within the UK as it did before Brexit (at least) until 31 December 2020. Moreover, it follows from Article 67(1)(a) of the Withdrawal Agreement that the provisions regarding jurisdiction of the BIR (Recast) will continue to apply to legal proceedings instituted before the end of the Transition Period as well as in respect of proceedings or actions related to such legal proceedings. Similarly, according to Article 67(2)(a) of the Withdrawal Agreement, the BIR (Recast) will also apply to the recognition and enforcement of judgments given in legal proceedings instituted before the end of the Transition Period (though seemingly not to proceedings or actions related to such legal proceedings).

Although the position is reasonably clear concerning the BIR (Recast), the position of the Lugano Convention 2007 and the Hague Convention during the Transition Period is, at a closer look, less evident. According to the Withdrawal Agreement, the continued application of EU law to the UK during this period includes international agreements to which the EU is a party.[8] In particular, during the Transition Period, the UK shall be bound by the obligations stemming from international agreements 'concluded by the Union, by Member States acting on its behalf, or by the Union and its Member States acting jointly'.[9] In an EU and UK perspective, the argument is that these international agreements would continue to operate as they do now, and that the UK would simply be treated as an EU Member State for the purposes of these agreements. In view of the requirements of the Withdrawal Agreement, it could be argued that nothing has changed in the perspective of third parties and that the agreements should continue to apply to the UK during the Transition Period.

However, although this solution may be acceptable to the EU and the UK, it is not certain that third parties will agree. According to Article 26 of the Vienna Convention on the Law of Treaties (VCLT), it is the EU that constitutes the contracting party and is as such bound by the agreement. Moreover, as provided for Article 34 VCLT, an international agreement cannot create rights and obligations for a third State without its consent. Thus, in an international law perspective, the UK does not continue to benefit from the Lugano Convention 2007 and the Hague Convention during the Transition Period since it has never been bound by either of the agreements in its own right under international law.

[4] Articles 126-127 of the Withdrawal Agreement.
[5] Article 127(3) of the Withdrawal Agreement.
[6] Article 126 of the Withdrawal Agreement.
[7] Article 132 of the Withdrawal Agreement.
[8] Article 2(a)(iv) of the Withdrawal Agreement.
[9] Article 129(1) of the Withdrawal Agreement.

3 JURISDICTION AND THE ENFORCEMENT AFTER THE TRANSITION PERIOD – STILL CONSIDERABLE UNCERTAINTY

It was noted in the introduction that an effective regime of jurisdiction and enforcement is important in order to maintain the attraction of the UK as a destination for cross-border disputes. Commercial parties might hesitate in designating English courts in jurisdiction clauses if they may not be respected in the EU, if there is a risk of parallel proceedings in the UK and an EU Member State respectively and if interim or final judgments of English courts are more difficult to enforce in the EU. Equally, the EU Member States have an interest in maintaining an efficient regime whereby issues related to jurisdiction and enforcement are regulated in order to provide certainty and efficiency for businesses and others engaged in cross-border transactions with the UK.

However, it is still uncertain how jurisdiction and enforcement between the UK and the EU Member States will be dealt with once the Transition Period has come to an end. The Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom (Political Declaration), a non-legally binding document setting out the framework for the future relationship between the EU and the UK, does not, unfortunately, provide much guidance. While it is stated that the parties should explore options for judicial cooperation in matrimonial, parental responsibility and other related matters, and that a new security partnership should comprise of judicial cooperation within criminal matters, foreign policy, security and defence and related areas,[10] the Political Declaration is silent on future judicial cooperation. The lack of guidance is unfortunate. As we shall see, there is still considerable uncertainty surrounding the future application to the UK of existing EU and international arrangements.

3.1 BIR (RECAST)

The BIR (Recast) entered into force on 10 January 2015,[11] replacing Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2000] OJ L12/1 (the Brussels I Regulation), and applies to all Member States, except Denmark, in accordance with EU law.[12] However, as provided for in a separate agreement between Denmark and the EU, the regulation applies to the relations between the EU and Denmark under public international law.[13] The UK has benefitted from the regulation as an EU Member State and remains subject to its regime during the Transition Period. However, as an EU regulation, the BIR (Recast) will not apply to the UK after the Transition Period.

Domicile is the primary connecting factor in the Brussels regime in order to establish jurisdiction.[14] However, there are several exceptions to this general rule. For example, in

[10] Political Declaration, paras 56 as well as 79-82 and 86-88 respectively.
[11] Proceedings instituted in EU Member States prior to 10 January 2015 are regulated by the Brussels I Regulation.
[12] Denmark opted out from the home affairs and justice pillar through the Maastricht Treaty.
[13] Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
[14] Article 4(1) BIR (Recast). The meaning of jurisdiction is governed by Articles 62 and 63 BIR (Recast).

contract claims, the defendant may be sued in the place of performance of the obligation in question.[15] Accordingly, in a claim arising out of a non-delivery of goods or services, the defendant could be sued in the country which delivery of the goods or the provision of services was meant to occur. Fundamentally, Article 25 BIR (Recast) governs all choice-of-court agreements. If the parties have agreed that a court of a Member State should have jurisdiction to settle a dispute, then, provided certain formalities are met, that court should have jurisdiction. [16] Although this provision arguably also applies to non-exclusive jurisdiction agreements,[17] Article 25 specifically provides that jurisdiction shall be exclusive unless the parties have agreed otherwise. Moreover, notably, it applies irrespective of the parties' domicile. Thus, if a party domiciled in Australia enter into a contract with a party domiciled in South Africa that includes a clause requiring any legal proceedings to be brought in London, this choice will be respected by the courts throughout the remaining EU-27.

The rules relating to *lis pendens* are found in Articles 29 to 31 BIR (Recast). Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, it follows from Article 29 that any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. However, this rule is expressly without prejudice to Article 31(2), which ensures that where a court of a Member State on which an agreement confers exclusive jurisdiction is seised, any court of another Member State must stay proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement. Put differently, the court chosen by the parties will have priority regardless of which court was first seised. This is a notable change compared to the previous Brussels I Regulation, and related instruments such as the Lugano Convention 2007. Article 31(2) has accordingly reversed the CJEU's unfortunate decision in Case C-116/02, *Gasser*, and ended the notorious "Italian torpedo" procedure intended to cripple or sink legitimate proceedings founded on an exclusive jurisdiction clause.[18] Another important addition brought on by the BIR (Recast) concerns choice-of-court agreements in favour of proceedings in a non-EU Member State. Provided certain conditions are fulfilled, Articles 33 and 34 BIR (Recast) now expressly permit a court in a Member State to stay proceedings in favour of a court in a state outside the EU in circumstances where proceedings are pending before the court of the third state when the EU Member State court is seised.

Alongside sophisticated rules on jurisdiction, the BIR (Recast) also provides a comprehensive regime on recognition and enforcement of judgments. As provided for in

---

[15] Article 7(1) BIR (Recast).

[16] As set out in Article 25 BIR (Recast), there are certain conditions that have to be fulfilled. The only substantive prohibition, if those conditions are fulfilled, is if the jurisdiction agreement is held to be 'null and void as to its substantive validity' under the law of the state chosen to have jurisdiction. See further Aikens and Dinsmore (n 3), 913.

[17] See for example Richard Fentiman, *International Commercial Litigation*, (2nd edn OUP, 2015) para 2.81. For support in the case law, see further Case C-23/78, *Meeth v Glacetal* EU:C:1978:198.

[18] In Case C-116/02, *Gasser* EU:C:2003:657, a case on the 1968 Brussels Convention, the CJEU gave priority to the *lis pendens* rule over exclusive choice-of-court agreements. That position prevailed under the Brussels I Regulation as well as the Lugano Convention 2007, neither of the instruments made any change to the text in this regard. The underlying principle, as stated by the CJEU, was that every Member State was equally competent to decide whether or not a choice-of-court agreement was valid and effective (Case C-116/02, *Gasser* EU:C:2003:657, para, 48).

Article 36(1), a Member State is required to recognise a judgment in another Member State without imposing any special procedure. Moreover, as set out in Article 39, a Member State must also enforce a judgment without requiring a declaration of enforceability, provided the judgment is enforceable in the Member State where it is given. Accordingly, this means that the *exequatur* procedure common in civil law systems has been abolished, which is a notable improvement compared to previous enforcement rules. It should also be noted that the BIR (Recast) governs the availability of protective measures foreseen by the domestic law of each Member State, whether they are sought in support of a final judgment in the "exporting" Member State or on a provisional basis in support of ongoing proceedings in the "exporting" Member State.[19]

In theory, it may be possible for the UK to agree an international agreement with the EU similar to that agreed to by Denmark in order to continue to benefit from the BIR (Recast). This solution would have a number of significant advantages.[20] The BIR (Recast) is generally considered to be the most advanced framework on jurisdiction and recognition and enforcement of judgements in civil and commercial matters and its rules, as broadly set out above, would continue to apply between the EU and the UK. However, the role of EU institutions accepted by Denmark in its agreement with the EU does not seem acceptable to the UK. Notably, Article 6(1) of the agreement between the EU and Denmark requires the latter to refer questions of interpretation concerning the BIR (Recast) to the CJEU.[21] It is highly unlikely that the UK would want to agree to such obligations.[22] Tellingly, in the UK government's document 'The Future Relationship with the EU', concerning the UK's approach to the negotiations on future relations with the EU, it is stated that:

> '*Whatever happens*, the Government will *not negotiate any arrangement* in which the UK does not have control of its own laws and political life. *That means that we will not agree to any obligations for our laws to be aligned with the EU's, or for the EU's institutions, including the Court of Justice, to have any jurisdiction in the UK*'.[23]

Accordingly, the BIR (Recast), despite its advantages, does not seem to be a viable option for a future arrangement between the EU and the UK. It should be noted that a decision to apply the BIR (Recast) unilaterally is not an alternative. It does not work well for jurisdiction and it does not work at all for recognition and enforcement of judgments; the regulation rests on a principle of reciprocity.

---

[19] Articles 35 and 40 BIR (Recast) respectively. Pre- and post-judgment relief is not new, see for example Articles 31 and 47 respectively of the Lugano Convention 2007.

[20] See further Masters and McRae (n 3), 485-487.

[21] It should be noted that Article 6(2) of the agreement requires Denmark to give "due account" to CJEU decisions when applying the BUR (Recast). This is similar to the interpretative requirement provided for in the 2007 Lugano Convention. See further text to n 28 below.

[22] There may be further difficulties to consider if the UK would want to continue to be subject to the BIR (Recast). For example, according to Article 5(2) of the agreement between the EU and Denmark, the latter nay not enter into international agreements which may affect or alter the scope of the BIR (Recast) without the agreement of the EU. See further Aikens and Dinsmore (n 3), 914-915.

[23] UK government, 'The Future Relationship with the EU', para 5 (emphasis added).

3.2 LUGANO CONVENTION 2007

As the successor to the Lugano Convention 1988, the Lugano Convention 2007 was signed by the EU as well as Iceland, Norway and Switzerland and entered into force on 1 January 2010.[24] Accordingly, the UK has been covered by this international agreement in accordance with its EU membership and is not a contracting party in its own right.[25] As considered above, the UK is not a party to international agreements entered into by the EU alone, including the Lugano Convention 2007, after Brexit.

Similar principles that apply to the BIR (Recast) also govern the Lugano Convention 2007. However, as with the predecessor the BIR (Recast), the Brussels I Regulation, the scope of the convention is narrower in some important respects. For example, concerning jurisdiction, it follows from Article 23(1) that an exclusive jurisdiction clause shall be recognised by the courts of the contracting parties only if at least one of the parties is domiciled in a State bound by the convention. Accordingly, in contrast to the BIR (Recast), in circumstances where neither of the parties is domiciled in a State bound by the Lugano Convention 2007, the latter does not require the chosen court to accept jurisdiction. In such cases, whether to accept jurisdiction is a matter for the chosen court and its domestic conflict of laws rules.[26]

In addition, the *lis pendens* rule in Article 27 of the Lugano Convention 2007 applies to the court first seised and is not subject to any exception. Thus, as opposed to the improved BIR (Recast), the court chosen by the parties will *not* necessarily have priority regardless of which court was first seised. Consequently, as noted above, torpedo actions initiated before a court of another contracting party than that specified in an exclusive jurisdiction clause cannot be avoided under the Lugano Convention 2007. Moreover, the discretion introduced in Articles 33 and 34 BIR (Recast) to stay proceedings where there are identical or related proceedings in a third State is not found in the Lugano Convention 2007.

Further, regarding enforcement, a State bound by the Lugano Convention 2007 is required to recognise a judgment from another Member State without imposing any special procedure.[27] However, as required by Article 38(1), a judgment given in a State bound by the convention shall only be enforceable in another State bound by the convention provided it has been declared enforceable there.[28] As noted above, in order to simplify the process of enforcement, this *exequatur* procedure is not included in the BIR (Recast).

The relationship between the courts of the contracting parties and the CJEU is dealt with in a separate protocol, Protocol 2. As its Preamble explains, the protocol seeks to reduce divergent interpretations as between the Brussels I Regulation and the Lugano Convention 2007. Because the Protocol is directed at non-EU Member States and operates as part of a multilateral regime, its provisions are more nuanced than the Denmark-EU Agreement

---

[24] It entered into force on 1 January 2011 for Switzerland and on 1 May 2011 for Iceland.
[25] Article 216(2) TFEU.
[26] The Lugano Convention 2007 does not leave this situation entirely unregulated. As provided for in Article 23(3), courts of other States bound by the Lugano Convention 2007 will not have jurisdiction over disputes where none of the parties is domiciled in a State bound by the convention, unless the chosen court has declined jurisdiction.
[27] Article 33(1) of the Lugano Convention 2007.
[28] As provided for in Article 39(1) and Annex II of the Lugano Convention 2007, the application shall be submitted to certain specified courts; in England and Wales it is normally the High Court of Justice, in Scotland generally the Court of Session and in Northern Ireland usually the High Court of Justice.

considered above. In particular, Article 1(1) of the protocol requires courts applying and interpreting the convention to "pay due account" to relevant decisions of the CJEU, as well as the courts of other states bound by the convention. This obligation applies not only to provisions of the Lugano Convention 2007, but also to the Lugano Convention 1988 as well as the Brussels Convention and the Brussels I Regulation.[29]

Is the Lugano Convention 2007 a feasible alternative as to regulate the relationship between courts in EU Member States and the UK after the Transition Period? In view of the similarities to the BIR (Recast), it would provide stability and certainty if the UK were to accede to the Lugano Convention 2007. However, the parallelism that exists between the Brussels and Lugano instruments and the influence of the CJEU may, at first sight at least, seem incompatible with the UK's approach towards the CJEU and the obligation to take account of judgments of a foreign court. Yet, on 8 April 2020, the UK submitted its application to accede to the Lugano Convention 2007. Its application follows the support received in January 2020 from Norway, Iceland and Switzerland to accede to the convention following the end of the Transition Period.[30] However, to join the 2007 Lugano Convention cannot be done unilaterally, or with the support by some, or the majority, of the contracting parties. As provided for in Article 72 of the Lugano Convention 2007, in addition to fulfilling the necessary criteria, the UK is only able to accede if all contracting parties unanimously agree to it.[31] It is far from certain that the EU is ready to provide the necessary support, such a move is likely to be dependent on the negotiations between the parties at large.

In the event there would be unanimous agreement to allow the UK to accede to the Lugano Convention 2007, the convention would enter into force in relation to the UK, at the very earliest, on the first day of the third month following the unanimous decision by the other contracting parties.[32] Accordingly, if the EU would agree to the UK becoming a member before 1 November 2020, the Lugano Convention 2007 could become applicable on 1 January 2021.[33] However, even in this scenario, the status of the UK would not necessarily provide the legal certainty hoped for. As discussed above, although the EU and the UK continue to treat the UK as bound by the international agreements entered into by the EU during the Transition Period, the UK is not a party to the Lugano Convention 2007 as a matter of international law. The UK would only be bound by the rules of the Lugano Convention 2007 from the moment the convention would enter into force in relation to the UK as a contracting party, thus possibly from 1 January 2021.

As set out in Article 63(1) of the Lugano Convention 2007, the convention only applies to legal proceedings instituted *after* the entry into force in the State where a judgment originates from and in the State where recognition or enforcement of a judgment is sought. However, Article 63(2) provides for an exception to this rule. If the proceedings in the state

---

[29] Article 1(1) of Protocol 2 of the 2007 Lugano Convention illustrates the principle of parallelism that has guided the parties to the Brussels and Lugano regimes to ensure the conformity between the Brussels and Lugano instruments.

[30] UK government, 'Support for the UK's intent to accede to the Lugano Convention 2007' <(https://www.gov.uk/government/news/support-for-the-uks-intent-to-accede-to-the-lugano-convention-2007) accessed 7 May 2020> .

[31] This requirement would not apply if the UK became a member of the European Free Trade Association (Article 71 of the 2007 Lugano Convention).

[32] Articles 72(3)-(4) of the Lugano Convention 2007.

[33] It would be contrary to the Withdrawal Agreement for the UK to apply the 2007 Lugano Convention as a party in its own right before the end of the Transition Period (Article 129(4) of the Withdrawal Agreement).

of origin were instituted *before* the entry into force of the Lugano Convention 2007, judgments given after its entry into force must be recognised and enforced in accordance with the rules of the convention, provided one of two alternative conditions is fulfilled. First, if the proceedings in the state of origin were instituted after the entry into force of the Lugano Convention 1988 both in the state of origin and in the state addressed, or, second, if jurisdiction was founded upon rules which "accorded with" those provided for in the Lugano Convention 2007 or in a convention concluded between the state of origin and the state addressed which was in force when the proceedings were instituted.

It may well be argued that the UK would fulfil both these conditions. In particular, although the UK has not been covered by the Lugano Convention 2007 as a matter of international law after Brexit on 31 January 2020, the UK has been bound by this convention as well as the BIR (Recast) in accordance with its obligations as an EU Member State prior to that date and, during the Transition Period, it has been subject to the BIR (Recast) as well as the rules of the Lugano Convention 2007 as provided for in the Withdrawal Agreement. The parallelism between the Lugano Convention 2007 and the BIR (Recast) means that the UK has continuously, prior to the 1 January 2021, been bound by rules which have "accorded with" those set out in the Lugano Convention 2007.

However, the transitional provisions of the Lugano Convention 2007 alongside those of the Withdrawal Agreement do not provide for all situations. As considered above, under the Withdrawal Agreement, the BIR (Recast) remains applicable during the Transition Period and continues to apply after the Transition Period, provided legal proceedings were instituted *before* the end of the Transition Period. It follows that a situation where a jurisdiction clause designates UK courts under a choice of court agreement entered into *before* the end of the Transition Period, but where legal proceedings are instituted *after* the Transition Period, could become problematic. Even if the UK would accede to the Lugano Convention 2007 on 1 January 2021, the convention will not apply to such a choice-of-court agreement. Nor will the BIR (Recast) apply since legal proceedings have been instituted *after* the end of the Transition Period. Accordingly, in this scenario, courts in EU Member States would not be required to stay proceedings in favour of the designated UK courts under the Lugano Convention 2007 or the BIR (Recast).

It may perhaps be argued, in view of the requirement in the Withdrawal Agreement to continue to apply international agreements entered into by the EU to the UK during the Transition Period, that EU Member State courts have an obligation under the Withdrawal Agreement to apply the rules of the Lugano Convention 2007 in this situation. The rationale for this argument would be that the UK is treated as an EU Member State for the purposes of EU law (including international agreements entered into by the EU) during the Transition Period and the UK should therefore be in no worse position as regards jurisdiction clauses agreed during this period. On the other hand, it is the BIR (Recast) that governs the relationship between courts of the EU Member States and the UK during the Transition Period. The Lugano Convention 2007 is not applicable. The EU and the UK have specifically agreed in the Withdrawal Agreement in what circumstances the BIR (Recast) would apply after the Transition Period. As considered above, the BIR (Recast) does not apply if legal proceedings are instituted after the end of the Transition Period.

3.3 HAGUE CONVENTION

The Hague Convention is an international agreement that entered into force on 1 October 2015, to which the EU is a party (Denmark is a party in its own right) alongside Mexico, Montenegro and Singapore.[34] As set out in Article 1(1), it applies to exclusive choice of court agreements in international cases in civil and commercial matters.[35] Consumer and employment contracts, alongside other types of contracts, are expressly excluded from its application.[36] Similarly to the Lugano Convention 2007, the UK has been covered by the Hague Convention only in accordance with its EU membership. As an international agreement entered into by the EU alone, the UK is covered by thus agreement as a matter of international law after Brexit.

The essence of the Hague Convention is set out in three basic rules. First, pursuant to Article 5, the chosen court in an *exclusive* choice of court agreement shall have jurisdiction to decide a dispute which falls within its purview and cannot as a general rule decline to exercise its jurisdiction.[37] Second, as provided for in Article 6, except for certain specific circumstances, courts in other states bound by the convention that have not been chosen are required to suspend or dismiss proceedings brought before them. Third, it follows from Article 8 that non-chosen courts must both recognise and enforce a decision by the court chosen by the parties without review of the merits of the judgment. In addition to these three basic principles, the rule on non-exclusive jurisdiction agreements in Article 22 must also be recognised as an important characteristic of the convention. According to this provision, a contracting state may declare that it will recognise and enforce judgments given by courts of another contracting State.[38]

Although the Hague Convention constitutes a comprehensive regime on jurisdiction, recognition and enforcement of judgments amongst its contracting parties, this convention is a far less developed tool than both the BIR (Recast) and the Lugano Convention 2007. There are significant shortcomings to consider, particularly in comparison with the BIR (Recast). Its restriction to exclusive jurisdiction agreements is an obvious limitation. Moreover, as expressly set out in Article 7, the Hague Convention does not apply to interim

---

[34] The US, China, Ukraine and the Republic of North Macedonia have signed the Hague Convention, but they have not yet ratified it.

[35] The definition of what is an international case differs between jurisdictional issues (Chapter II) and recognition and enforcement issues (Chapter III). For the convention's jurisdictional rules to apply, a case is international unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State (Article 1(2) of the Hague Convention). For the purposes of obtaining recognition and enforcement of a judgment in a contracting State, it is sufficient that the judgment presented is foreign (Article 1(3) of the Hague Convention).

[36] Articles 2(1)-(2) of the Hague Convention

[37] As provided for in Article 3(b) of the Hague Convention, all choices of jurisdiction are presumed to be exclusive unless they are expressly stated to be otherwise. Notably, asymmetric jurisdiction clauses – choice of court agreements drafted to be exclusive as regards proceedings brought by one party but not as regards proceedings brought by the other party – is not considered to be an exclusive jurisdiction clause for the purposes of the convention (Trevor Hartley and Masato Dogauchi, 'Explanatory Report on the 2005 Hague Choice of Court Agreements Convention', paras 105-106. Moreover, Article 19 of the convention provides for an exception to the rule that a designated court cannot decline to exercise jurisdiction. A State may declare that its courts may refuse to determine disputes to which an exclusive choice of court agreement applies if, except for the location of the chosen court, there is no connection between that State and the parties or the dispute.

[38] Where no choice is made by the parties, the convention simply does not apply.

measures. Also, although non-chosen courts are required to both recognise and enforce a decision of a designated court, the convention leaves the process of doing so to the State where recognition and enforcement take place. Accordingly, in contrast to the BIR (Recast), the Hague Convention allows for an *exequatur* procedure.[39]

Despite its more limited application, the Hague Convention constitutes an important alternative means by which certainty could be provided to parties in the EU and UK respectively. In contrast to the Lugano Convention 2007, the Hague Convention is open to all states without any requirement of acceptance by other contracting parties.[40] The UK has the intention to accede to the convention and deposited its original application to do so on 28 December 2018, declaring that the UK would accede to the Hague Convention in its own right with effect from 1 April 2019. However, with the entry into force of the Withdrawal Agreement, there has not been a need for the UK to accede to the Convention during the Transition Period. Instead, the UK has signalled that it will deposit a new instrument of accession at the appropriate time prior to the termination of the Transition Period. According to Article 31(1), the Hague Convention takes effect on the first day of the month that follows a period of three months after ratification. Provided that the Transition Period ends on 31 December 2020, this means that the UK must deposit its new instrument of accession by the end of September 2020 in order to accede to the convention on 1 January 2021.

However, similarly to the Lugano Convention 2007, the status of the UK in relation to the Hague Convention does not necessarily provide the legal certainty hoped for. As discussed above, although the EU and the UK continue to treat the UK as bound by the international agreements entered into by the EU during the Transition Period, the UK is not a party to the convention. Further, according to Article 16, the Hague Convention shall only apply to exclusive choice-of-court agreements concluded *after* its entry into force *for the State of the chosen court*. Consequently, if the UK were to accede to the Hague Convention on 1 January 2021, the rules of the convention would only apply to exclusive UK jurisdiction clauses entered into after that date. Moreover, as also considered above, the BIR (Recast) continues to apply after the Transition Period only if legal proceedings have been instituted before the end of this period.

It follows that a situation where an exclusive jurisdiction clause designates UK courts under a choice-of-court agreement entered into *before* the end of the Transition Period, but where legal proceedings are instituted *after* the Transition Period, is not covered by either the BIR (Recast) or the Hague Convention (or, as considered above, the Lugano Convention 2007), even if the UK would accede to the latter on 1 January 2021. Accordingly, courts in EU Member States will not be required to stay proceedings in favour of the designated UK courts under the Hague Convention or the BIR (Recast).[41]

---

[39] Article 39 BIR (Recast).

[40] Article 27 of the Hague Convention.

[41] Similarly to the Lugano Convention 2007, it could be argued that EU Member State courts have an obligation under the Withdrawal Agreement to apply the rules of the Hague Convention in this situation, in accordance with the requirement in the Withdrawal Agreement whereby the UK continues to be bound by obligations stemming from international agreements entered into by the EU during the Transition Period (Article 129(1) of the Withdrawal Agreement). However, as underlined above, it is the BIR (Recast) that governs the relationship between courts of the EU Member States and the UK during the Transition Period. The Hague Convention is not applicable. The EU and the UK have specifically agreed in the Withdrawal

It should be noted that UK courts faced with an exclusive jurisdiction clause designating a court in an EU Member State under a choice-of-court agreement entered into before the end of the Transition Period, but where legal proceedings are instituted after the Transition Period, are in a different position under the Hague Convention than courts in EU Member States in corresponding circumstances. As underlined above, the Hague Convention applies to exclusive choice of court agreements concluded *after its entry into force for the State of the chosen court*. Accordingly, contracting states should apply the Hague Convention to enforce judgments pursuant to exclusive jurisdiction clauses in favour of other contracting states, as long as the Hague Convention was in force for the chosen State at the time the clause was entered into. It does not matter, at that time, whether the convention was in force in the country of enforcement, provided it is in force by the time enforcement proceedings are brought. Accordingly, there is an element of asymmetry in the Hague Convention; a new contracting State must apply it retrospectively to clauses in favour of existing members, provided the clause was agreed after the Hague Convention entered into force for that State, whereas existing members will only apply the Hague Convention prospectively as far as clauses in favour of a new contracting State are concerned.

3.4 BRUSSELS CONVENTION

The Brussels Convention was concluded as an international agreement in 1968 by the original six members of the EU (then the EEC). Its object was to facilitate the enforcement of judgments in civil and commercial matters amongst Member States. A protocol concluded in 1971 gave the European Court of Justice (now CJEU) jurisdiction to interpret the Brussels Convention. Amendments were made to the convention in 1978 at the time that the UK, alongside Ireland and Denmark, entered into an Accession Convention with the original six Contracting Parties. Further amendments to the Brussels Convention were made as other countries acceded to the EU (then the EC and subsequently the EU).[42] The Brussels Convention was followed by the Brussels I Regulation but was never formally cancelled after the entry into force of the regulation.

As noted in the introduction, it has been argued that the Brussels Convention has not been terminated as a matter of public international law and that, upon Brexit, the Brussels Convention would revive between the UK and the Member States. The argument circles around Article 68 of the Brussels I Regulation,[43] which provides that '[Brussels I Regulation] *shall, as between the Member States, supersede* the 1968 Brussels Convention […]' (emphasis added). According to Aikens and Dinsmore, this wording does not evince an intention impliedly to terminate the Brussels Convention but rather to suspend its application for so long as the Brussels I Regulation, and subsequently the BIR (Recast), applies.[44] Thus, pursuant to this view, the BIR (Recast) will take precedence over the Brussels Convention as long as the parties to the convention are also subject to the regulation. In support of this argument it is also underlined that recital 23 of the Brussels I Regulation provides that the

Agreement in what circumstances the BIR (Recast) should apply after the Transition Period. As considered above, the BIR (Recast) does not apply if legal proceedings are instituted after the end of the Transition Period.

[42] In particular, see Aikens and Dinsmore (n 3), 906-907.

[43] Article 68 of the Brussels I Regulation corresponds to Article 68 BIR (Recast).

[44] Aikens and Dinsmore (n 3) 908. See also Dickinson (n 3), 201-203 and Masters and McRae (n 3) 492-494.

Brussels Convention continues to apply to certain territories of the Member States that are not within the scope of regulation.[45] Masters and McRae consider this to strengthen the argument that the convention has not been terminated and remains intact.[46]

However, there are difficulties with the view that the Brussels Convention has been revived due to Brexit. First, the terms 'shall […] supersede' are out of step with other language versions of the Brussels I Regulation and do not adequately reflect the meaning of Article 68 BIR (Recast). For example, the French language version uses the term 'remplace', the German 'tritt […] an die Stelle', the Italian 'sostituisce', the Swedish 'ska […] ersätta' and the Danish 'træder […] i stedet for'. Accordingly, in order for the English language version to reflect what the true meaning of Article 68 of the Brussels I Regulation, it would have been more accurate to use the terms 'shall […] replace' (or possibly 'shall […] substitute') instead of 'shall […] supersede'. The wording 'shall replace' suggests that the Brussels Convention was terminated by the Brussels I Regulation, not simply temporarily displaced.
Second, recital 23 of the Brussels I Regulation must be read alongside recital 21 and, in particular, recital 22. The latter refers to the special position enjoyed by Denmark as a non-participant in the Brussels I Regulation and provides:

> 'Since the Brussels Convention *remains in force* in relations between Denmark and the Member States that are bound by [the Brussels I Regulation], both the Convention and the 1971 Protocol continue to apply between Denmark and the Member States bound by [the Brussels I Regulation]'.[47]

Accordingly, the reason the Convention would continue to apply between Denmark and the other Member States at the time of the adoption of the Brussels I Regulation was because Denmark did not participate in the adoption of the Brussels I Regulation and the Brussels Convention therefore continued to be 'in force' as between Denmark and the other Member States. With the use of the terms '[t]he Brussels Convention *also* continues to apply to' (emphasis added), recital 23 refers back to recital 22. Thus, the Brussels Convention continues to apply to certain territories of the Member States that are not within the scope of the Brussels I Regulation because the convention *remains in force* in this regard. It is not merely a question of to which territories the Brussels Convention applies or is temporarily disapplied. In accordance with Article 68 of the Brussels I Regulation, as discussed above, the Brussels Convention was terminated and replaced by the Brussels I Regulation as between the Member States, but for the areas singled out in recitals 22 and 23.

Third, the Brussels Convention was never meant to apply to non-EU Member States. It follows from the preamble that the purpose of the convention was to strengthen the legal protection of persons established in the EU (then EEC). The original contracting parties were all EU (then EEC) Member States and Article 63 of the convention made it a requirement for all future EU Member States to join.

Notably, similar arguments as those presented above about the revival of the Brussels Convention could be raised in respect of the Lugano Convention 1988 since it was agreed to by the UK in its own right, alongside the other then existing EU Member States. However,

---

[45] Recital 23 Brussels I Regulation corresponds to recital 9 BIR (Recast).
[46] Masters and McRae (n 3) 493.
[47] (emphasis added).

it is commonly agreed that the arguments in favour of a revival of this convention have less prospect of success.[48] Primarily, the English language version of Lugano Convention 2007, the successor of the Lugano Convention 1988, is clearer. According to the wording of the Article 69(6) of the Lugano Convention 2007, this convention "*shall replace*" the Lugano Convention 1988. Moreover, the Lugano Convention 1988 does not continue to apply with regard to certain territories, accordingly it does not create any ambiguity in this respect.

It should be recognised that public international law conventions concerning the effect of treaties[49] do not deal specifically with the question of whether one treaty is impliedly terminated where a supra-national body such as the EU has formed a new instrument on behalf of its Member States, with the intention that this new instrument should 'replace' a previously concluded international treaty entered into by some of the member States of the supra-national body.[50] However, Article 54(b) of the VCLT provides that the termination of a treaty may take place at any time by consent of all the parties. The EU has assumed exclusive competence in matters of jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.[51] Put differently, the Member States have voluntarily provided the EU with their competence to act within these matters. Arguably, with the adoption of the Brussels I Regulation by the EU, the EU Member States (including Denmark, in accordance with the EU-Denmark agreement) have at least implicitly agreed to terminate the Brussels Convention. There is nothing in the Brussels Convention that required the Member States to terminate the convention by a certain procedure.

In any event, the Brussels Convention has been marginalised in favour of modified instruments, namely the Brussels I Regulation and subsequently the BIR (Recast), with changes made to remedy what were seen as being flaws in the original architecture.[52] Moreover, even if the Brussels Convention would be considered still applicable, it is doubtful if all EU Member States would be covered by the convention, thus its territorial application would be significantly reduced. In addition, according to a separate protocol also accepted by the UK, the Brussels Convention is subject to the interpretation of the CJEU.[53] As discussed above, this is hardly a palatable option for the UK.

4 CONCLUDING REFLECTIONS

It would be wrong to think that the UK will lose its status as a leading centre for international commercial litigation after Brexit. There are important reasons why London is a destination of choice for international litigation that will not be (at least directly) affected by Brexit. For example, the reputation and experience of English judges, English law as the prevalent choice of applicable law in international commercial transactions, the efficiency of remedies available under English law, the procedural effectiveness of the English Courts and the

[48] See for example Aikens and Dinsmore (n 3), p. 912, Dickinson (n 3), pp. 203-204 and Masters and McRae (n 3) 4.
[49] Including the VCLT and the Vienna Convention on the Law of Treaties between States and International Organisations public international law conventions concerning the effect of treaties.
[50] See further Dickinson (n 3) 204.
[51] See further Opinion 1/03, *The new Lugano Convention* EU:C:2006:81.
[52] With the entry into force of the Lugano Convention 2007, the same is true for the Lugano Convention 1988.
[53] Protocol concerning the interpretation by the Court of Justice of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.

neutrality, independence and impartiality of the judiciary. Moreover, it is difficult to escape the fact that the English language is the *lingua franca* of international commerce.

However, a key component of a jurisdiction's international competitiveness is the extent to which its courts' judgments will be recognised and enforced internationally. If the EU and the UK are not able to agree on common rules in this regard, judgments of the remaining EU Member States may still be recognised and enforced in the UK and vice versa under the unilateral private international law recognition and enforcement rules of each relevant country. But the application of national rules is generally more complicated than a common framework. In this perspective, a return to unilateralism in the UK is not a benefit and it is unlikely to promote London as a legal centre and venue.[54] Common EU-UK rules on jurisdiction and enforcement in order to promote and assist cross-border litigation involving UK courts or litigants is therefore in the interest of the UK. Such a framework, promoting stability and access to justice, is of course also of significance to businesses and individuals in the EU with interests related to the UK.

The BIR (Recast) has evolved through the application of both the Brussels and Lugano regimes, with the result that it has advanced into a sophisticated instrument used in all EU Member States. In view of the UK government's unwillingness to grant the CJEU jurisdiction in the UK, it is highly unlikely that the UK would want to apply the regulation as a matter of an international agreement similarly to Denmark. However, it is encouraging that the UK government has applied to accede to the Lugano Convention 2007. In view of the existing parallelism between the Brussels and Lugano regimes, the result would be that there would not be any major changes from the current regime in relation to jurisdiction and enforcement, so that English (UK) court judgments would continue to be readily enforceable throughout the EU and in EFTA countries, and English jurisdiction clauses would largely be respected by those countries, and vice versa. With that said, there are disadvantages with the Lugano Convention 2007 – it lacks the improvements brought on by the BIR (Recast). Notoriously, the 2007 Lugano Convention leaves parties at liberty to resort to forum optimisation tactics and choose the forum that may be most appropriate to their case or most inconvenient for the adverse party.

While the UK's intention to join the Lugano Convention is welcome, it is not at all certain that the unanimous agreement needed to accede is forthcoming in the near future. While Iceland, Norway and Switzerland have indicated their support for the UK's accession, the EU's position is at the time of writing not yet clear. In view of the ongoing negotiations between the parties and the unwillingness of the UK to participate in the internal market, the EU (including Denmark as an independent State) may well hesitate in agreeing to the UK's application. If the UK is unable to accede to the Lugano Convention 2007 when the Transition Period comes to an end, the Hague Convention appears to be the most straightforward solution, in particular since there is no need for approval of any other contracting party to sign and ratify the convention. However, the more limited nature of the Hague Convention would mean a significantly less advanced instrument than what is currently available. For example, first, the Hague Convention only applies where there is an

[54] Jan Dalhuisen, 'Recognition of civil and commercial judgments if the UK reaches "exit day" without a new arrangement in place' (2017) 10 Journal of International Banking and Financial Law 646, 647.

exclusive jurisdiction agreement, and, second, in contrast to the BIR (Recast), the Hague Convention leaves the process of enforcement to the enforcing State.

Finally, one option that was not discussed above is of course for the UK and the EU to negotiate a new arrangement on civil jurisdiction and judgments. However, such an exercise would be time-consuming and it is unlikely for such an option to become a reality prior to the end of the Transition Period, which is, under the now existing time table, only months away. Still, it is reasonable to believe that there will be continued negotiations between the EU and the UK also after the (possible) entry into force of a new agreement, or indeed agreements, between the parties on 1 January 2021. Hopefully, such negotiations will result in continued development of any arrangement on civil jurisdiction and judgments, be it an update of the Lugano Convention 2007 or the establishment of something new. This would benefit both the UK and the EU Member States.

LIST OF REFERENCES

Aikens R and Dinsmore A, 'Jurisdiction, Enforcement and the Conflict of Laws in Cross-Border Commercial Disputes: What Are the Legal Consequences of Brexit?' (2016) 27(7) European Business Law Review 903

Dalhuisen J, 'Recognition of civil and commercial judgments if the UK reaches "exit day" without a new arrangement in place' (2017) 10 Journal of International Banking and Financial Law 646

Dickinson A, 'Back to the Future: The UK's EU Exit and the Conflict of Laws' (2016) 12 Journal of Private International Law 195
DOI: https://doi.org/10.1080/17441048.2016.1209847

Fentiman R, *International Commercial Litigation* (2nd edn Oxford University Press, 2015)

Masters S and McRae B, 'What does Brexit Mean for the Brussels Regime?' (2016) 33 Journal of International Arbitration, Special Issue, 483

THE EU LEGALITY PRINCIPLE IN PUBLIC PROCUREMENT CONTRACTS: ADHERENCE TO PROCEDURALISATION AS A DIRECT CONSEQUENCE

OLGA GIAKOUMINAKI*

The early interest that EU law has demonstrated for public procurement contracts has gradually been molded into a sector-specific paradigm of European administrative law. Despite the constant movement of the sector counting already four generations of substantive and two generations of procedural EU law, its qualification as administrative law provides some pillars of stability; as an expression of a sui generis principle of legality, the award of public contracts is organized via formalistic, yet sometimes rigid and time-consuming procedures, due process emerging as a common principle among national and supranational administrative systems. Even though due process constitutes the gateway to accountability, the aim of the paper is limited to underlining the indicators of administrative procedure in the award of public contracts.

1 INTRODUCTION

The regulation of procurement contracts at an EU level constituted the first positive EU intervention imposing the reorganization of activities of national administrations, considering that the obligation to respect the primary Community law provisions was still rather vague and primarily a negative one. The taxonomy and the divergences of national procuring methods combined with the extremely early intervention in the field practically reversed the stages of emergence of European administrative law in the sector;[1] instead of reliance to the general principles of EU law and negative integration through the adjudicating powers of the ECJ, positive integration was the only road ahead for the approximation of national legislations on procurement contracts. This necessity emerged because to the exception of France, the rest of the six founding Member States regulated the contracting activity of their administrations through exclusively civil law principles and given that in order to do so, the contracting authorities were *ad hoc* exempted from their classic constitutional obligations, administrative law was completely extraneous to these scenarios.[2] As a consequence, the public origin of the contracting activities was far from being self-explanatory and given the hesitance of the Commission in the early integration days, the 'buying national' attitude had to be struck down through positive measures.[3]

---

* Phd Candidate, University Paris I – Panthéon Sorbonne. The author would like to thank Alezini-Eirini Loxa for her observations and helpful advices on a previous version of this article and for constantly reminding her that the use of full stops is neither a weakness nor a fatal flaw.

[1] Jürgen Schwarze, *European Administrative law* (Sweet &Maxwell, London, 1992); Carol Harlow, 'Three phases in the evolution of EU administrative law', in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU law* (OUP 2011) 439-464.

[2] On the state of the art of national procurement strategies at the time of the Treaty of Rome see Maurice-André Flamme, *Traité Théorique et Pratique des Marchés Publics* (Bruylant, Brussels, 1969).

[3] Even though a number of scholars have argued in favor of the direct applicability of the EEC Treaty in procurement scenarios (see for instance Maurice-André Flamme, Philippe Flamme, *Vers l'Europe des marchés*

The interference of EU law in the field of public procurement contracts has cast a multi-layered effect on national administrations. Against the conceptual differences of the Member States, the Europeanization led to a conceptual harmonization, at times even unification.[4] Nevertheless, the process of public contracting needed more intricate, yet pervasive approximation. Another formula had to be found. This variety of contracting methods combined with the objective of tackling against national bias and considering the then limited administrative capacity of the Community reshaped the regulation; the solution was none other than the establishment of specific rules for the award of the contracts: depending on the previous national tradition on the issue this legal framework has either enriched the national administrative scheme (this is the case of France, Spain, Portugal, Greece) or emerged as the first presence of administrative law obligations in the field (the case of the majority of the Member States such as Germany, Austria, Italy etc.).

2 THE EU PRINCIPLE OF LEGALITY

Taking into account that the adoption of this specific framework will be applied by national administrations (the term being used in a functional fashion) and considering furthermore the omnipresent objective to protect the economic rights of economic operators, the impact of the EU framework is multiple; for the Member States that used to regulate the award phase through administrative circulars as well as for the bodies governed by public law that were previously exempted from any obligation concerning their buying activity, the EU law framework has had an attributive function, in the sense that it essentially transformed the State buying activity into a *stricto sensu* government function, substituting the previous freedom of contract with public law obligations.[5] For all the public authorities that are governed by the framework, EU procurement law also serves as the basic regulatory instrument that sets limits to the exercise of an already acknowledged authority, preventing phenomena of arbitrariness through legal certainty and transparency. Fulfilling the aforementioned tasks, the specific EU framework is being transformed into a proper principle of legality.

The choice of the principle of legality as the quintessence of EU procurement law and as the defining criterion of its administrative dimension echoes national administrative archetypes. In national administrative systems, the principle of legality acts both as a prerequisite and a consequence of the existence of an administrative authority or an administrative act. However, the components of the principle that act as a prerequisite, for instance, the definition of the critical terms, such as public authority, public service, right or obligation - are of higher normative – usually constitutional – value compared to the rules

publics? A propos de la directive Fournitures du 22 mars 1988 (RMC, 1988) 456; José M. Fernández Martín, *The EC Public Procurement Rules: A Critical Analysis* (Clarendon Press, Oxford, 1996); the first direct application of the Treaty provisions in *Dundalk* case (Case 45/87 *Commission of the European Communities v Ireland* [1988] ECR 04929) did not pave the way but was subsequent to the first generation of procurement directives in the early 70s.

[4] For instance, the different understanding of terms such as contracting authority, administrative contract, public service obligation has gradually been replaced by autonomous concepts, such as body governed by public law, public contract, public work etc.

[5] Gerdy Jurgens, Maartje Verhoeven, Paulien Willemsen, 'Administrative Powers in German and English law' in Leonard Besselink, Frans Pennings, Sacha Prechal (eds), *The Eclipse of the legality principle in the European Union* (Kluwer, 2011) 37-53.

that define their tasks and procedures. On the contrary, the normative value of the rules acting as prerequisite and as consequence of the existence of the EU principle of legality are contained in the same legal instrument, the directives.

2.1 THE ORIGINS OF THE EU PRINCIPLE OF LEGALITY

Taking into account on the one hand the supranational origin of this principle of legality and on the other hand, the logical proximity, fruit of national law, between the terms 'rule of law' and 'principle of legality', debating the existence of such a principle, necessarily implies a discussion on rule of law. To begin with, the complete lack of references to EU primary law to the rule of law until the mid-80s wasn't but a logical consequence of the Community's functional and organizational proximity to a *sui generis* international organization rather than a federate state. As a result, the lack of references wasn't but a symptom of an overall absent public law narrative.[6] However, Walter Hallstein, first president of the European Commission and undeterred by the lacking references famously proclaimed Community as a community of law, a proper *Rechtgemeinschaft*.[7] In spite of the proliferation of similar references resulting to Community being naturally portrayed as a community of law, a polity 'based on the rule of law',[8] whose founding Treaty 'albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law',[9] it was only Article 2 of the Treaty on European Union that dressed the principle with a constitutional veil holding that: 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'.

On that note, adopting a rather 'thin' definition of the principle of legality, detached from the democratic legitimacy of the State, Schwarze had considered *Snupat*[10] as the birth case of the principle of administrative legality.[11] On the contrary, Pescatore had argued that it was the Treaty of Rome that firstly established the principle arguing that the Community 'conceived as a body governed by public law subject to the principles of legality and responsibility which apply to the State, is an international organization'.[12]

Nonetheless, despite doctrinal debate, the first Community reference to the principle of administrative legality was rather belated and got lost in translation. In particular, in *Granaria*, a case relevant to the legality of a Community regulation, the Court provided,

---

[6] On the evolution of the nature of the EU and its impact on European administrative law see Carol Harlow, Richard Rawlings, 'A fragmented framework' in Carol Harlow and Richard Rawlings (eds), *Process and Procedure in EU Administration* (London, Hart Publishing 2014) 9-37.

[7] The term was first used by Walter Hallstein, cf Walter Hallstein, *Die EWG – Eine Rechtsgemeinschaft*, 1962, published as Walter Hallstein, 'Europäische Reden' in Thomas Oppermann and Joachim Kohler (eds), *Stuttgart: Deutsche Verlags-Anstalt* (Deutsche Verlags-Anstalt, 1979) 343; see also Joel Rideau, 'Communauté de droit et Etats de droit' in Mélanges Rend-Jean Dupuy (ed)*, Humanité et droit international (*Paris, Pédone, 1991) 249.

[8] Case C-294/83 *Parti écologiste "Les Verts" v European Parliament* [1986], ECR - 01339, para 23, Case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union* [2002], ECR I-6677, para 38.

[9] Opinion 1/91, pursuant to the second subparagraph of Article 228 (1) of the Treaty [1991], ECR I-06079, para 21.

[10] Joined Cases 42/59 and 49/59 *Société nouvelle des usines de Pontlieue - Aciéries du Temple (S.N.U.P.A.T.) v High Authority of the European Coal and Steel Community* [1961] ECR 53, 87.

[11] Juergen Schwarze, *Droit administratif européen*, vol 1 (Bruylant, 1994) 10.

[12] Pierre Pescatore, *Les travaux du « groupe juridique » dans la négotiaton des Traités de Rome*, vol. XXXIV (Studia Diplomatica, 1981) 175-176.

unwillingly, a perfect illustration of the linguistic difficulties relevant to sensitive constitutional notions. The English translation of the case contains the term 'the principle of the rule of law within the Community context',[13] the French one refers to '*le principe de la légalité Communautaire*', while the German one includes the term '*Rechtstaatlichkeit*'. While a first reading of the case reveals a simple translation of the critical term, it was the reception reserved by the national doctrine that revealed the terminological asymmetry; the semantic proximity between principle of legality and the rule of law has led the German doctrine to interpret this case as the first reference to the rule of law,[14] while the other ones did not adopt such a reading. On the contrary, *Hoechst* is generally perceived as providing a first definition of the EU principle of legality.[15] The case provided that:

> 'Nonetheless, in all the legal systems of the Member States, any intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, must have a legal basis and be justified on the grounds laid down by law, and, consequently, those systems provide, albeit in different forms, protection against arbitrary or disproportionate intervention'.[16]

2.2 THE STATUS OF THE EU PRINCIPLE OF LEGALITY

This first cased relating to the EU principle of legality demanded an explicit legal basis for public actions and as such, they seemed to transpose the Anglo-American conceptualization of the term demanding the acts of public authority being based on an act of parliament. Notwithstanding that the principle of legality figured frequently in opinions of Advocates Generals,[17] and despite being qualified as a 'value',[18] 'an inherent principle of every legal system' and as 'one of the fundamental pillars in the historical process of the assertion of the rule of law',[19] the principle still does not figure among the general principles of EU law.[20]

Yet, this lack of consolidation should not be surprising. In light of the conceptualization of the principle of legality as by-product of the rule of law, the discourse of thin and thick rule of law can be easily transposed to the principle. Consequently, the thin (formal) and the thick (substantive) emerge as the dominant conceptualizations of the

---

[13] Case C-101/78 *Granaria BV v Hoofdproduktschap voor Akkerbouwprodukten* [1979] ECR 38, para 5.
[14] Rainer Hoffmann, 'Rechtstaatprinzip und Europäisches Gemeinschaftrecht' in Rainer Hoffmann et al (eds), *Rechtstaatlichkeit in Europa* (Heidelberg, Müller 1996) 323.
[15] Case C-46/87, *Hoechst v. Commission* [1989] ECR I-02859.
[16] ibid, para 19.
[17] Joined Cases C-182/03 and C-217/03 *Belgium v Commission* [2006] ECR I-05479, Opinion of AG Kokott, para 69; Case C-533/10 *Compagnie internationale pour la vente à distance (CIVAD) SA v Receveur des douanes de Roubaix and Others* [2012] ECLI:EU:C:2012:347, Opinion of AG Cruz Villalón, para 56 (it is thus in the very nature of European Union law that the rules of which it is comprised are capable of being declared invalid); Case C-309/06 *Marks & Spencer plc v Commissioners of Customs & Excise* [2008] ECR I-02283, Opinion of AG Kokott, para 40 (the AG refers to the 'principle of lawfulness of administrative action').
[18] Franz Merli, 'Principle of Legality and the Hierarchy of Norms' in Werner Schroeder (ed) *Strengthening the Rule of Law in Europe: From a common concept to mechanisms of implementation (*Oxford, Hart Publishing 2016) 38.
[19] Case C-135/11 P *IFAW Internationaler Tierschutz-Fonds v Commission* ECLI :EU :C :2012 :118, Opinion of AG Cruz Villalón, para 67.
[20] Thomas Von Danwitz, 'The Rule of Law in the Recent Jurisprudence of the ECJ' (2014) 37(5) Fordham International Law Journal 1311.

principle of legality.[21] At the one end of the spectrum, a thin reading of the principle exhausts its content in compliance with the normative spectrum, while at the other end of the spectrum the thick definition views the law as a democratic expression demanding democratic legitimacy. As Merli has summarized the two opposing concepts as 'one can have legality without fundamental rights, but one cannot have fundamental rights without legality'.[22] The *ex post* principle of legality referred to by the AGs falls into the first category. Nevertheless, regarding direct EU administration and their acts, the acceptance even of a thick definition of an autonomous principle of legality is not unthinkable under the concept of general interest embedded in the objectives listed in the Treaties.[23] On the contrary, the acceptance of a principle of legality is trickier with regard to indirect administration due to the natural subjection of national authorities to domestic constitutions. This explains why, as far as indirect administration is concerned the principle of legality is frequently confused as the principle of primacy of EU law[24] and the right of effective judicial protection.[25]

To state that the emergence of a new rule of law had an impact on administrative law would be an understatement. The symbiotic, yet archetypical relationship that the rule of law develops with the principle of legality resulted in a silent, yet omnipresent revolution marked by the adaptation of administrative law to the emerging norm. Notwithstanding the divergent impact on national administrations, the relocation of the center of gravity of administrative law is universally the common ground. The detachment of administrative law from 'its *raison d'être*, the State', its *destatisation* has not been unanimously welcomed by administrative law scholars.[26] The reception of the Europeanization of administrative law depends primarily on the objectives that preexistent domestic administrative law used to serve; in that sense, the deforestation of public authorities from their almost royal prerogatives, as well as the weakening of the exorbitant status of administrative law is constantly viewed as a crisis of its legitimacy, since the very *ratio* of administrative law was the protection of the State interests.[27] On the other hand, the more optimistic approach of German scholars is justified taking into account that the objectives of the emerging EU administrative law coincide with the objectives of German administrative law, none other than the protection of the rights of private parties.[28]

---

[21] The distinction between formal and substantive conceptualization of the principle of the rule of law is fully developed in the work of Fuller, see Lon L. Fuller, *The Morality of Law* (New Haven, Yale University Press 1969).

[22] Merli (n 18).

[23] Loïc Azoulai and Laure Clément-Wilz, 'Le principe de légalité' in Jean-Bernard Auby and Jacqueline Dutheil de la Rochère (eds), *Traité de droit Administratif Européen* (Bruylant 2014) 1044-1089; on primary law as source of European administrative law see Herwig C.H. Hofmann, Gerard C. Rowe, Alexander H. Turk, 'Sources of European Union Administrative Law', in Herwig C.H. Hofmann, Gerard C. Rowe, Alexander H. Turk (eds), *Administrative Law and Policy of the European Union* (OUP 2011) 67; at the other end of the spectrum rejecting any idea of a principle of legality within the EU see Alexander Somek, 'Is legality a principle of EU law ?' in Stefan Vogenauer, Stephen Weatherill (eds), *General Principles of Law: European and Comparative Perspectives* (Oxford, Hart Publishing 2017) 53-76.

[24] Azoulai, Clément-Wilz (n 23) 22.

[25] Eric Caprano, *Etat de droit et droits européens* (Paris, L'Harmattan 2005).

[26] Sabino Cassese, New paths for administrative law: A manifesto, (2012), 10(3), International Journal of Constitutional Law 603.

[27] Jean-Bernard Auby, *La bataille de San Romano. Réflexions sur les évolutions récentes du droit administratif* (AJDA 2001) 912-926.

[28] Matthias Ruffert, *The Transformation of Administrative law In Europe* (Munich, European Law Publishers 2007); Wolfgang Hoffman Riem, *Zwischenschritte zur Modernisierung der Rechtswissenschaft* , (2007) 62 JuristenzeItung 645;

In an attempt to define the two ends of the community principle of legality, the proclamation of the rule of law as foundation of the Community binds not only the direct administration, but on the contrary every authority acting within the competences of the community law.[29] Indirect administration is, according to the principle of primacy and the principle of effectiveness of Community law, recognized in *Costa v Enel,* bound by the Community rule of law. Therefore, within the procurement context, all contracting authorities are bound by the Community concept of the rule of law. Considering that part of the national diversity in administrative contracting originates from the relationship that the contracting authorities develop with the principle of legality, the interaction between two principles of legality is a phenomenon to observe.

The applied to the procurement contracts principle of legality presents both dynamic and static characteristics. Taking into account that the directive 71/305 was only eleven pages long and contained 44 articles (regulating only the category of public works contracts),[30] while directive 2014/24 is 178 pages long with 138 recitals, 94 articles and 15 annexes,[31] it is safe to say that there is an intensification of the principle of legality. The ever-evolving principle of legality owes its expansion to its dependency from the ever-evolving and ever-expanding European Constitution, to the activist stance of the ECJ, which expanded the coverage of secondary law and to the maturity of certain concepts of EU law, such as the general principle of effectiveness, leading to the adoption of the remedies directives and resulting in a complete system of EU administrative law. Nonetheless, among the static characteristics of the principle, the obligation to organize a procurement procedure remains astonishingly stable and seems immune to the resurgence of administrative discretion.

3 PROCEDURALISATION AS AN EXPRESSION OF THE PRINCIPLE OF LEGALITY

Notwithstanding the different intensities of administrative obligations and the dynamics between discretion and obligation, as every autonomous legal order, the allegiance of the EU legal order to an autonomous concept of rule of law has been translated into an autonomous concept of principle of legality.

Yet, despite its autonomy, following in the footsteps of continental administrative archetypes, administrative law and administrative procedure are jointly shaped. Administrative procedure should be defined as a series of actions conducted in a manner that lead to the adoption of an administrative decision. To begin with, administrative procedures have long been considered as synonymous to the rule of law considering their protective to the individual rights function. Schwarze viewed the subjection of the European

Eberhard Schmidt-Assmann, *Principes de base d'une réforme du droit administratif. Partie 1*., (2008) 24(3) RFDA 427 ; Schmidt-Assmann, *Principes de base d'une réforme du droit administratif. Parties 2 et 3*, (2008) 28(4) RFDA 667.

[29] At least within the spectrum of human rights, article 51.1 EU charter of Fundamental Rights.

[30] Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts, *OJ L 185/5*.

[31] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance, *OJ L 94/65*.

Community to the rule of law as an obligation to also provide administrative procedures that reflect this meta-principle.[32]

As an obligation of substantive administrative law, administrative procedure describes a concept 'at the heart of administrative law',[33] the process of administrative decision-making as an obligation of administrative authorities to perform a certain course of action that includes a plethora of successive, yet distinct steps in order to achieve a single purpose. In other words, procedure is the obligation of the meticulous respect of a sequence of steps.[34] In the words of Galligan, it is 'a commitment to procedural formality, to openness and transparency, to the disclosure of information, and to the need for explanation and justification of the course chosen'.[35] 'Administrative procedure is the formal path, established in legislation, which an administrative action should follow'.[36]

According to this linear definition, administrative procedure, dismantles the principle of legality into a web of pre-settled steps that have to be thoroughly followed. Proceduralisation or proceduralism should consequently be defined as the phenomenon describing generalized and inflexible adherence to procedure.[37] Negatively, in an effort to avoid confusions, proceduralisation as a phenomenon depicting the symbiotic relationship between EU administrative law and procedure should not be confused with the homonymous phenomenon describing the tendency of the ever-expanding regulation of national procedural rules in order to guarantee the effectiveness of EU law.[38]

Taking into account the 'natural and logical supremacy'[39] of administration over all the other functions of the State, it is understandable why the conceptualization of administrative procedure constituted a major step for the consolidation of the rule of law in continental legal traditions.[40] Procedures acting as the very embodiment of the vertical relationship developed between the citizen and the administration, since they are the primary 'conveyor belt' of the constitutional values and guarantees set forth by the principles of the rule of law, democracy, and efficacy in the interactions of the Administration and the citizen.[41] Despite that administrative procedures constitute common heritage of European administrative law,

---

[32] Schwarze, Judicial review of European Administrative Procedure [2004] *Public Law* 146, 156.
[33] Neil Walker, Book Review of Dennis J. Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures*, (1999) 62 Modern L Rev 962.
[34] Giacinto Della Cananea, 'The Requirement to Carry Out a Procedure', in Della Cananea, *Due Process of Law Beyond the State*, (Oxford OUP 2016) 17-34.
[35] Dennis J Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures,* (Oxford. Clarendon Press 1996) 482.
[36] Wolfgang Rusch, 'Administrative procedures in EU Member States' (Conference on Public Administration Reform and European Integration, Budva, 26-27 March 2009) <http://www.sigmaweb.org/publications/42754772.pdf> accessed 1 July 2020.
[37] Harlow, Rawlings, 'Proceduralism and automation, Challenges to the values of administrative law' n Elizabeth Fisher, Jeff King, and Alison Young (eds), *Foundations and Future of Public Law: Essays in honour of Paul Craig* (OUP 2020) 275-298.
[38] Olivier Dubos, 'The Origins of the Proceduralisation of EU Law: A Grey Area of European Federalism' (2015) 8 Review of European Administrative Law 7; Rorberto Caranta, 'Remedies in EU Public Contract Law: The Proceduralisation of EU Public Procurement Legislation' (2015) 8 Review of European Administrative Law 75.
[39] Michel D. Stassinopoulos, *Traité des actes administratifs* (Athens, Institut français d'Athènes 1954) 2.
[40] Schmidt-Aßmann, '*Der Rechtsstaat*' in Josef Isensee, Paul Kirchhof (eds), *Handbuch des Staatsrechts* (3rd edition, C.F. Müller 2004) 541-612.
[41] Javier Barnes (ed), *Transforming Administrative Procedure* (Global Law Press 2008) 16.

familiar to every jurisdiction, the application of civil law or soft law for the award of public contracts has excluded, in some jurisdiction, any application of administrative procedures.

3.1 PROCEDURALISATION AS AN EXPRESSION OF THE EU PRINCIPLE OF LEGALITY

Proceduralisation in European administrative decision-making is symbiotic to the objectives of EU law. The all-encompassing objective of the creation of the internal market aiming primarily at creating and protecting 'individual rights that become part of their legal heritage'[42] is being translated as the protection of procedural rights of private parties against arbitrariness of contracting administration in the field of public procurement contracts. The obligation of the plethora of steps has therefore emerged as a protecting shield for individual rights in the context of administrative decisions, since each steps of the way bears the necessary legal space for the incorporation of the rights. Galligan views the emergence of complex procedures as the result of the incorporation of social values and fairness 'which add to the richness and complexity of legal processes'.[43] From that point of view, the successive obligations of the precontractual procedure that take the form of rigid, distinctive steps susceptible to engage the administration's accountability should be contrasted to civil law contracts, which are basically instantaneous decisions, lacking any procedure and consequently any space for procedural fairness. The protection of individual rights does is being transformed to the obligation to respect the step that primarily aims at guaranteeing this right.

The procedural rights that have been explicitly recognized in the field of European administrative law are the rights to information access, the right to access documents, the rights of defense, the principle of legitimate expectations, all of which form the so-called participation rights. The need to incorporate all those procedural rights into procurement decision-making, the regulatory attention is monopolized with the detailed description of procedures, rather than their outcome or their result, since the legitimacy (the protection of procedural rights) unfolds gradually at the different stages of the procedure.[44] In the words of Gonzalez,

> 'This sequence allows different parameters to be identified which determine administrative action and which affect different stages of the process of forming and adopting decisions with implications well beyond the formal termination of the procedure. Some of these elements are related to the procedure in itself (information gathering and public-private collaboration, deliberation); others have to do with the outcome of the procedure (lawfulness of decisions); and finally, others are related to the execution of the decision (effectiveness). This sequence

[42] Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963], ECR 1.
[43] Galligan, *Due Process and Fair Procedures* (OUP 1996) 7.
[44] Hermann Pünder, 'German Administrative Procedure in a Comparative Perspective: Observations on the Path to a Transnational Ius Commune Proceduralis in Administrative Law' (2013) 11 INT'L J CONST L 940.

> highlights a gradual optimization of the legitimacy of the actions of the administration that manifests itself during the administrative procedure'.[45]

At the other end of EU legislative intervention, the judicial activism of the Court in the field is equally measured via the lens of formalism as the addition of new steps – in the form of new administrative obligations, functioning as 'catalysts for a more deliberative and/or reflexive administrative style'.[46]

The recognition of procedural rights of private parties as the legitimacy factor of administrative action results in the distinction of the latter not only externally, from contracts of private law but also internally, from previous administrative narratives. According to the taxonomy established by Barnes, the evolutionary observation of administrative procedures results in the distinction of three generations, that reflect divergent types of governance.[47] The first generation contains primarily individual decisions, while the administration is restricted to a 'mouth of the law' function.[48] Administrative procedures that belong to the second generation represent the 'command and control' function of governance, reflecting a gradual enrichment of decision-making processes and enhanced guarantees of citizens' rights.[49] Last but not least, administrative procedures belonging in the third generation constitute a hybrid between vertical and horizontal relationships, since the enhanced collaborative mechanisms erode the archetypical image of administrative interventions as expressions of *imperium*. In the words of Barnes, '[t]he old image of hierarchical public administration single-handedly implementing well defined policy goals set down in legislation must today compete with a vision of the administrative process as open-ended, collaborative and networked'.[50] During this third generation 'the law's function consists of providing rules on procedures to be followed rather than directly prescribing substantive behavior. […] the procedure itself is given the role of a solution-finding and norm-generating mechanism'.[51]

3.2 PROCEDURALISATION IN EU PUBLIC PROCUREMENT LAW

The emergence of proceduralisation as a general, functional, principle of European administrative law has particularly marked the field of procurement contracts. The transition from a 'command and order' administration to what Schmidt-Aßmann has described as steering administrative archetype is particularly evident with procurement contracts, since

---

[45] Jorge Agudo Gonzalez, 'The Evolution of Administrative Procedure Theory in New Governance Key Point' (2013) 6, 73 Review of European Administrative Law 102.
[46] Joanne Scott, Susan. P. Sturm, 'Courts as Catalysts; Rethinking the Judicial Role in New Governance' (2007) 13 Columbia Journal of European Law 565; this is particularly evident in cases such as *Telaustria* and *Alcatel,* see Case C-324/98, *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG, joined party: Herold Business Data AG* [2000] ECR I-10745, Case C-81/98, *Alcatel Austria and Others v. Bundesministerium für Wissenschaft und Verkehr* [1999] ECR I-07671.
[47] Barnes, 'Three generations of administrative procedures', in Susan Rose-Ackerman, Henry R. Luce, Peter L. Lindseth, Blake Emerson (eds) *Comparative Administrative law*, (Elgar 2017) 302-318; see also, Anne Meuwese, Ymre Schuurmans, Wim Voermans, 'Towards a European Administrative Procedure Act' (2009) 2(2) REAL 3-35.
[48] ibid 310.
[49] ibid 312.
[50] Francesca Bignami, 'From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law' (2011) 59 Am. J. Comp. L. 859, 869.
[51] Barnes (n 47) 311.

the award phase of the contract is regulated through 'the pathways model',[52] in the sense that the award of the contracts is statutorily depicted as a plethora of possible routes to follow, in the Commission's words as a 'menu of common procedures'.[53] The exhaustive nature of the available procurement procedures should be regarded as the first step towards the enforcement of proceduralism, taking into account that the pressing need to guarantee the necessary works, supplies and services is being transformed into a series of obligations (as opposed to the private law freedom of contract).[54] The identification and the description of the needs of a contracting authority are internal to the administration steps and thus irrelevant to procedures. Proceduralisation is being thus activated once the contracting activity has chosen the type of the procedure; therefore, against the relative administrative discretion with regard to the choice of the type of the procedures, once a choice of the procedure is completed, the authority has to meticulously apply all the steps applicable to the type of procedure chosen. As the Court stressed in *Wallon buses*:

> '[…] although under Article 15(1) of the Directive contracting entities obliged to apply the procedures in the Directive do indeed have a degree of choice regarding the procedure to be applied to a contract, once they have issued an invitation to tender under one particular procedure, they are required to observe the rules applicable to it, until the contract has been finally awarded'.[55]

This holistic approach of the award procedure is the most frequently met in the case-law. The recognition of the procedure as a plethora of consecutive, distinct, yet mandatory steps almost never sees the surface of the Court's case-law. However, in a rare acknowledgement the Court held that:

> '[…] the decision by a contracting entity concerning the type of procedure to be followed and whether it is necessary for a prior call for competition to be issued for the award of a public contract constitutes a distinct stage in the procedure (emphasis added), a stage during which the essential characteristics of the execution of the procedure are defined and which may, as a rule, take place only at the point when that procedure is initiated'.[56]

Despite the Court turning a blind eye in the dismantling of the procedure into smaller steps, proceduralisation has emerged through a joint effort of both the legislator and the judge. The first one set the scenery by describing the fundamental steps that safeguard the access

---

[52] Harlow, 'The pathways model and steering: Public Procurement' *in* Harlow, Rawlings (eds) *Process and Procedure in EU Administration* (London, Hart Publishing 2014) 142-169.

[53] Commission staff working Paper, Evaluation report: Impact and effectiveness of EU Public Procurement Legislation, (2011), SEC 853 final <https://ec.europa.eu/docsroom/documents/15468/attachments/1/translations/en/renditions/native> accessed 1 July 2020.

[54] Case C-299/08, *Commission v France* [2009] ECR I-11587; This case should be considered as a follow-up of *CEI and Bellini,* considering that France had claimed that this case provides a margin of discretion to the Member States*,* see *Joined Cases C-27/86 to* C-29/86, *SA Constructions et entreprises industrielles (CEI) and others v Société coopérative "Association intercommunale pour les autoroutes des Ardennes" and others* [1987] ECR 3347.

[55] Case C-87/94, *Commission v Belgium* 1996] ECR I-02043, para 35.

[56] Case C-337/98, *Commission v France* [2000] ECR I-08377, para 36. Considering that the case was relevant to the *rationae temporis* applicability of Directive 93/38/EC, the opinion of AG Jacobs equally underlined the different stages of the procedure.

to the market, while the judge clarified the field of the 'exit' (or relevant to the rejection of tenderers) obligations through sectoral consolidation of the rights of defense. Nevertheless, the obligations set by the European instances concern distinctively the obligation to respect each step.[57] On the contrary, the holistic obligation to respect a whole procedure emerges implicitly as a silent general principle. In addition to that and in spite of the interpretative asymmetries concerning the different concepts relevant to each step, the obligation to respect the procedure emerges as a rather abstract one, immune to divergent understandings of concepts. Furthermore, unifying the partial obligations on this issue, the obligation to respect a multi-step procedure constitutes an issue of maximum harmonization as *Commission v France* has suggested.

Archetypically, the endgame of administrative procedures is the adoption of individual administrative acts. Notwithstanding the major differences between individual administrative acts and contracts, the award phase of procurement and concession contracts navigate harmoniously between the two concepts, since on the one hand their endgame is the conclusion of a contract, but on the other hand the future contractor of the administration emerges as the result of the administrative procedure of the award. From that point of view and as a reminder of the embedded administrative roots of the regulation of contracts, the administrative authority has to adopt an individual administrative act. The 'individual' dimension of the decision is not a quantitative one, in the sense of the addressee of the decision being a single interested party, but a qualitative one, in the sense of a legal relationship that ties the interested parties in a homogenous way.

Following the previous analysis, unsurprisingly, the result towards which the award procedure of the contract aims at has been embedded in the meticulous respect of all the steps of the procedure. Considering the nuclear role of subjective public rights as well as the importance of the decision being justified on objective grounds, the absence of contract-specific award criteria disqualify the procedure from the qualification of a 'public contract', since from an administrative perspective there is no proper act or decision of the administrative authority. In particular, the ECJ has recently held that the lack of award criteria and therefore the lack of choice of tenders disqualifies framework agreements from the concept of 'public contract'. In *Falk Pharma* and *Maria Tirkonnen,* the contracting authorities entered into framework agreements with all the advisors that had applied and met with the selection criteria.[58] Nevertheless, in both cases, the invitations to tender did not contain any award criteria that allowed the comparison of the preselected tenders. Being questioned on the nature of these agreements on different bases, the Court stressed the objective of the procurement directives as the avoidance of national preference, which according to the Court is most acute at the selection of admissible tenders. Therefore, the lack of choice of a tender annihilates the objective of the regulation[59] and disqualifies framework agreements from the

[57] The extensive case-law on infringement proceedings concern primarily the non-respect of procedural steps by contracting authorities.

[58] Case C-410/14, *Dr. Falk Pharma GmbH v DAK-Gesundheit* [2016] ECLI:EU:C:2016:399 ; Case C-9/17, *Tirkkonen*, [2018] ECLI:EU:C:2018:142.

[59] See *Falk Pharma*. Consequently, where a public entity seeks to conclude supply contracts with all the economic operators wishing to supply the goods concerned in accordance with the conditions specified by that entity, the fact that the contracting authority does not designate an economic operator to whom contractual exclusivity is to be awarded means that there is no need to control, through the detailed rules of Directive 2004/18, the action of that contracting authority so as to prevent it from awarding a contract in

concept of 'public contracts'.[60] Even though both cases have been criticized for expanding the scope of the exceptions to public contracts,[61] they nevertheless demonstrate proceduralisation as a genetic step of the procurement regulation.

3.3 ENHANCED PARTICIPATION AS A RECENT EXPRESSION OF PROCEDURALISATION

The transition from *administrés* to collaborators of public administration, from addressees of the public legal order to co-drafters of the new emerging administration emerges clearly in the field through the negotiated and the competitive dialogue award procedures. To begin with, the competitive procedures with negotiation as well as the participation of the interested undertakings in the competitive dialogue procedure is not simply an expression of administrative rationality, but on the contrary the ability of the administration to buy beyond the off-the-shelves products depends absolutely on the participation of the interested economic operators. Nevertheless, before being recognized as a procedure of common law alongside open and restricted award procedures, the negotiated procedures constituted an exceptional procedure, available only in extreme scenarios.[62] The need to constrain contracting authorities through obligations combined with the tradition to conclude contracts using negotiated procedures led to a need to root out this natural tendency. As Mattera has commented:

> '[T]he directive has brought about a radical reversal of the situation in Member States, in that the single tendering procedure, which was the normal procedure chosen by national awarding authorities, has become under the Directive an exceptional procedure, permitted only under the special circumstances set out in the Article'.[63]

In addition to that, the possibility of technical dialogue prior to the publication of the tender notice was adopted in 2004/18 directive following the alignment of the directives with the GPA agreement.[64] Prior to that, perceived by the legislator as a constant threat to the principles of non-discrimination and transparency, any contact with the potential candidates was eliminated during the first decades of the European procurement edifice.[65] Nevertheless, the discrimination concerns succumbed before the increased effectiveness of those

favor of national operators. It is therefore apparent that the choice of a tender and, thus, of a successful tenderer, is intrinsically linked to the regulation of public contracts by that directive and, consequently, to the concept of 'public contract' within the meaning of Article 1(2) of that directive, paras 37-38.

[60] The conclusion of the ECJ is unsurprising considering that already directive 2004/17 had not qualified framework agreements as award procedures, a conceptualization repeated in the 2014 directives.

[61] David McGowan, 'The importance of award criteria and choice to the existence of a public contract, Case C-9/17 Maria Tirkkonen' (2018) 4 PPLR 111- 114.

[62] The Court even made sure that the exceptions for the exceptions opening the recourse to negotiated procedures were interpreted narrowly, see Case 199/85, *Commission v. Italy* [1987] ECR 1039; Case C-71/92, *Commission v. Spain* [1993] ECR I-5923; Case C-328/92, *Commission v. Spain* [1994] ECR I-1569; Case C-57/94, *Commission v. Italy* [1995] ECR I-1249; Case C-318/94, *Commission v. Germany* [1996] ECR I-1949.

[63] Alfonso Mattera, *Le Marché Unique Européen. Ses Règles, son Fonctionnement* (Paris, Jupiter 1988) 321.

[64] Recital 10 of Directive 97/52 of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively, OJ L 328/1.

[65] Sue Arrowsmith, 'The problem of discussions with tenderers under the EC procurement directives: the current law and the case for reform' (1998) 3 PPLR 65-82.

procedures compared to the classic ones.[66] The path of the adversarial principle in administrative contracting has certainly been an adventurous one, since from an outsider, the participatory mechanisms do not simply offer alternative award procedures, but even alternative contract proceedings, the public private partnership being the most characteristic example.

Another element of enhanced participation to the procurement procedure transcends all the categories of award procedures and concerns the provision of information. Notwithstanding that the contracting authority bears the responsibility of the organization of the award procedure, the interested operators do not simply manifest their interest, but they provide the Administration with all the necessary information allowing it to reach the correct decisions. From an abstract perspective, the provision of detailed information from the citizens, weakens the interrogatory aspect of administration, making it compatible with the definition of administrative procedure of Schmidt-Aßmann as an 'intertwined process carried out by public bodies designed to gather, manage and analyze information'.[67] In other words, as Barnes has stressed, the Administration:

> '[n]eed only verify the integrity, reliability, and quality of the information generated, processed, and submitted by the applicant […]. This privatization is borne of a new regulatory strategy – the transference of transaction costs to the private sector and a shared responsibility between state and society in the promotion of the public interest, while the ultimate control of the final result remains in the hands of the administration'.[68]

Therefore, participation is being transformed to 'a sort of duty'.[69]

3.4 FRAGMENTED PROCEDURALISATION AS AN EXPRESSION OF THE EU PRINCIPLE OF LEGALITY

Proceduralisation is construed as synonymous to the right-oriented objectives of EU administrative edifice. Yet, as an integral part of the EU administrative construction, public procurement law has equally inherited the genes of the same disease, procedural

---

[66] Recitals 42-43 of Directive 2014/24 on public procurement and repealing Directive 2004/18/EC OJ L 94/65 'A greater use of those procedures is also likely to increase cross-border trade, as the evaluation has shown that contracts awarded by negotiated procedure with prior publication have a particularly high success rate of cross-border tenders. Member States should be able to provide for the use of the competitive procedure with negotiation or the competitive dialogue, in various situations where open or restricted procedures without negotiations are not likely to lead to satisfactory procurement outcomes. For works contracts, such situations include works that are not standard buildings or where works includes design or innovative solutions. For services or supplies that require adaptation or design efforts, the use of a competitive procedure with negotiation or competitive dialogue is likely to be of value. Such adaptation or design efforts are particularly necessary in the case of complex purchases such as sophisticated products, intellectual services, for example some consultancy services, architectural services or engineering services, or major information and communications technology (ICT) projects. In those cases, negotiations may be necessary to guarantee that the supply or service in question corresponds to the needs of the contracting authority'.

[67] Schmidt-Aßmann, 'Structures and Function of Administrative Procedures in German, European and International Law', in Barnes (ed), *Transforming Administrative Procedure*, (Global Law Press 2008) 47-74

[68] Barnes (n 68) 47.

[69] Anna Simonati, 'The Principles of Administrative Procedure and the EU Courts: and Evolution in Progress' (2011) 4 Review of European Administrative Law 50.

fragmentation, which is further exacerbated by the specific characteristics of the field. As Lenaerts and Vanhamme have described the phenomenon:

> 'The European Community has no comprehensive legislation on the procedural rights of private parties to be respected throughout the administrative process that precedes the adoption of decisions which might adversely affect the interests of such parties. Rather it has a variety of ad hoc legislative enactments applicable to specific fields of substantive law supplemented with unwritten general principles of law whose observance conditions the legality of administrative proceedings and thus the legality of the decision adopted as a result of these proceedings'.[70]

Proceduralisation and its effective implementation in the field of public procurement should be regarded as synonymous to detailed regulation, for a number of factors but not simply because the latter guarantees the effectiveness of the former. To begin with, detailed regulation in the European administrative law space should be regarded as the panacea against the 'weak administrative capacity of the Union'.[71] Unable to observe the correct application of European policies by national administrations and being slightly prejudiced against the latter, the European legislator's contribution in the field of European administrative law has been correctly labelled as 'imposed uniformity' since EU laws craft extremely detailed legislation.[72] The lack of administrative capacity which acts as a catalyst for the enhancement of the enforceability through the creation of detailed rules bears also another characteristic; the lack of vision of administrative decision-making in the EU law context contributes additionally to the detailed regulation of each field.

Moreover, the increasing complexity of the administrative apparatus constitutes an impediment to the codification of an *administrative ius commune*, since EU, lacks competence for the codification of administrative procedures not only before the European institutions, but more importantly before national administrations.[73] In order to remedy against the unconvincing - among doctrine - potential competence awarded by article 100A, article 298 was added in the Treaty of Lisbon.[74] Nevertheless, despite the debate on the existence of competence to regulate the EU civil service, the codification of administrative procedure lacks political desirability.[75] In addition to that, in the absence of a comprehensive legislation

---

[70] Koen Lenaerts, Jan Vanhamme, 'Procedural rights of private parties in the Community Administrative Process', (1997) 34 CMLR 531.
[71] R.Daniel Kelemen, *Eurolegalism: The transformation of Law and Regulation in the European Union* (HUP, 2011).
[72] Rob J G M Widdershoven, 'Developing Administrative Law in Europe: Natural Convergence or Imposed Uniformity', (2014) 7 Review of European Administrative Law 5.
[73] Päivi Leino Sandberg, 'Efficiency, Citizens and Administrative Culture. The Politics of Good Administration in the EU', (2014) 20(4) EPL 681; Melanie Smith, 'Developing Administrative Principles in the EU: A foundational Model of Legitimacy?' (2012) 18(2) European Law Journal 269; Christoph Vedder, '(Teil)Kodifikation des Verwaltungsverfahrensrechts der EG' in J. Schwarze, C. Starck (eds), *Vereinheitlichung des* Verwaltungsverfahrensrechts *in der EG* 98.
[74] Nevertheless, Schwarze remained unconvinced of the legal basis provided by 298 TFEU, Juergen Schwarze, 'European Administrative Law in the Light of the Treaty of Lisbon' (2012) 18(2) *European Public Law* 285; following the same line of reasoning Craig has equally expressed his doubts that even post-Lisbon the legal competence to enact such a law is lacking, see Paul Craig, 'A general law on administrative procedure, legislative competence and judicial competence', *European Public Law*, (2013) 19(3), 503.
[75] On the 15th January 2013, the European Parliament adopted a resolution requesting from the European Commission the submission of a proposal for the codification of Administrative Procedure of the EU. According to the resolution, nine general principles governing the direct EU administration would be codified, including principle of transparency, fairness, efficiency, legitimate expectations constituting a code

of individual rights in administrative decision-making can't be simply replaced by article 41 ECHR, since that does not cover the economic rights stemming directly from the fundamental freedoms. Therefore, this results to a fragmented 'public administration without a common law on administrative procedure'.[76] In order to tackle the abstractive character of the general principles of EU law that necessarily regulate the field transforming case-law into a quasi-primary legal source, the European legislator imposes sector-specific legislation that consequently result in extreme fragmentation.

Perhaps the scourge of excessive fragmentation is endemic to the field. Fragmentation should also be regarded as the direct consequence of the complexity of administrative procedures – the procedures of award of procurement contracts naturally belong in this category,[77] since the impossibility of convergence through negative integration obliges the European legislator to adopt positive, yet sector-specific procedures, which results in a 'mixed bag', a 'heterogenous and unsystematic amalgam of procedures'.[78]

As external aspect of fragmentation should be regarded not only the distinction of the sector-specific measures from other positive interventions of the EU, but also the isolation of the specific administrative procedures from the general ones and the impact the former cast on the latter. On top of the external fragmentation which distinguishes the sector of public contracts from the other EU policies implemented via indirect administration, the sector presents extreme internal fragmentation. A factor for identifying the internal fragmentation is that the specific regimes of award function as *lex specialis* compared to the *lex generalis*, none other than the regime described in the classic sector directive. Notwithstanding that the three types of contracts of the so-called classic sector were at last consolidated with directive 2004/18, sources of divergence continue to exist. To begin with, the utilities contracts remain subjected to another regime, a lighter one that is adapted to the specific characteristics of the relevant markets and has parallelly a sector-specific remedies directive. The specific regime of Annex II B services that are subject to very limited procedural requirements.[79] Furthermore, in an effort to codify the chaotic situation that emerged in the aftermath of the relevant to the concession contracts case-law, acknowledging that the two interpretative communications of the Commission worsened instead of

---

of practice under Article 298 TFEU. Nevertheless, the Baroso Commission was not convinced of the benefits of such a legislative initiative. The European Parliament reiterated, on the occasion of a resolution on the monitoring of EU law of the 26th October 2017, the necessity of such a codification. The Commission has since remained silent, see <http://www.europarl.europa.eu/doceo/document/TA-8-2017-0421_EN.html?redirect> accessed on 1 July 2020.

[76] Eva Nieto-Garrido, Isaac Martin Delgado. 'Towards a Law on Administrative Procedure' in *European Administrative Law in the Constitutional Treaty* (London, Hart Publishing 2007) 107–138; see also Herwig C.H. Hofmann, Gerard C. Rowe, Alexander H. Turk, 'The present and future condition of European Union Administrative Law where the authors focus on the personal fragmentation of the integrated administration as the source of the legal one', in Herwig C.H. Hofmann, Gerard C. Rowe, Alexander H. Turk (eds), *Administrative Law and Policy of the European Union* (OUP 2011).

[77] Gonzalez (n 45) has described complex administrative procedures as defined by the exercise of discretionary powers, regulatory strategies based on goal-oriented programs, since the goals and interests at stake are not one dimensional, in the same way that it is possible that the administrations involved may not be either; all of which contributes to the fact that the recipients of these procedures are not singularisable (approval of general provisions and plans), giving rise to complex legal relationships, which may be triangular or multilateral.

[78] ibid 85.

[79] They are only subject to technical specifications and the publication of contract award notices (Arts. 74-77 Directive 2014/24).

ameliorating the situation, another specific regime emerged from the adoption of the Concessions Directive.[80] A fifth regime covers the public-private partnerships and a last one includes all the contracts that fall outside the *rationae materiae* of the directives and are thus regulated by 'a periphery of floating principles' of EU primary law.[81]

4 THE IDENTIFICATION OF THE STEPS IN THE AWARD PROCEDURE

The award of a contract as a procedure is mostly evident via two distinctive elements; on the one hand the obligation to respect certain time limits between each step of the way, and on the other hand regulation of steps by completely different rules. Explicit time limits between the different phases of the award of contracts have been imposed for the first time by the generation of directives of 2004. In particular, once the contract notice is published, articles 38 of the public sector directive and article 45 of the utilities directive set different time limits for the reception depending on the type of the award procedure. Yet, the different time limits allow for the effectiveness of fundamental freedoms, since they allow the expression of a cross-border interest. The importance of time-limits is revealed by the maximum harmonization of the minimum time limits leaving no room for maneuver to the Member States.[82] The possibility of shortening the time limits in the directives of 2014 as a response to the financial crisis underlines rather than threatens their importance.[83] The detailed presentation of an award procedure is of minimum added value for the purposes of this paper. On the contrary, the presentation of the clearly separate steps of the administrative procedure contribute to the objective of the analysis.

4.1 THE DISTINCTION BETWEEN SELECTION AND AWARD PHASES

To begin with, the clear-cut dichotomy between the selection and the award phases of the award of contract, and therefore the difference between suitability of the candidate and most economically advantageous tender have emerged as the first indicators of this administrative sequence. The different rules governing the two steps of the procedure were raised for the first time in *Beentjes*.[84] In *Beentjes*, the referring court asked, among others, whether Directive 71/305/EEC precluded the rejection of a tender for lack of professional experience. In its reply, the ECJ set for the first time the principle of rigid dichotomy between selection and award criteria by stating that 'even though the directive […] does not rule out the possibility that examination of the tenderer's suitability and the award of the contract may take place simultaneously, the two procedures are governed by different rules',[85] adding that 'their

[80] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts Text with EEA relevance, OJ L 94/1.
[81] Dacian Dragos, Roberto Caranta (eds), *Outside the procurement directives – inside the Treaty?*, (Copenhagen, Djøf Publishing 2012).
[82] Article 38, now article 66 of both Directives 2014/24 and 2014/25, which sets as minimum time limits the ones defined in each award procedure.
[83] Glenn Fletcher, 'Minimum time limits under the new Public Procurement Directive', (2014) 3 PPLR 94-102.
[84] Case 31/87, *Gebroeders Beentjes BV v State of the Netherlands* [1988] ECR 04635.
[85] ibid, para 16.

choice [the choice of contracting authorities] is limited to criteria aimed at identifying the offer which is economically most advantageous'.[86] This case-law is far from isolated. On the contrary, the dichotomy was clarified in *GAT,* where the referring court asked whether references relating to the products offered by the tenderers to other customers can be used not as a criterion establishing their suitability but as an award criterion.[87] The Court held that directive 93/36/EEC precludes a list of references being listed as an award criterion.

The waterproof distinction between the two was strengthened in the aftermath of the *Lianakis* ruling.[88] In *Lianakis,* the Municipal Council of Alexandroupolis published a call for tenders and the contract notice specified the award criteria in order of priority. Among the award criteria, the contracting authority had used the tenderer's experience and qualifications. The Court held that the contracting authority had wrongfully applied the aforementioned criterion as an award criterion, since the tenderer's ability to perform the contract was a selection criterion and could only be taken into account at the previous phase. Notwithstanding that 'Directive 92/50 does not in theory preclude the examination of the tenderers' suitability and the award of the contract from taking place simultaneously, the two procedures are nevertheless distinct and are governed by different rules'.[89] The *Lianakis* ruling established a fundamental distinction between selection and award criteria and the impossibility of potential spillover from the one to the other. To sum up, the *acquis* of *Lianakis* is that in the selection phase it is the tenderer that is evaluated, while in the award phase it is the tender that is under assessment.[90]

The rigid distinction between the two phases was not well received by practitioners, since the tendency was in favor of the flexible approach.[91] The *acquis* of the *Lianakis* ruling was also reiterated in the utilities context, even though the utilities directive did not set out specific criteria of qualitative selection.[92] In particular, on the occasion of the award of a design and consultancy contract by ERGA OSE, the contracting authority set different qualifications for Greek and foreign firms, excluding the firms that had submitted an expression of interest in the six months preceding the date of that competition. In addition to that, among the award criteria the contracting authority had listed 'specific and general

---

[86] ibid, para 19; see also Case 31/87, *Gebroeders Beentjes BV v State of the Netherlands* [1988] ECR 0463, Opinion of AG Darmon, paras 35-37 'In simpler terms, it may be said that the criteria for the award "to the most economically advantageous tender" concern the "product" and not the "producer", the quality of the "work" and not that of the contractor. The directive thus draws a clear distinction between the criteria for checking the suitability of a contractor, which concern the qualities of the contractor as such, and those for awarding the contract, which relate to the qualities of the service which he offers, of the work which he proposes to carry out. In those circumstances, compliance with the provisions of the directive requires that the criteria should not be confused and that criteria relating to the contractor's suitability should not be taken into account in connection with the award of the contract'.

[87] Case C-315/01, *GAT v ÖSAG* [2003] ECR I-6351.

[88] Case C-532/06, *Emm. G. Lianakis AE v. Alexandroupolis* [2008] ECR I-251, I-269.

[89] ibid, para 26.

[90] The conclusions of the judgment were not favorably received by the doctrine, see for instance, Philip Lee, Implications of the *Lianakis* decision (2010) 19 PPLR 47; Chris Bovis, Giacomo Calzolari, 'Dialogue', in Gustavo Piga, Steen Treumer (eds), *The Applied Law and Economics of Public Procurement* (Routledge 2013) 69-81.

[91] Steen Treumer, 'The distinction between selection and award criteria in EC procurement law – a rule without exception?', (2009) 3 PPLR 103-111.

[92] Council Directive 93/38 only contained Article 34, which described the award criteria for the identification of the most economically advantageous tender. On the contrary, a good indication of the complexification of the procedure is the number and the sophistication of the articles that describe the selection as well as the award criteria in the 2014 Directives. More specifically, Articles 78-84 of the 2014/24 Directive describe both selection and award criteria, as well as the procedure of the exclusion in every phase of the procedure.

experience'. The Commission claimed that, by setting different requirements for foreign companies, the contracting authority breached the principle of equal treatment and confused, in an unacceptable way the selection and the award phases of the contract. The Hellenic Republic claimed that the clause at stake was always applied not as an irrebuttable presumption, but the parties could provide clarifications in order not to be rejected. Nevertheless, the Court rejected the argument by holding that Greece was in breach of the relevant to award criteria article 34 of the directive.[93] The absolute character of the prohibition of the meddling between the two was again reiterated on the occasion of the next generation of directives in *Spain v Commission,* the Court rejecting the use of previous experience as award criterion.[94]

The clear distinction established in *Lianakis* continues to remain the principle even in the aftermath of *Ambisig,*[95] despite interpretations of the latter as an overruling of the former. The procurement contract at stake was a contract for services of an intellectual nature awarded on the basis of the most advantageous economic offer. Among the award criteria laid down by the contracting authority figured the criterion of the evaluation of the team, which included 'its proven experience and an analysis of the academic and professional background of its members'.[96] On the contrary, among the award criteria listed in article 53(1)(a) the academic or relevant to the performance criteria weren't listed, since the list is only indicative. Ambisig, who had been ranked second after the selection phase of the contract challenged the inclusion of a selection criterion in the award phase. The selection board dismissed Ambisig's argument stating that 'the experience of the proposed technical team is, in the specific case, an intrinsic characteristic of the tender and not a characteristic of the tenderer'.[97] AG Wathelet was of the opinion that the critical criterion was admissible for the evaluation of the tenders, since it was a specific and not a generic one. Nevertheless, he underlined that this distinctive line is not an overruling, but a confirmation of the *Lianakis* ruling: 'I even think that this distinction between an abstract and a specific analysis of manpower is not incompatible with the judgments in Lianakis and Others and Commission v Greece'.[98]

Since the Court was convinced by the opinion of the AG, the *acquis* of *Lianakis* has not been relativized.[99] The *Lianakis acquis* has been further enhanced by the principle of legal and substantive identity between the operators being preselected and the ones submitting tenders.[100] Even though the requirement of identity has been interpreted extensively by the Court, it has nevertheless been admitted that this requirement is applicable even in restricted procedures, enhancing the distinction between the two steps.[101]

---

93 Case C-199/07, *Commission v Greece* [2009] ECR I-10669.
94 Case C-641/13 P, *Commission v Spain* [2014] ECLI:EU:C:2014:2264.
95 Case C-601/13, *Ambisig* [2015] ECLI :EU:C:2015:204.
96 ibid, para 10.
97 ibid, para 13.
98 Case C-601/13, *Ambisig* [2015] ECLI :EU:C:2014:2474, Opinion of AG Wathelet, para 45.
99 As is often the case, for judgments that are issued right after the adoption of a new, sector-specific legislation, but fall outside the *rationae temporis* of their applicability, the relevant provisions of the new directives act as interpretative guides for the cases, as an expression of the good administration of the justice, see AG Wathelet (n 99) part V, *post scriptum.*
100 Case C-396/14, *MT Højgaard A/S and Züblin A/S v Banedanmark* [2016] ECLI:EU:C:2016:347.
101 Case C-697/17, *Telecom Italia v Infratel Italia SpA* [2019] ECLI:EU:C:2019:599.

To sum up, considering that the dichotomy of the two phases remains untouched, the verification processes can't be confused, since the object of each's phase evaluation is not identical.[102] Subsequently, considering the difference in data, the obligation to state reasons for the rejection at each phase is satisfied by different criteria. Nevertheless, from a chronological perspective, neither *Lianakis* nor the directives exclude a simultaneous assessment of the two.

4.2 THE SUSPENSION OF THE AWARD PROCEDURE AT THE SELECTION PHASE

At the selection phase of the contract, the rejection of undertakings could only be an administrative decision and not a regulatory one, since the latter does not satisfy the hearing principle. A neighboring to the hearing principle obligation at the selection phase of the contract concerns the rejection of economic operators bearing a CE mark. In particular, the Court explicitly deprived the contracting authorities from the competence to reject economic operators whenever the presumption of compliance with European standards was at stake contributing to the emergence of an additional step in the procedure.

In *Medipac-Kazantzidis,* the overlapping of the Medical Devices Directive with the principle of rule of law and general principles of EU law governing the procurement procedures resulted in two new, distinctive administrative obligations.[103] In that ruling, the activist contribution of the Court did not consist in the 'discovery' of new obligations, but rather it clarified the process of interaction of the two sector-specific mentalities. The *acquis* of *Medipac-Kazantzidis* is that the principles of equal treatment and transparency, combined with rule of law attributes oblige the contracting authorities to inform the national competent authority whenever a case of non-conformity with CE marking arises and to suspend the award procedure while waiting for the authority's decision concerning the validity of a CE mark.

The case was relative to the supply of surgical sutures. In particular, the general hospital of Heraklion (a body governed by public law) launched an award procedure for the supply of surgical sutures with a below-thresholds value. The contract would be awarded on the basis of the lowest prices and the sutures had to bear the CE marking, pursuant to Directive 93/42. Medipac was one of the tenderers offering medical supplies that bore the CE marking, according to the technical specifications of the contract. Nevertheless, the administrative board of the hospital decided that Medipac's tender had to be excluded following the doubts expressed by surgeons of the hospital concerning the technical reliability of its proposed contracts. Therefore, on the basis of the complaints of the surgeons, the contracting authority unilaterally decided to reject the tender. Medipac appealed against the decision of the procurement committee before the Greek Council of State, and the national supreme administrative court referred the question of the unilateral rejection to the Court of Justice, which, since the contract was falling outside the scope of the directives, used the *acquis* of the medical devices directive in order to resolve this question. In particular, according to the

[102] This waterproof distinction is also reflected in the directives, which continue to regulate the phases via different sections.
[103] Case C-6/05, *Medipac-Kazantzidis v (PE.S.Y. KRITIS)* [2007] ECR I-04557.

technical specifications laid down in the notice of award, the contracting authority did not go beyond the CE marking, requesting only compliance with that.

According to article 5 of Directive 93/42/EEC relative to the free movement of medical devices 'Member States shall presume compliance with essential requirements referred to in article 3 in respect of devices which are in conformity with the relevant national standards adopted pursuant to the harmonized standards'. This presumption of compliance was rebuttable, since the directive set out in Article 8(1) the safeguard and withdrawal procedure:

> '[W]hen a Member State ascertains that the devices referred to in Article 4() […], when correctly installed, maintained and used for their intended purpose, may compromise the health and/or the safety of patients, users or, where applicable, other persons, it shall take all appropriate interim measures to withdraw such devices from the market or prohibit or restrict their being placed on the market or put into service'.

In particular, the competent authority to carry out the safeguard procedure in Greece was the Ministry of Health, Welfare and Social security acting through the directorate for Biomedical Technology. Nevertheless, as was stressed by AG Sharpston 'it is common ground that Greece initiated neither the safeguard procedure under Article 8 nor the procedure for dealing with wrongly affixed marking under Article 18 of the Medical Devices Directive'.[104] On the contrary, even though the contracting authority had informed the National Drug Association, the administrative committee did not wait for the reply of the former but decided to take matters at its own hands and when the competent authority replied that the products were effectively compliant with the CE marking, the tender remained rejected.

Compared to other rejections at the selection phase, *Medipac-Kazantzidis* illustrates a reverse process of rejection; when issues of public health and safety are raised for products that bear CE marking, they can't simply be excluded from the procurement contract at stake but they have to be withdrawn from the national market. Considering the threat for the free movement of medical devices that the withdrawal from a national market constitutes, the directive contains a specific process as well as a competent to carry it out authority. Notwithstanding the serious doubts of a public authority, considering the consequences of the safeguard procedure, the rebuttal of the presumption of compliance with CE mark needs thorough examination and motivation. The non-respect of the procedure set out in the directive leads necessarily to an infringement of the free movement of the relevant devices. As was held by AG Sharpston, '[t]he legitimate desire – indeed, the duty – of a hospital that is a contracting authority to protect public health must find expression in a way that does not cut right across the principles of free movement, equality of tenders, transparency and proportionality arising from the EC Treaty'.[105]

Therefore, in an effort to find a compromise between the two directives, the Court adopted AG's opinion, according to which the discretion of rejection with regards to

---

[104] Case C-6/05, *Medipac-Kazantzidis v (PE.S.Y. KRITIS)* [2007] ECR I-04557, Opinion of AG Sharpston, para 74

[105] ibid, para 82.

technical standard has to be restricted due to the lack of competence awarded by the Member State. As a consequence, AG Sharpston recognized that contracting authorities 'must suspend the award procedure and inform the competent national authority of its concerns. If the competent national authority rejects those concerns as unfounded, the suspension of the award procedure must be lifted and the tender in question treated as technically acceptable'.[106]

Mutatis mutandis, later on, the infringement proceeding initiated against Greece concerned the rejection on grounds of non-conformity by hospital procurement committees of numerous medical devices certified with CE marking, bypassing the mandatory prior examination by the national competent authority.[107] In *Commission v Greece*, the infringement proceeding was based on multiple complaints that were identical to the issues raised in *Medipac-Kazantzidis*. Nevertheless, in the context of this case, and despite any lack of references to the value of the contracts, the departure from the safeguard procedure was not based on the general principles applicable to procurement procedures but the Court based the breach on constituted article 8(2) of Directive 93/36.

4.3 THE STANDSTILL STEP OF THE AWARD PROCEDURE

The revolution of the Remedies scenery resulted from the addition of a new step in the procedure, none other than the standstill. According to the formula developed in *Rewe and Comet*, Community law acts as a forum of creation of individual rights, while their enforcement lies in the discretion of the national legislator.[108] In an effort to fight against the natural flaws that emerge from this deferential approach of procedural rules, the EU legislator has relativized this general premise in the public procurement field, where we observe the phenomenon of 'internal market law made better',[109] since the EU chose to additionally restrict national's legislator autonomy by regulating the remedies in the field.[110]

However, the legislator chose a much less interventionist approach. From a quantitative perspective, the Remedies directive aim at the coordination of the remedies. As the Court held:

> 'Directive 89/665 does no more than coordinate existing mechanisms in Member States in order to ensure the full and effective application of the directives laying down substantive rules concerning public contracts, it does not expressly define the scope of the remedies which the Member States must establish for that purpose'.[111]

In other words, the European legislator, respecting the divergent legal traditions in the field, designed the mechanisms of redress as pathways, leaving excessive regulatory discretion to

---

[106] ibid, para 98.
[107] Case C-489/06, *Commission v Greece* [2009] ECR I-01797.
[108] Case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 188.
[109] Stephen Weatherill, 'EU law on Public Procurement: Internal market law made better', in Sanja Bogojevic, Xavier Groussot, Jörgen Hettne (eds), *Discretion in EU Public Procurement Law* (Hart Pubishing 2018) 21-50.
[110] On the evolutionary approach of remedies in EC law, see Thomas Eilmansberger, 'The relationship between rights and remedies in EC law: in search of the missing link', (2004) 41 CMLR 1199-1246.
[111] Case C-92/00 *Hospital Ingenieure,* [2002] ECR I-05553, para 58.

the national legislator.[112] In addition to that, from a qualitative perspective, the EU legislator did not explicitly prioritize any type of remedies, since article 2(6) of Directive 89/665/EEC explicitly stated that:

> '[E]xcept where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement'.[113]

Allowing explicitly the replacement of interim relied by damages after the conclusion of the contract, the obligation of correct transposition would be satisfied even in terms of alternativeness, the Member States having to provide either a set aside and interim relief or the award of damages. The regulatory approach of absolute equivalence among the available remedies, was compatible with the taxonomy of national regimes of public procurement. Nevertheless, this principle of absolute equivalence was relativized in the aftermath of the *Alcatel* ruling.[114] The issue at stake was essentially the reasonable limitation period for set aside and interim relief remedies. Considering that the Remedies directives remained silent on national limitation's period and that furthermore, the award of damages was open after the conclusion of the contract, one of the remedies provided for in the directive was always available. A reaffirmation of the sufficiency of the award of damages as well as the deferential approach on the setting of time-limits was provided in both in *Universale-Bau* and *Santex*.[115] Summarizing the approach of the Court, Eliantonio commented that 'the ECJ's approach seems to be that a national limitation period is in breach of the principle of effective judicial protection whenever it deprives the parties concerned of any remedies before the national courts'.[116]

If the Court had continued to follow the *Universale-Bau* and *Santex* approach, the availability only of damages would be sufficient. In addition to that, the equivalence of the available remedies is compliant with the deferential approach of *Rewe/Comet*. Nevertheless, the virtue (or the activist contribution of Alcatel) is that is raised the standard of effectiveness in the field from a deferential one, to a *Simmenthal*-like principle of effectiveness that the 'full force and effect' requirement of national procedural rules should be tested against every remedy available.[117] From the perspective of administrative law, *Alcatel* is an activist ruling because, through the vehicle of the general principle of effectiveness of EU law, it has created

---

[112] Case C-258/97, *Hospital Ingenieure* [1999] ECR I-1405, paras 21 *et seq.,* in particular para 28; Case C-54/96, *Dorsch Consult* [1997] E.C.R. I-4961, paras 40 *et seq.*; and Case C-76/97, *Tögel* [1998] ECR I-5357, paras 2 *et seq.*

[113] The reluctance of the European legislator to intervene against national procedural law should be contrasted with the previous to the adoption of the Remedies directive regime, when the Court, in light of application of article 169 TFEU, accepted the award of interim relief even after the conclusion of the contract, ie the *Lottomatica* case, Case C-272/91 R, *Commission v Italy* [1994] ECR I-01409.

[114] Case C-81/98, *Alcatel Austria and Others* [1999] ECR I-07671.

[115] In both cases, the permissibility of national time-limits was reaffirmed, and the national frameworks were not found in breach of the principle of effectiveness of EU law, Case C-470/99, *Universale-Bau* [2002] ECR I-11617, Case C-327/00, *Santex* [2003] ECR I-01877.

[116] Mariolina Eliantonio, 'The influence of the ECJ's Case law on Time limits in the Italian, German and English Administrative Legal Systems: A comparative analysis', (2009) 15(4) European Public Law 616.

[117] Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, [1978] ECR – 00629.

new administrative obligations, adding a new step in the award procedure interpreting almost *contra legem* the Remedies directive.

In 1996, the Austrian Ministry of Economy and Traffic published an invitation to tender for the supply of components of the electronic system for automatic data transmission. The applicable Directive was the Public Supply Directive 93/36. The contract was awarded to Kapsch AG. The conclusion occurred on the same date with the award decision. The unsuccessful tenderers applied to the *Bundesvegabeamt* requiring the annulment of the award decision and interim measures for the suspension of the performance of the contract. According to the applicable Austrian law, the interim relief measures were applicable until the conclusion of the contract. After the conclusion, the Federal Public Procurement Agency could only confirm the potential unlawfulness of the award decision opening the floor to the claim of damages. Under the application of national law, the Federal Public Procurement Agency dismissed the interim relief claims. However, the dismissal decision was challenged before the Constitutional Court on the grounds of incompatibility of national provision to Directive 89/665/EEC. Essentially, the Court was asked whether the Remedies Directive obliged Member States to always provide set aside and interim relied remedies against the award decision. Austria argued that the transposition was compliant with the aforementioned article 2(6) of the Remedies Directive.

However, the Court was faced with a problem of legal realism; theoretically and according to the formal character of the award procedure, the award decision and the conclusion/signature of the contract were different decisions, thereby leaving, prior to the signature, the necessary time and place for the set aside and the interim relief of the award decision. However, two major tendencies were practically depriving the interim relief of any effectiveness. On the one hand, the 'race to signature' phenomenon which describes the overwhelming tendency of contracting authorities to conclude the contract as soon as possible, even on the same day with the award decision, making any interim relief inapplicable. Supplementing the destructive effect of the race to signature, the employment of rules and methods of civil law in a great number of jurisdictions was resulting in the publication only of the conclusion of the contract and subsequently the unsuccessful tenderers were never notified of the award decision.[118]

In order to safeguard the effectiveness of the set aside and interim relief damages, the Court explicitly prioritized set aside and interim relief by holding that the award decision does not fall under article 2(6), but instead under article 2(1)(b), as a potential unlawful decision which a party may ask to set aside. In particular, the Court underlined their importance for ensuring effective application of the Directives by holding that remedies should be provided 'in particular at the stage where infringements can still be rectified'.[119] The Court concluded that the award decision should always be open to challenge and that the exception of article 2(6) only refers to cases after the award of the contract. The shift from *Universale-Bau*, where the Court ruled, among others, on the compatibility of the absence of suspensory effect of national review proceedings.

Essentially, the *acquis* of Alcatel is that the time between the award and the conclusion of the contract cannot be a consequence of mere procedural formalism, but a guarantee of

[118] ibid, para 48.
[119] *Alcatel* (n 114) para 33.

the effectiveness of EU law. As Pachnou rightfully observed, in *Alcatel* the Court 'defined the result, but not the means' for its enforcement.[120] However, this only proved to be half-true, since *Alcatel* proved to be a catalyst to the redesign of national procurement remedies.[121] The AG had sufficiently demonstrated the path to be followed by stating that 'procedural effectiveness and economy therefore require that there should be a separate procedure for reviewing, in sufficient time, the validity of the decision awarding the contract'.[122] Therefore, an indication of the means to be followed was after all included in *Alcatel*.

In particular, the means to the correct implementation of the *Alcatel acquis* is the enforcement of the principle of legality through the emergence of administrative obligations. To begin with, in the aftermath of Alcatel, Austria adopted a Federal circular intended to ensure compliance until the adoption of provisions. Since the Federal circular was not binding, the unsatisfied and determined to implement the ruling Commission initiated an infringement proceeding proving that in the absence of binding rules, some *Länder* were not obliged to communicate the award decision. In particular, from the Alcatel ruling emerged not one but two administrative obligations; the obligation to communicate the award decision to all the unsuccessful tenderers and the requirement to attend a reasonable time between the award and the conclusion. *Alcatel* essentially transformed the award decision of the contract from an internal to the administration decision, communicable only to the interested party to an administrative decision that affects adversely the unsuccessful tenderers making it for that reason duly communicated and motivated. Or as the Court held in *Commission v Austria*:

> 'Legislation relating to access to administrative documents which merely requires that tenderers be informed only as regards decisions which directly affect them cannot offset the failure to require that all tenderers be informed of the contract award decision prior to conclusion of the contract, so that a genuine possibility to bring an action is available to them'.[123]

The *acquis* of *Alcatel* ruling is the establishment of reasonable time that allows access to justice against the decision to award the contract. Notwithstanding that the judge did not cross the Rubicon by establishing a minimum of reasonable time for the Member States, the Commission did not refrain from enforcing the new standards of effectiveness against national laws that would, prior to *Alcatel*, be considered compatible with the Remedies directive. The lack of provision of a mandatory standstill period between the award and the conclusion of the contract is Spain didn't successfully pass the standard of remedies.[124] *Mutatis mutandis*, inflicting the double obligation of notification of the award decision and the

---

[120] Despina Pachnou, 'Enforcment of the EC procurement rules: the standards required of national review systems under EC law in the context of the principle of effectiveness', (2000) 9 PPLR 73.
[121] See in particular, Aris Georgopoulos, 'The system of remedies for enforcing the public procurement rules in Greece: a critical overview', (2000) PPLR 75-93; Cecily Davis, 'The European Court of Justice decision in Alcatel – the implications in the United Kingdom for procurement remedies and PFI', (2002) PPLR 282-287; Joël Arnould, 'The consequences of the *Alcatel Austria* case under French law: the Sodisfom judgment of the Administrative Court of Paris', (2003) PPLR 148-150; William Timmermans, Mike Gelders, Standstill obligations in European and Belgian public procurement law (2005) 6 PPLR 265-290.
[122] Case C-81/98, *Alcatel Austria and Others*, Opinion of AG Mischo [1999] ECR I-07671, para 47.
[123] Case C-212/02, *Commission v Austria* [2004] ECLI:EU:C:2004 :386, para 23.
[124] Case C-444/06, *Commission v Spain* [2008] ECR I-02045.

suspension of the procedure, the non-suspensive character of the notification of both Irish and French law was sufficient for their incompatibility with the Directive.[125] The obligations entailed in the *Alcatel* ruling were, alongside with the sanction of ineffectiveness, the biggest novelty of the new Remedies Directive.[126]

5 CONCLUSION

Administrative law, whether national or supranational, does not adhere to formalistic procedures in vain; a multi-step procedure creates the necessary legal space for the 'fitting' of the *ratio* of the legislation while at the same time leaving the necessary traces allowing for accountability. As such, EU procurement law has adhered to the same unwritten principle of administrative law. Reversing the argument, the dismantling of the procurement directives into procedures and of the procedures into steps constitutes an undeniable argument of the administrativisation of the field. However, as was demonstrated, this due process narrative was initially only abstractly depicted in the directives. It was primarily the jurisprudential *acquis* of the sector that raised bulkheads between the different stages of the procedures, followed by the legislator who seized the chance and codified these significant contributions of the Court. The gradual emergence of proceduralization has also resulted in its autonomy from similar national narratives, in the sense that once consolidated, their specific traits echo the EU legal order from which they came resurfaced. As fruits of the European administrative law tree, in light of the absence of an administrative procedure act, the procurement procedures have shown symptoms the same fragmentation disease. In addition to that, the tendency of EU law towards enhancement of procedural instead of substantive rights is equally reflected in the procurement procedures, in the sense that judicial activism has lately concentrated on the guarantee of the effectiveness of EU law, rather than access to the procurement market. Last but not least, the resilience of the procurement procedures is also evident from their capacity to adapt to new governance models which essentially transform the addressees of the administrative legal order to its co-drafters. Procurement procedures constitute the most important *acquis* of the EU interference with public contracts.

[125] Case C-455/08, *Commission v Ireland*, [2009] ECR I-00225; Case C-327/08, *Commission v France* [2009] ECR I-00102.

[126] To state that the standstill obligation has been codified by the legislator would be an understatement Directive 2007/66 was adopted in order to codify the aforementioned jurisprudential *acquis*, taking into account that standstill obligation and ineffectiveness of the contract redefined the remedies scenery, in particular Article 2(6) of Directive 2007 'furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement'.

LIST OF REFERENCES

Arnould J, 'The consequences of the *Alcatel Austria* case under French law: the Sodisfom judgment of the Administrative Court of Paris' (2003) PPLR 148

Arrowsmith S, 'The problem of discussions with tenderers under the EC procurement directives: the current law and the case for reform'(1998) 3 PPLR 65

Auby JB, 'La bataille de San Romano. Réflexions sur les évolutions récentes du droit administratif' (2001) AJDA 912

Azoulai L and Clément-Wilz L, 'Le principe de légalité' in Auby J N and Dutheil de la Rochère J (eds.) *Traité de droit Administratif Européen* (Bruylant, 2014)

Barnes J, 'Three Generations of Administrative Procedures' in Rose-Ackerman S, Lindseth PL and Emerson B (eds.) *Comparative Administrative law* (Elgar, 2017)
DOI: https://doi.org/10.4337/9781784718671.00027

— *Transforming Administrative Procedure* (Global Law Press, 2008)

Bignami F, 'From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law' (2011) 59 Am. J. Comp. L. 859
DOI: https://doi.org/10.5131/AJCL.2010.0031

Bovis C and Calzolari G, 'Dialogue' in Piga G and Treumer S (eds.) *The Applied Law and Economics of Public Procurement* (Routledge, 2013)
DOI: https://doi.org/10.4324/9780203096314

Caprano E, *Etat de droit et droits européens* (L'Harmattan, 2005)

Caranta R, 'Remedies in EU Public Contract Law: The Proceduralisation of EU Public Procurement Legislation' (2015) 8 REALaw 75
DOI: http://dx.doi.org/10.7590/187479815X14313382198331

Cassese S, 'New paths for administrative law: A manifesto' (2012) 10 I CON 603
DOI: https://doi-org.ludwig.lub.lu.se/10.1093/icon/mos038

Craig P, 'A general law on administrative procedure, legislative competence and judicial competence' (2013), 19 EPL 503

Davis C, 'The European Court of Justice decision in Alcatel – the implications in the United Kingdom for procurement remedies and PFI' (2002)11 PPLR 282

Della Cananea G, 'The Requirement to Carry Out a Procedure' in Della Cananea G (ed.) *Due Process of Law Beyond the State* (OUP, 2016)
DOI: https://doi.org/10.1093/acprof:oso/9780198788386.003.0002

Dragos D and Caranta R, *Outside the EU Procurement Directives – Inside the Treaty?* (Djøf, 2012)

Dubos O, 'The Origins of the Proceduralisation of EU Law: A Grey Area of European Federalism' (2015) 8 REALaw 7
DOI: http://dx.doi.org/10.7590/187479815X14313376686336

Eilmansberger T, 'The relationship between rights and remedies in EC law: in search of the missing link' (2004) 41 CML Rev 1199

Eliantonio M, 'The influence of the ECJ's Case law on Time limits in the Italian, German and English Administrative Legal Systems: A comparative analysis' (2009) 15 EP 616
DOI: http://dx.doi.org/10.2139/ssrn.1427255

Fernandez-Martin JM, *The EC Public Procurement Rules, A Critical Analysis* (OUP, 1996)

Flamme MA, *Traité Théorique et Pratique des Marchés Publics* (Bruylant, 1969)

Flamme MA and Flamme P, 'Vers l'Europe des marchés publics ? (à propos de la directive « Fournitures » du 22 mars 1988)' (1988) RMC 456

Fletcher G, 'Minimum time limits under the new Public Procurement Directive' (2014) PPLR 94-102

Fuller L, *The Morality of Law* (Yale University Press, 1969)

Galligan DJ, *Due Process and Fair Procedures: A Study of Administrative Procedures* (OUP, 1997)
DOI: https://doi.org/10.1093/acprof:oso/9780198256762.001.0001

Georgopoulos A, 'The system of remedies for enforcing the public procurement rules in Greece: a critical overview' (2000) PPLR 75

Gonzalez JA, 'The Evolution of Administrative Procedure Theory in New Governance Key Point' (2013) 6 REALaw 73 102

Hallstein W, 'Die EWG – Eine Rechtsgemeinschaft, 1962' published in Walter Hallstein, *Europäische Reden*, in Oppermann T and Kohler J (eds.) (Deutsche Verlags-Anstalt, 1979)

Harlow C and Rawlings R, 'A Fragmented Framework' in Harlow C and Rawlings R (eds.) *Process and Procedure in EU Administration* (Hart Publishing, 2014)
DOI: https://doi.org/10.5040/9781474201087.ch-001

— 'Proceduralism and Automation: Challenges to the Values of Administrative Law' in Fisher E, King J and Young A (eds.) *The Foundations and Future of Public Law: Essays in Honour of Paul Craig* (OUP, 2020)
DOI: https://doi.org/10.1093/oso/9780198845249.003.0014

— 'The Pathways Model and Steering: Public Procurement' in Harlow C and Rawlings R (eds.) *Process and Procedure in EU Administration* (Hart Publishing, 2014)
DOI: https://doi.org/10.5040/9781474201087.ch-006

Harlow C, Three Phases in the Evolution of EU Administrative Law, in Craig P and De Búrca G (eds.) *The Evolution of EU law* (OUP, 2011)

Hoffmann R, 'Rechtstaatprinzip und Europäisches Gemeinschaftrecht' in Hoffmann R et al (eds.) *Rechtstaatlichkeit in Europa* (Müller, 1996)

Hofmann HCH, Rowe GC and Türk AH, 'Sources of European Union Administrative Law' in Hofmann HCH, Rowe GC and Türk AH (eds.) *Administrative Law and Policy of the European Union* (OUP, 2011)
DOI: https://doi.org/10.1093/acprof:oso/9780199286485.003.0005

— 'The present and future condition of European Union Administrative Law' in Hofmann HCH, Rowe GC and Türk H (eds.) *Administrative Law and Policy of the European Union* (OUP, 2011)
DOI: https://doi.org/10.1093/acprof:oso/9780199286485.003.0026

Jurgens G, Verhoeven M and Willemsen P, 'Administrative Powers in German and English Law' in Besselink L, Pennings F and Prechal S (eds.) *The Eclipse of the legality principle in the European Union* (Kluwer, 2011)

Kelemen RD, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Harvard University Press, 2011)
DOI: https://doi.org/10.4159/harvard.9780674061057

Lee P, 'Implications of the *Lianakis* decision' (2010), 19 PPLR 47

Leino Sandberg P, 'Efficiency, Citizens and Administrative Culture. The Politics of Good Administration in the EU', (2014) 20 EPL 681

Lenaerts K and Vanhamme J,' Procedural rights of private parties in the Community Administrative Process' (1997) 34 CML Rev 531

Mattera A, *Le Marché Unique Européen. Ses Règles, son Fonctionnement* (Jupiter, 1988)

McGowan D, 'The importance of award criteria and choice to the existence of a public contract, case C-9/17 Maria Tirkkonen' (2018) 4 PPLR 111

Merli F, 'Principle of Legality and the Hierarchy of Norms' in Schroeder W (ed.) *Strengthening the Rule of Law in Europe: From a common concept to mechanisms of implementation* (Hart, 2016) 38
DOI: https://doi.org/10.5040/9781474202534.ch-002

Meuwese A, Schuurmans Y and Voermans WJ, 'Towards a European Administrative Procedure Act', (2009) 2 REALaw 3
DOI: http://dx.doi.org/10.7590/REAL_2009_02_02

Nieto-Garrido E, and Delgado IM, *Towards a Law on Administrative Procedure, European Administrative Law in the Constitutional Treaty* (Hart, 2007)
DOI: https://doi.org/10.5040/9781472564085

Pachnou D, 'Enforcement of the EC procurement rules: the standards required of national review systems under EC law in the context of the principle of effectiveness' (2000) PPLR 73

Pescatore P, 'Les travaux du « groupe juridique » dans la négociation des Traités de Rome', (1981) XXXIV Studia Diplomatica 175

Punder H, 'German Administrative Procedure in a Comparative Perspective: Observations on the Path to a Transnational *Ius Commune Proceduralis* in Administrative Law' (2013) 11 I CON 940
DOI: https://doi.org/10.1093/icon/mot045

Rideau J, Communauté de droit et Etats de droit, in *Mélanges Rend-Jean Dupuy. Humanité et droit international* (Pédone, 1991)

Riem WH, 'Zwischenschritte zur Modernisierung der Rechtswissenschaft [Towards the Modernization of Jurisprudence]' (2007) 62 JurIstenzeItung 645
DOI: 10.1628/002268807781498352

Ruffert M, *The Transformation of Administrative Law in Europe* (Sellier European Law Publishers, 2007)

Schmidt- Aßmann E, Der Rechtsstaat, in Isensee J and Kirchhof P (eds.) *Handbuch des Staatsrechts* (C.F. Müller Verlag, 3rd edn, 2004)

— 'Structures and Function of Administrative Procedures in German, European and International Law' in Barnes J (ed.) T*ransforming Administrative Procedure* (Global Law Press, 2008)

— 'Principes de base d'une réforme du droit administratif. Partie 1' (2008) 24 RFDA 427

— 'Principes de base d'une réforme du droit administratif. Parties 2 et 3' (2008) 28(4) RFDA 667

Schwarze J, *Droit administratif européen, vol I* (Bruylant, 1994)

— *European Administrative Law* (Sweet &Maxwell, 1992)

— 'European Administrative Law in the Light of the Treaty of Lisbon' (2012) 18 EPL 285

— 'Judicial review of European Administrative Procedure' (2004) Public Law 146

Scott J and Sturm SP, 'Courts as Catalysts; Rethinking the Judicial Role in New Governance' (2007) 13 Columbia Journal of European Law 565

Simonati A, 'The Principles of Administrative Procedure and the EU Courts: and Evolution in Progress' (2011) 4 REALaw 45
DOI:http://dx.doi.org/10.7590/REAL_2011_01_03

Smith M, 'Developing Administrative Principles in the EU: A foundational Model of Legitimacy?' (2012) 18 European Law Journal 269
DOI: http://dx.doi.org/10.1111/j.1468-0386.2011.00597.x

Somek A, 'Is legality a principle of EU law?' in Vogenauer S and Weatherill S (eds.) *General Principles of Law: European and Comparative Perspectives* (Hart Publishing, 2017) Chapter
DOI: https://doi.org/10.5040/9781509910724.ch-005

Stassinopoulos M, *Traité des actes administratifs* (Institut français d'Athènes, 1954)

Timmermans W and Gelders M, 'Standstill obligations in European and Belgian public procurement law' (2005) 6 PPLR 265

Treumer S, 'The distinction between selection and award criteria in EC procurement law – a rule without exception?' (2009) 3 PPLR 103

Vedder C, '(Teil) Kodifikation des Verwaltungsverfahrensrechts der EG' in Schwarze J and Starck C (eds.) *Vereinheitlichung des* Verwaltungsverfahrensrechts *in der EG (Europarecht, 1995)*

Von Danwitz T, 'The Rule of Law in the Recent Jurisprudence of the ECJ' (2014) 37 Fordham International Law Journal 1311-1348

Walker N, 'Book Review of Dennis J. Galligan, Due Process and Fair Procedures: A Study of Administrative Procedures' (1999) 62 Modern L Rev 962

Weatherill S, 'EU Law on Public Procurement: Internal Market Law Made Vetter' in Bogojevic S, Groussot X and Hettne J (eds.) *Discretion in EU Public Procurement Law* (Hart, 2018) 21-50
DOI: https://doi.org/10.5040/9781509919512.ch-002

Widdershoven RJGM, 'Developing Administrative Law in Europe: Natural Convergence or Imposed Uniformity' (2015) 7 REALaw 5
DOI: http://dx.doi.org/10.7590/187479814X14186465137861

MULTILEVEL GOVERNANCE OF MARITIME BORDER SURVEILLANCE IN THE EU AND ACCOUNTABILITY: THE COAST GUARD IN SWEDEN

ÅSA GUSTAFSSON*

The article strives to examine the accountability of the Swedish Coast Guard in the field of maritime border surveillance. Border management, including border surveillance, lies close to states' core interests, such as sovereignty and security, and are inherently sensitive to human rights violations. This has affected the developments of the regulatory framework at the EU level in different ways. The question is posed how EU law, and the instruments that are directly applicable in the member states, impact on the accountability of the Swedish Coast Guard in the field of maritime border surveillance. The member state in focus is Sweden and in that sense it deals with maritime border surveillance in the Baltic Sea region, and not the Mediterranean Sea region, which has often been the debated issue due to the migration pressure in that region. However, it is of interest to examine also an actor in a Nordic EU member state, taking into account inter alia the vast fragmentation regarding authorities with responsibilities in border management in the EU. Also the multilevel system of rules as well as of actors – Frontex and the member states' authorities – makes it relevant to make such an investigation. Whether multi-level regulation promotes or undermines accountability is to some extent dependent on which concept of accountability one holds. When applying a concept of individual accountability, the existence of a range of accountability avenues regarding the Coast Guard's activities transpires as quite satisfactory. However, if more actors would be involved in the Coast Guard's maritime border surveillance activities based on the existing multilevel system of actors and rules, this would negatively impact the possibilities to hold the different actors accountable, for instance since different 'accountability rules' apply to different actors.

1 INTRODUCTION

Border surveillance is a debated and controversial topic within the EU. The EU has around 7 400 km of external land borders and 57 800 km of external maritime borders and coastlines. The debate and developments concerning border surveillance of the external maritime borders have been Mediterranean driven, and there have been a proliferation of initiatives and strategies to cope with the situation.[1] However, it would also be of interest to shed some light on how maritime border surveillance is applied in a Nordic EU member state, Sweden, which this text purports to do, albeit in a limited way.

* Faculty of Social Sciences, Business and Economics, Åbo Akademi University.

[1] eg Sergio Carrera, Leonhard den Hertog, 'Whose Mare? Rule of Law Challenges in the Field of European Border Surveillance in the Mediterranean' (2015) 79 Liberty and Security, Centre of European Policy Studies, 3. Carrera and den Hertog analysed the field of European border surveillance in the Mediterranean with the aim of gaining a better understanding of the ways in which the legal, policy and operational developments in this domain can be understood in a post-Lisbon Treaty EU arena.

In migration policy most policy issues are governed by shared competences that leave the national level different degrees of freedom.[2] As Heidbreder states, there is no single multilevel mode of interaction in the EU in the field of migration policy.[3] The incremental evolution of central regulation regarding legal and irregular migration, including border control, entails a multitude of interaction modes.[4] To grasp the nature of multilevel policymaking in migration policy, it is central to distinguish which particular rules apply. The variance is not by broad policy fields but is mostly bound to policy issues.[5] Thus, the supranational rules have to be analysed issue by issue – which is one of the reasons for this contribution. In the EU, implementation is largely left to the members states.[6] In EU law, the concept of border management encompasses actions and/or decisions undertaken in the context of both border control and border surveillance.[7] The supranational EU rules on border surveillance consists of regulations that are binding legislative acts that must be applied in their entirety across the EU. Multilevel governance, through EU actors and national actors, of border surveillance is complex. In border management Frontex has significant coordination and operational tasks, but the formal control over border forces stays in the hands of the member states.[8] For an overall assessment of the research situation it seems appropriate to cite Heupel and Reinold:

> 'Governance beyond the nation-state is replete with challenges, complexities, and contradictions, and even though both International Relations (IR) and International Law (IL) scholarship have sought to develop conceptual tools in order to grasp this complex reality, there still remain a considerable number of blind spots on each discipline's research agenda'.[9]

Concerning surveillance as such, it has become an increasingly important security measure in various sectors of society in the EU context, and is understood as an efficient tool to combat different kinds of threats to Europe's internal and external security.[10] From a political or social science point of view, surveillance can be understood as 'the process of watching,

---

[2] Treaty of the Functioning of the European Union (TFEU), art 4(2) states: 'Shared competence between the Union and the Member States applies in the following principal areas: […] (j) area of freedom, security and justice'. Eva G. Heidbreder, 'Multilevel Elements of EU Migration Policy' (2014) 2 King Project-Political Science Unit, In-depth Study, 8.

[3] ibid, 8.

[4] ibid.

[5] ibid, 3.

[6] Andreas Føllesdal, 'Epilogue: Toward More Legitimate Multilevel Regulation' in Andreas Føllesdal, Ramses A. Wessel, Jan Wouters (eds), *Multilevel regulation and the EU: The interplay between global, European, and national normative processes* (Martinus Nijhoff Publishers 2008) 392.

[7] Jörg Monar, 'The External Shield of the Area of Freedom, Security and Justice: Progress and Deficits of the Integrated Management of External EU Borders' in J. de Zwaan and F. A. N. J. Goudappel (eds), *Freedom, Security and Justice in the European Union: Implementation of The Hague Programme* (T.M.C. Asser Press 2006)

[8] Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) 1052/2013 and (EU) 2016/1624 (2019 Frontex Regulation) [2019] OJ L 295/1, recital 12, art 7; Heidbreder (n 2) 7.

[9] Theresa Reinold, Monika Heupel, 'Introduction: The Rule of Law in an Era of Multi-level Governance and Global Legal Pluralism' in Theresa Reinold, Monika Heupel (eds), *The Rule of Law in Global Governance* (Palgrave Macmillan 2016) 1.

[10] Maria Jumbert Gabrielsen, 'Controlling the Mediterranean Space through Surveillance: The Politics and Discourse of Surveillance as an All-Encompassing Solution to EU Maritime Border Management Issues' (2012) 3 Espace Populations Sociétés 35.

monitoring, recording, and processing the behaviour of people, objects and events in order to govern activity'.[11] That definition underlines that surveillance is not strictly confined to watching and observing, but also records and processes what is being observed; thus, in a narrow sense, surveillance can be understood as the process of keeping something under close observation.[12] But, surveillance could also be understood as a three-part process: watching, collecting information, and finally, reacting to an observed abnormal situation.[13] On the issue of competing interests in EU migration policy, Peers has stated that:

> 'The EU's involvement in this field of law must not only address these diverse aspects of migration in a coherent way, but also has to manage two distinct but related conflicts: the balance between EU competence in this field and national sovereignty, and the tension between immigration control and the protection of human rights'.[14]

The division of authority is seemingly the outcome of competing interests in these two dimensions.[15]Border management and border surveillance lie close to states' core interests, such as sovereignty[16] and security,[17] which seemingly has affected the developments of the regulatory framework at EU level.[18] A longstanding conceptual discussion regarding border surveillance of maritime borders concerns the extent to which such border surveillance also subsumes search and rescue operations (SAR).[19]

How border management rules and practice relate to the upholding of human rights has been, and continues to be, extensively debated and explored by many scholars.[20] EU legislation in the field of human rights and border management has evolved, but it mainly sets out general rules.[21]

This contribution relates to aspects concerning both the abovementioned conflicts or dimensions – the 'sovereignty dimension' and the 'human rights dimension' – since they have been, and still are, essential for the development of the multilevel rules. In the context of accountability the human rights aspects are crucial, since border management activities are

---

[11] Valerie Jenness, Davin Smith, Judith Stephan-Norris, 'Taking a Look at Surveillance Studies' (2007) 36 Contemporary Sociology: A Journal of Reviews 2 vii.
[12] Jumbert Gabrielsen (n 10) 38.
[13] ibid.
[14] Steve Peers, 'Immigration and Asylum' in Catherine Bernard and Steve Peers (eds), *European Union Law* (OUP 2014) 777, cited by Heidbreder (n 2) 6.
[15] ibid.
[16] The traditional understanding of sovereignty is closely linked to the norm of non-intervention, as discussed by Daase in Christopher Daase, 'Security, Intervention, and the Responsibility to Protect: Transforming the State by Reinterpreting Sovereignty' in Stephan Leibfried, Evelyne Huber, Matthew Lange, Jonah D. Levy, Frank Nullmeier, John D. Stephens (eds) *The Oxford Handbook of Transformations of the State* (OUP 2015) 310
[17] The term 'national security' often denotes security relating to the protection of the territory of a state, see for instance Marie Jacobsson 'Maritime Security: an Individual or Collective Responsibility?' in Jarna Maria Petman and Johannes Klabbers (eds), *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Martinus Nijhoff 2003) 391.
[18] Åsa Gustafsson, 'The Baltic Sea Region Border Control Cooperation (BSRBCC) and border management in the Baltic Sea region: A case study' (2018) 98 Marine Policy 309.
[19] eg Carrera, den Hertog (n 1) 12.
[20] Sergio Carrera, Marco Stefan, *Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective Remedies for Victims of Human Rights Violations?* (2018) Centre for European Policy Studies.
[21] Peers (n 14) 783 - cited by Heidbreder (n 2) 7.

inherently sensitive to human rights violations.[22] However, human rights aspects will not be investigated substantially, since the focus of this text is of a procedural character: the existence of accountability mechanisms, as further clarified below.

Obviously, the Baltic Sea is in a completely different situation than the Mediterranean Sea when it comes to 'maritime migration pressure', which can hardly be said to exist at all in the Baltic Sea. Eight of the nine countries bordering the Baltic Sea – Finland, Russia, Estonia, Latvia, Lithuania, Poland, Germany, Denmark, Sweden – are EU members, only Russia is not, which implies that the 'maritime migration' situation in the Baltic Sea seems unlikely to change in any drastic way. It can also be noted that the large 'joint operations' that have attracted much attention in the Mediterranean, have (so far) not been used in the Baltic Sea – and would also not seem likely to occur, for the reasons just mentioned.

Nevertheless, the choice to investigate a Nordic member state, bordering the Baltic Sea, is motivated by the fact that the Nordic member states have not been explored that much so far regarding these issues, since focus has been on the Mediterranean region. More importantly, there has been an increasing plurality of actors involved in EU border management including surveillance, which blurs who is doing what and who is (or should be) responsible for what. The multi-actor and fragmented landscape[23] are reasons for investigating also authorities in Nordic members states. In 2017 it was assessed that more than 50 national authorities were involved in the border control functions that are included in the Schengen Borders Code,[24] and that more than 300 national authorities were engaging in coast guard functions in the EU.[25] Not all EU member states concerned have a specialised 'coast guard' authority. Coast guard functions in the EU have been performed by civil, paramilitary and military actors.[26]

An attempt to answer the research question posed below will shed light on the fragmentation caused by the complex multi-actor landscape related to border control and maritime surveillance in the EU. Such an examination becomes all the more important in a context where EU agencies such as the European Border and Coast Guard have become involved the implementation of EU bordering policies.[27] One example is that in the EU member state Greece, Frontex is involved in almost every aspect of border management,

---

[22] Mariana Gkliati, 'A Nexus Approach to the Responsibility of the European Border and Coast Guard: From Individual to Systemic Accountability' (2018) SSRN Electronic Journal <https://ssrn.com/abstract=3118551> accessed 15 April 2020 9, 10.

[23] Sergio Carrera, Steven Blockmans, Jean-Pierre Cassarino, Daniel Gros, Elspeth Guild, *The European Border and Coast Guard: Addressing Migration and Asylum Challenges in the Mediterranean?* (2017) Centre for European Policy Studies 26.

[24] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the Rules Governing the Movement of Persons across Borders (Schengen Borders Code) [2016] OJ L 77/1.

[25] Carrera, Blockmans, Cassarino, Gros, Guild (n 23) 29.

[26] ibid 30. According to the overview of countries compiled by Carrera and Stefan in 2018, in six countries (Turkey, Serbia, Italy, Greece, Bulgaria and Austria) out of in total eleven examined Council of Europe countries, border surveillance was performed by both civil and military authorities (the other countries examined were Hungary, Romania, Poland, Spain and Slovakia). A total of 26 authorities were performing border control and border surveillance in the 11 countries investigated - Sergio Carrera, Marco Stefan, *Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective Remedies for Victims of Human Rights Violations?* (2018) Centre for European Policy Studies 46-47.

[27] Carrera, Stefan, *Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective Remedies for Victims of Human Rights Violations?* (n 20) 14.

offering operational help to the national authorities.[28] If multiple actors are involved in border management, it makes the identification of the responsible actor even harder.

The main actor in Sweden responsible for the application of the EU rules on maritime border surveillance, is the Coast Guard. Against the background laid out above, the following research question is posed: How does EU law, and the instruments that are directly applicable in the member states, impact on the accountability of the Swedish Coast Guard in the field of maritime border surveillance in Sweden?

The question guiding the research is the extent to which accountability mechanisms exist. No attempt is made to assess the effectiveness of the mechanisms in question, since that would not be possible within the framework of this text. Furthermore, the investigation is not exhaustive or empirical, in the sense that it examines real life cases where accountability is at stake. Rather, the regulatory framework is explored for the purpose of identifying existing accountability possibilities.

The concept examined in the text is labelled 'maritime border surveillance'. This contribution is written from a legal perspective, but for instance the political scientific term multilevel governance, and reasonings concerning it, is used in the text, since that adds to the understanding of the context.

I will proceed as follows. First, the concepts multilevel regulation and accountability will be described for the purpose of this text. In the main part the relevant EU rules, in particular the rules on 'maritime border surveillance' within the EU/Schengen, are explored, and the developments that are assessed as relevant for the current status of the rules are described. Second, the national actor the Swedish Coast Guard and the context and rules relevant for its implementation of the rules, and its accountability, are explored. Finally, some tentative concluding comments are made.

2 THE CONCEPTS MULTILEVEL GOVERNANCE AND ACCOUNTABILITY

The research question involves issues regarding the division of competencies in the EU in the field of maritime border surveillance, as well as concerning an application of the concept accountability. No in-depth analysis is possible within the limits of this contribution of the concepts multilevel governance and accountability, but it is necessary to outline how these notions are viewed for the purpose of framing the research question, and for explaining which theoretical points of departure that are used for this specific investigation, while recognising that there are other ways to conceive of these issues.

[28] Aikaterini Drakopoulou, Alexandros Konstantinou, Dimitri Koros, 'Border management at the external Schengen Borders: Border controls, return operations, and obstacles to effective remedies in Greece' in Sergio Carrera, Marco 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) 177.

2.1 MULTILEVEL GOVERNANCE

This text is written from a legal perspective, but in this part it seems useful to adopt an interdisciplinary approach and apply the political scientific concept multi-level governance. The concept is assessed as of value when framing the research question.

The concept of multi-level governance initially emerged from European integration research, and has often been elaborated on in the field of political science in connection with analyses of the EU system.[29] However, there is no one definition of multilevel governance that enjoys consensus across academic disciplines, as stated *inter alia* by Chowdhury and Wessel,[30] citing Bache and Flinders.[31]

From a political science perspective pioneers Hooghe and Marks, as well as Piattoni, have elaborated on multi-level governance.[32] Hooghe and Marks start at a general level, stating that multi-level governance indicates the dispersion of authoritative decision-making across multiple players at different territorial levels within the EU,[33] and distinguish between two types of governance, where the first resembled federal arrangements, and the second implies governance based on special-purpose agencies.[34] Piattoni has suggested that there are three dimensions of multi-level governance.[35] First, 'centre v. periphery', second, 'domestic v. international', and, third, 'state v. society'. 'Centre v. periphery' implies movements away from the unitary state towards decentralized systems of governance. 'Domestic v. international' indicates movements away from the national state towards increasingly structured modes of international cooperation and regulation, including the EU.[36] The third dimension 'state v. society' concerns the increasing involvement of non-governmental organisations and civil society in authoritative decision-making. Here it is appropriate to cite Heidbreder, who assert that in the area of migration policy, the mix of (Hooghe's and Marks') type one and type two multilevel governance is particularly obvious because different policy concerns are tackled with different approaches.[37]

Chowdhury and Wessel have asserted that the differences between the concept multilevel regulation and multilevel governance primarily lie in the distinction between what is known as governance and regulation in academic literature.[38] They develop multi-level regulation as a frame of reference to capture developments that are vertically linked across

---

[29] Liesbet Hooghe, Gary Marks, *Multi-level Governance and European Integration* (Rowman & Littlefield 2001). Reinold, Heupel (n 9) 5. Simona Piattoni has strived to systematise approaches to multi-level governance through a three-dimensional based study, theoretical, empirical and normative, and argues in favour of a theory of multi-level governance in *The Theory of Multi-level governance: Conceptual, Empirical, and Normative Challenges* (OUP 2010). Lucinda Miller has analysed multi-level governance in her study on contract law in an EU context in *The Emergence of EU Contract Law: Exploring Europeanization* (OUP 2011) 155. See also Carlo Panara, 'Multi-Level Governance as a Constitutional Principle in the Legal System of the European Union' (2016) 16(4) Croatian and Comparative Public Administration 705.

[30] Nupur Chowdhury, Ramses A. Wessel, 'Conceptualising Multilevel Regulation in the EU: A Legal Translation of Multilevel Governance?' (2012) 18(3) European Law Journal 335.

[31] Ian Bache, Matthew Flinders, *Multi-level governance* (OUP 2004).

[32] Liesbet Hooghe, Gary Marks 'Types of multi-level governance' in Henrik Enderlein, Sonja Wälti, Michael Zürn (eds), *Handbook on multi-level governance* (Edward Elgar 2010); Piattoni (n 29).

[33] Hooghe and Marks, *Multi-level Governance and European Integration* (n 29) XI.

[34] Hooghe and Marks, 'Types of multi-level governance' (n 32) 17-22.

[35] Piattoni (n 29) 26-31. Cited by Panara (n 29) 708.

[36] ibid.

[37] Heidbreder (n 2) 3.

[38] Chowdhury, Wessel (n 30) 345.

administrative or territorial levels within specific regulatory space, where the regulatory actions comprise rule making, rule enforcement and rule authorization.[39]

Panara takes a step on the legal path and analyses multi-level governance from a legal perspective to identify its legal basis within the EU, identifying for instance the subsidiarity principle as of significant importance.[40]

Having touched on certain scholars' views of multilevel governance and multilevel regulation, it is relevant to come back to Heupel's and Reinold's analysis which involves global legal pluralism.[41] They point to the lack of interdisciplinary work that tries to bring together the concepts of multi-level governance and global legal pluralism (but mention Isksel and Thies),[42] and underline that political scientists and international lawyers 'have a shared interest in understanding the causal dynamics of governance beyond the nation-state and in appraising its normative implications for democracy, accountability, and the rule of law'.[43] A common approach for political scientists and international lawyers is that both multi-level governance theories and the literature on legal pluralism 'dismiss the notion of a hierarchical ordering of global governance along the lines of the ideal of the centralized nation-state'.[44]

The above overview of certain contributions related to multilevel governance shows that there are a multitude of approaches. For the purposes of this text I will use an assumption of a general character as the point of departure in the investigation, namely that multi-level governance indicates the dispersion of authoritative decision-making across multiple players at different territorial levels within the EU.

2.2 ACCOUNTABILITY AND HUMAN RIGHTS

Accountability is undoubtedly a broad term, called *inter alia* an 'ever-expanding concept',[45] that can incorporate a number of understandings.[46] It has been given various meanings in different contexts and raises several questions. Nollkaemper, Wouters and Hachez point to three questions; 'who is accountable', 'to who must one be accountable', and 'for what is one held accountable'?[47] Different forms of accountability can be identified, such as democratic and legal accountability.[48]

---

[39] Chowdhury, Wessel (n 30) 345.
[40] Panara (n 29).
[41] In a legal context such approaches as (i) constitutionalism, (ii) global administrative law, (iii) fragmentation of international law, have been developed to deal with the complexity – however, they will not be further explored here. For an overview see for instance Ramses A. Wessel, Jan Wouters, 'The phenomenon of multilevel regulation: Interactions between global, EU and national regulatory spheres' in Andreas Føllesdal, Ramses A. Wessel, Jan Wouters (eds), *Multilevel regulation and the EU: The interplay between global, European, and national normative processes* (Martinus Nijhoff Publishers 2008), 32.
[42] Turkuler Isiksel, Anne Thies, 'Changing subjects: Rights, remedies and responsibilities of individuals under global legal pluralism' (2013) 2 Global Constitutionalism 2.
[43] Reinold, Heupel (n 9) 4.
[44] ibid.
[45] Andreas von Arnauld, Sinthiou Buszewski, 'Modes of Legal Accountability: The Srebrenica Example' (2013) 88 Die Friedens-Warte ¾ 15.
[46] André Nollkaemper, Deidre Curtin, 'Conceptualizing Accountability in International and European Law' (2007) 36 Netherlands Yearbook of International Law.
[47] André Nollkaemper, Jan Wouters, Nicolas Hachez, *Accountability and the Rule of Law at International Level* (2008) Policy brief 5-6.
[48] Gkliati (n 22).

Such concepts as transparency, liability, controllability, responsibility and responsiveness have been used in connection with accountability.[49] It is of interest that Krisch explores pluralism's implications for democracy and the rule of law, and highlights pluralism's normative virtues, asserting that the interaction of different normative orders and authorities could be viewed as an accountability mechanism.[50]

Accountability could be termed 'individual' and are in those cases perhaps mostly seen as legal.[51] Courts are assessed as the natural accountability mechanism. At the international level one downside is that international courts are often not accessible to individuals.[52]

It can be noted that the concept of complaint mechanism could encompass the accountability instruments and bodies which are internal to the authorities.[53] The Organization for Security Cooperation in Europe (OSCE) has identified 'five levels' of supervision, of which the first is 'internal affairs', in its 2008 Guidebook on Democratic Policing.[54] This text will not explore the wide field of legal aspects on human rights violations and remedies in any detail, but some observations deemed relevant and necessary for this text will be made:

European Convention on Human Rights (ECHR)[55] states parties have human rights obligations, both substantial and regarding procedures, in border management situations where authorities have 'effective' control, including extra-territorial jurisdiction.[56] In a judgment by the European Court of Human Rights (ECtHR) the legal environment surrounding Frontex, based on the earlier Frontex mandate, has been dealt with, in *Hirsi Jamaa et al. v Italy*.[57] The judgment interprets the obligations under the ECHR of Italy. One of the merits of the judgment is to clarify ECHR obligations binding an EU member state in the framework of operations allegedly aimed at combating illegal immigration and conducted alongside EU-coordinated border surveillance operations. The Court found that Italy had assumed *de jure* and *de facto* control over the immigrants. The Court confirmed its 'Hirsi doctrine' of *de jure* and *de facto* control in respect of extraterritorial jurisdiction in *N.D. and N.T. v. Spain*.[58]

The ECHR safeguards are also guaranteed by the Charter of Fundamental Rights of the European Union (EU Charter).[59] The EU Charter has the same legal value as the EU Treaties. Article 52(3) of the EU Charter states that, without prejudice to a more extensive protection, the scope of the rights for which it provides shall be the same as the one laid

---

[49] Maaike Damen, *Accountability in a multilevel setting: Cohesion Policy*, Paper presented at Regional Studies Association European Conference (2013) 5.
[50] Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (OUP 2010) 272.
[51] Gkliati (n 22).
[52] Nollkaemper, Wouters, Hachez (n 46) 6.
[53] Carrera, Stefan, *Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective Remedies for Victims of Human Rights Violations?* (n 20) 2.
[54] ibid 20; OSCE, *Guidebook on Democratic Policing*, (2008) by the Senior Police Adviser to the OSCE Secretary General.
[55] The Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), 4 November 1950.
[56] *N.D. and N.T. v. Spain*, App no 8675/15 and 8697/15 (ECtHR 2 October 2017). Carrera, Stefan, *Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective Remedies for Victims of Human Rights Violations?* (n 20) 7.
[57] *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR, 23 February 2012).
[58] *N.D. and N.T. v. Spain* (n 56), para 54.
[59] Charter of Fundamental Rights of the European Union (EU Charter) [2012] OJ C 326/391.

down by the ECHR. Furthermore, the EU Charter provides for even greater possibilities to control the action of agents of the EU and its member states when they act within the scope of EU law. It describes the rights and principles that apply to the authorities of EU member states when they implement EU law regulating border checks and border surveillance. In all cases where the administrative and law enforcement action of EU member states and EU agencies falls under the scope of Schengen rules and other relevant EU legal and policy instruments, the fundamental rights safeguards provided by the EU Charter apply, irrespective of the fact that such action is conducted outside the EU's geographical borders.[60]

Substantive human rights obligations entail the adoption and implementation of rules of conduct directed at ensuring that the States' authorities fully respect relevant standards regarding human rights protection in the performance of border management.[61] However, previously this did not transpire explicitly in the relevant EU legislation, but the last few years' sea operations in the Mediterranean to tackle the refugee crisis and the criticized handling by the EU of these operations, resulted in amendments and new EU legislation related to human rights: For instance, an amendment to the Frontex Regulation in 2011 required the agency to explicitly act in compliance with the EU Charter.[62] In the 2016 Frontex Regulations there were explicit references to fundamental rights,[63] and in the 2019 Frontex Regulation further such references were included.[64] For instance, in preambular para. 24 it is stated; 'In a spirit of shared responsibility, the role of the Agency should be to monitor regularly the management of the external borders, including the respect for fundamental rights in the border management and return activities of the Agency'.

Concerning remedies, the EU right to an *effective* judicial remedy (emphasis added) is not restricted to allegations of 'fundamental rights' violations. It also extends to any rights conferred to individuals by the law of the Union. Article 47 EU Charter covers 'all rights' and administrative guarantees enshrined in EU secondary legislation, which include those covered in the Schengen Borders Code.[65] The Schengen Borders Code requires that there is effective judicial protection against abusive actions or inactions of authorities in charge of border management in the area of border controls and surveillance. It is appropriate to refer

---

[60] *N.D. and N.T. v. Spain* (n 56), para 54. Carrera, Stefan, *Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective Remedies for Victims of Human Rights Violations?* (n 20) 7.

[61] Sergio Carrera, Marco Stefan, 'Human rights complaints at international borders or during expulsion procedures International, European, and EU standards', in Sergio Carrera, Marco Stefan (eds), *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union Complaint Mechanisms and Access to Justice* (London Routledge 2020) 261.

[62] Regulation (EU) 1168/2011 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 [2011] OJ L 304/1.

[63] 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 (2016 Frontex Regulation) [2016] OJ L251/1.

[64] 2019 Frontex Regulation.

[65] Art. 47 'Right to an effective remedy and to a fair trial': 'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented'. Carrera, Stefan, 'Introduction Justicing Europe's frontiers: effective access to remedies and justice in bordering and expulsion policies' (n 27) 13.

briefly also to the ECtHR jurisprudence on *effective* remedies (emphasis added). Article 13 of the ECHR provides the right to an effective remedy and in principle concerns complaints of substantive violations of Convention provisions.[66] The provision has been interpreted by the ECtHR as a guarantee for everyone that claims that his or her rights under the ECHR has been violated.[67] The ECtHR jurisprudence concerning different aspects of an effective remedy is plentiful. Here I will only very briefly refer to the Court's view that the 'authority' referred to in art. 13 does not need, in all cases, to be a judicial institution in the strict sense.[68]

Sergio Carrera and Marco Stefan have examined the extent to which the various authorities and actors currently performing border management (and expulsion-related tasks) in the EU are subject to accountability mechanisms capable of delivering effective remedies and justice for abuses suffered by migrants and asylum seekers.[69] They *inter alia* reach the conclusion that ensuring access to effective remedies for abuses occurring in the field of border management (and returns) remains complicated in practice.[70] For the purpose of this text, it can be noted that they point out that a 'complaint' can be differentiated from, and does not always correspond to, a right to appeal of administrative decisions.[71]

Having examined some aspects of accountability, as summarised above, I have chosen to apply the following concept of accountability mechanisms accessible for individuals, both 'complaints' and 'appeals' for the purpose of this text, since that seems suitable for the kind of overarching exploration made here; first, the existence of possible internal instruments, and, second, of external avenues, both legal avenues – possible court proceeding, as well as ombudspersons, national human rights institutions, or other similar national accountability bodies.

3 THE EU RULES

In this section an overview of the developments of the EU rules on border surveillance is made. The purpose is to shed light on how the division of competencies regarding border surveillance has developed, and to highlight, first, the tensions that have existed, and still exist, between EU competence and national sovereignty, and, second, the initial absence of explicit human rights requirements. For a brief overview of the human rights framework deemed as of relevance for the topic in this contribution, see sec. 2.2.

First, I explore relevant aspects of the Schengen cooperation, second, of the EU rules on border surveillance, and, third, of the European Agency for the Management of Operational Cooperation at the External Borders, Frontex.

---

[66] Art. 13: 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity'. European Court of Human Rights, *Guide to Article 13 of the European Convention on Human Rights Right to an effective remedy*, First edition 31 October 2019, 6.

[67] *Klass et al. v the Federal Republic of Germany*, App no 5029/71 (ECtHR 6 September 1978).

[68] eg *Golder v the United Kingdom*, App no. 4451/70 (21 February 1975) para 33; *Klass et al. v Germany* (n 67) para 67.

[69] Carrera, Stefan, *Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective Remedies for Victims of Human Rights Violations?* (n 20); Carrera, Stefan, 'Introduction Justicing Europe's frontiers: effective access to remedies and justice in bordering and expulsion policies' (n 27).

[70] Carrera, Stefan, 'Human rights complaints at international borders or during expulsion procedures International, European, and EU standards' (n 61) 267.

[71] Carrera, Stefan, 'Introduction Justicing Europe's frontiers: effective access to remedies and justice in bordering and expulsion policies' (n 27) 2.

3.1 THE SCHENGEN COOPERATION

The supranational EU border surveillance concept has its origin in the Schengen cooperation. The Schengen system entails that there is a common external border for which, in the absence of internal border controls, the member states are responsible together in order to ensure security within the area. The Schengen system has been developed and implemented by predominantly home affairs or interior ministries, as often referred to,[72] but the initial foundations of the Schengen area were in fact mainly driven by economic pressures: The 1985 Schengen Agreement was negotiated largely by ministers of transport and foreign affairs, and was primarily concerned with establishing the free circulation of goods, hardly touching upon aspects of police and security.[73] These were the EU objectives at the time – the creation of a common market was the central one, and the measures that the Schengen cooperation entailed were necessarily connected to these objectives.

Border control and the Schengen cooperation were developed in the context of the communitarisation of a range of issues termed Justice and Home Affairs matters – immigration, border control, asylum (also judicial cooperation, police cooperation and criminal law can be mentioned). Since a focus of this text is the division of competences, it is necessary to describe why the EU got involved in this field and why the member states felt it necessary to confer these competences. Border control was as a 'flanking' measure to the creation of internal market and an Area of Freedom, Security and Justice (as coined in the 1997 Amsterdam Treaty).

The emergence of the creation of an AFSJ, as an objective of EU law, created the need for much closer cooperation on external border controls. If the EU only has the competences necessary to achieve the objectives set out in the treaty, then as these objectives change, the competences have to evolve by setting more ambitious objectives. Creating an AFSJ and not only an internal market, the member states (implicitly as well as explicitly) agreed that the EU was to have greater competences in the fields necessary to achieve those objectives.

Initially the Schengen cooperation was based on the 1985 Schengen Agreement[74] and the 1990 Schengen Convention.[75] The Schengen Agreement was originally signed between Belgium, France, Germany, Luxembourg, and the Netherlands, outside the EU's legal framework. Free movement of people was a core part of the original Treaty of Rome, but there was disagreement among member states how that should be realised.

---

[72] Carrera, den Hertog (n 1) 20. Andreas Maurer and Roderick Parkes, *Democracy and European Justice and - by seHome Affairs: Policies under the Shadow of September 11* (2005) Stiftung Wissenschaft und Politik, Working Paper 2005, 11. Didier Bigo, *Police en Réseaux: l'Expérience Européenne* (Press de Science Po. 1996).

[73] Carrera, den Hertog (n 1) 20.

[74] United Nations Treaty Collection, Agreement Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, 14 June 1985. The official text is only available in Dutch, French and German.

[75] United Nations Treaty Collection, 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 (with Final Act, Procès-verbal and Joint Declaration), 19 June 1990. The official text is only available in Dutch, French and German.

The Schengen Area was formed partly due to the lack of consensus amongst EU member states over whether or not the EU had the jurisdiction to abolish border controls, and partly because those states that wanted to implement the idea did not wish to wait for others.[76] The Schengen area gradually expanded to include more EU member states. However, the Ireland and the UK opted out of joining the Schengen Area, and Romania, Bulgaria, Croatia, and Cyprus are EU members who plan to become Schengen countries but are not at present. Furthermore, four non-EU states form part of the Schengen Area: Iceland, Liechtenstein, Norway and Switzerland. The different standings of states regarding the Schengen cooperation, resulting in its geographical scope, originate from the tensions between supra-national control and state sovereignty over borders.

It has been argued that the foreign affairs ministries were ousted by justice and home affairs ministries at the time of the formation of the Schengen cooperation.[77] In the home affairs-driven Schengen field, there have been struggles not least around the division of competences and sovereignty issues.

Looking at the developments from a treaty perspective the following can be mentioned: In connection with the 1999 entry into force of the Amsterdam Treaty, the Schengen cooperation was incorporated into the EU, according to the so-called Schengen Protocol that is attached to the Amsterdam Treaty. This entailed that the Schengen cooperation thereafter was implemented within the EU legal framework. Being part of the area without internal border controls means that the Schengen states do not – principally – carry out border checks at their internal borders (ie borders between two Schengen states) and carry out harmonised controls, based on clearly defined criteria, at their external borders (ie borders between a Schengen state and a non-Schengen state).[78]

The Maastricht Treaty, which came into force in 1993, created the three pillars structure of the EU. Issues related to the management of borders were governed by inter-governmental decision-making and located in the 'third pillar'. However, following the entry into force in 1999 of the Amsterdam Treaty, and the end of a transition period in 2004, border management effectively became a shared competence between the EU and its member states.[79] Some issues concerning border management were now part of the supranational decision-making. The first Schengen Borders Code Regulation was adopted in 2006.[80] The definition of border surveillance in the latest (full) revision in 2016 of the Schengen Borders Code[81] is still the same as in the 2006 Code. The structure of the Schengen Borders Code was due in large part to the fact that rules already adopted in various legal instruments such as, in particular, the Schengen Convention and the Common Manual on checks at the external borders, were incorporated in it. The Schengen Convention did not include an explicit definition of border surveillance, but in art. 6.3 and 6.4 there were

[76] Paul Craig, Gráinne de Burca, *EU Law: Text, Cases and Materials* (OUP 2003) 751.
[77] Virginie Guiraudon, 'European and Integration Policy: Vertical Policy Making as Venue Shopping' (2000) 38(2) Journal of Common Market Studies 260, cited by Carrera, den Hertog (n 1) 20.
[78] Daniel Thym, 'Legal framework for entry and border controls', in Kay Hailbronner, Daniel Thym (eds), *EU immigration and asylum law – a commentary* (C.H. Beck/Hart/Nomos 2016) 31.
[79] eg Sarah Wolff, *EU Integrated Border Management Beyond Lisbon: Contrasting Policies and Practice* (Clingendael European Studies Programme 2009) 25.
[80] Regulation (EC) 562/2006 of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) OJ L 105/1.
[81] Schengen Borders Code.

formulations on border surveillance being carried out between the border crossing points, stating *inter alia* that it should be carried out with the aim that persons should not be able to avoid the control at border crossing points.

The Lisbon Treaty entered into force in 2009. The Lisbon Treaty abolished the 'third pillar' (policing and criminal law) and moved its provisions into the same Title that concerned immigration, asylum and civil law. Perhaps some of the most significant changes that the Treaty of Lisbon entailed, affected 'Area of Freedom, Security and Justice (AFSJ) law, concerning issues of relevance both for a holistic view on border management, and for national sovereignty.

A new explicit competence on 'an integrated management system for the external border' was introduced at treaty level with the Lisbon Treaty. Until the entry into force of the Lisbon Treaty, the notion of integrated border management was more a political concept than a legally binding one even if it was already present as an objective in the 2001 Laeken Declaration.[82] In the 2016 Frontex Regulation[83] the concept 'integrated border management' was for the first time filled with a more precise content, including border control, which encompasses border surveillance. However, the definition of border surveillance is still placed in the Schengen Borders Code.

Finally, one last example regarding what can be interpreted as a sovereignty expression by member states can be worth mentioning: According to art. 4.2 Treaty on European Union (TEU) the EU is obliged to respect the member states' 'essential state functions' which include 'maintaining law and order and safeguarding national security'. Art. 72 Treaty on the Functioning of the European Union (TFEU) states that the Treaty provisions on the area of freedom, security and justice (not only those on immigration and asylum) 'shall not affect the exercise of the responsibilities incumbent upon member states with regard to the maintenance of law and order and the safeguarding of internal security'. There have been different interpretations of this article.[84] The article could be seen as a reminder that detailed rules in corresponding EU legislation should 'leave breathing space for member states when it comes to the maintenance of law and order and the safeguarding of internal security'.[85]

3.2 THE EU CONCEPT BORDER SURVEILLANCE

In EU law, the concept of border management encompasses actions and/or decisions undertaken in the context of both border control and border surveillance.[86] The concepts border control, border checks and border surveillance are used in the Schengen context and applied by the 26 Schengen states, including Sweden. Sweden participates fully in the Schengen cooperation since 25 March 2001. Core legal instruments of relevance for these

[82] Presidency Conclusions European Council meeting in Laeken 14 and 15 december 2001, DOC/01/18
[83] 2016 Frontex Regulation.
[84] Thym discusses art. 72 and states: 'Some commentators have argued that the caveat in today's Article 72 TFEU should be construed […] as a justification for non-compliance with EU legislation whenever the maintenance of law and order was at stake', but he argues against that interpretation (n 78) 44-45.
[85] Thym (n 78) 45.
[86] Monar (n 7), cited by Carrera, Stefan, 'Human rights complaints at international borders or during expulsion procedures International, European, and EU standards' (n 61) 283.

concepts are the Schengen Borders Code,[87] and the 2019 Frontex Regulation.[88] These regulations are directly applicable in the EU member states.

The rules on the communication network EUROSUR, earlier in a stand-alone EUROSUR Regulation,[89] have now been included in the 2019 Frontex Regulation (sec. 3). The backbone of EUROSUR is a network of National Coordination Centres (NCCs). It is of interest to note that it has been made clear that 'EUROSUR information' can be used for Search and Rescue (SAR) purposes.[90]

Art. 1 in the Schengen Borders Code describes the overarching aim of the Code, which is border control of persons. Art 2.10 in the Schengen Borders Code states that**:**

> 'border control means the activity carried out at a border, in accordance with and for the purposes of this Regulation, in response exclusively to an intention to cross or the act of crossing that border, regardless of any other consideration, consisting of border checks and border surveillance.'

Art. 2.12 states that border surveillance means the 'surveillance of borders between border crossing points and the surveillance of border crossing points outside the fixed opening hours, in order to prevent persons from circumventing border checks'.

Art. 13 in the Code provides more details on border surveillance and states that the main purpose of border surveillance 'shall be to prevent unauthorised border crossings, to counter cross-border criminality and to take measures against persons who have crossed the border illegally'. Furthermore, 'surveillance shall be carried out in such a way as to prevent and discourage persons from circumventing the checks at border crossing points' by border guards using mobile or stationary units. The article explains that border guards shall act 'by patrolling or stationing themselves at places known or perceived to be sensitive, the aim of such surveillance being to apprehend individuals crossing the border illegally. Surveillance may also be carried out by technical means, including electronic means.'

In the latest 'Practical Handbook for Border Guards' there are some practical advice on sea borders (p. 92ff) and border surveillance (p. 103ff).[91]

Court proceedings before the European Court of Justice (CJEU) has had an influence on the development of the concept border surveillance. The following is a brief summary of the events that against the background of the refugee crisis and developments in the

---

[87] Schengen Borders Code. The legal base according to the regulation on the Schengen Borders Code: 'Having regard to the Treaty on the Functioning of the European Union, and in particular Article 77(2)(b) and (e) thereof, […]'.

[88] 2019 Frontex Regulation. The legal base according to the 2019 Frontex regulation: 'Having regard to the Treaty on the Functioning of the European Union, and in particular Article 77(2)(b) and (d) and Article 79(2)(c) thereof, [...]'.

[89] Regulation (EU) 1052/2013 of 22 October 2013 establishing the European Border Surveillance System (EUROSUR) [2013] OJ L295/11. The legal base according to the EUROSUR was: 'Having regard to the Treaty on the Functioning of the European Union, and in particular Article 77(2)(d) thereof, [...]'.

[90] 2019 Frontex Regulation, art. 28(2)(b).

[91] C(2019)7131 final, Brussels, 8.10.2019, Annex to the Commission Recommendation establishing a common "Practical Handbook for Border Guards" to be used by Member States' competent authorities when carrying out the border control of persons and replacing Commission Recommendation C(2006) 5186 of 6 November 2006.

Mediterranean Sea area led up to the adoption of a 2010 Council Decision,[92] and the subsequent adoption of Regulation 656/2014.[93]

The 2010 Council Decision in question contained guidelines on SAR and disembarkation and was challenged by the European Parliament, supported by the European Commission. The Decision was annulled by the CJEU in case C-355/10 in 2012.[94] The Court was of the view that political choices would have to be made regarding measures in the Decision; depending on these political choices the powers of the border guards may vary significantly.[95] The Court concluded that the contested measures in question, such as detection and interception, constituted essential elements of external maritime border surveillance, and that they should be adopted through a legislative act,[96] in accordance with the Court's case-law on essential elements.[97] Advocate General Mengozzi had elaborated on border surveillance in his Opinion in case C-355/10 and stated *inter alia* that surveillance is defined in the Schengen Borders Code essentially through its objectives and that that definition sets out a particularly broad concept, capable of encompassing any measure aimed at avoiding or preventing circumvention of border checks.[98] He also asserted that the concept of surveillance must be interpreted in a dynamic and flexible manner.[99]

Thereafter, a new legislative act, Regulation 656/2014,[100] was negotiated and adopted, establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex. (One aim of the adoption of Regulation 656/2014 Regulation was to codify the *Hirsi v. Italy* judgment).[101] The adoption of Regulation 656/2014 was the result of a long and troubled process of negotiating concerning the rules applicable to Frontex sea border surveillance operations.[102] The outcome entails that in this specific context, within the scope of Regulation 656/2014, which encompasses and is limited to Frontex joint operations, border surveillance includes detection, interception, including on

---

92 Council Decision 2010/252/EU of 26 April 2010 supplementing Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2010] OJ 2010 L 111/20.

93 Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Regulation 656/2014) [2014] OJ L189/93.

94 Case C-355/10 *European Parliament v Council of the European Union* [2012] ECLI:EU:C:2012:516.

95 ibid, para 56: 'First, the adoption of rules on the conferral of enforcement powers on border guards, referred to in paragraphs 74 and 75 above, entails political choices falling within the responsibilities of the European Union legislature, in that it requires the conflicting interests at issue to be weighed up on the basis of a number of assessments. […] Thus, the adoption of such rules constitutes a major development in the SBC system.'

96 ibid, para 84: 'In those circumstances, the contested decision must be annulled in its entirety because it contains essential elements of the surveillance of the sea external borders of the Member States which go beyond the scope of the additional measures within the meaning of Article 12(5) of the SBC, and only the European Union legislature was entitled to adopt such a decision.'

97 ibid, para 64.

98 Case C-355/10 *European Parliament v Council of the European Union* [2012] ECLI:EU:C:2012:516, Opinion of AG Mengozzi, para 57.

99 ibid.

100 Regulation 656/2014; Carrera, den Hertog (n 1) 3-13.

101 Carrera, den Hertog (n 1) 10-1.

102 The negotiations leading up to the adoption of the Regulation have been discussed by *inter alia* Carrera, den Hertog (n 1) 12.

the high seas, and even SAR.[103] The limited scope – border surveillance operations carried out by member states at their external sea borders in the context of operational cooperation coordinated by the Frontex – 'persuaded' the Members States that were hesitant to accept for instance the inclusion of SAR in the regulation.[104] EU member states resistance originated from the fundamental distinction they made between activities under the rubric of border surveillance, under EU competence, and SAR, which remain formally under the sovereignty of national competent authorities of EU member states.[105]

Sergio Carrera and Leonhard den Hertog have analysed the case and underlines that it was *prima facie* a legal institutional dispute, but the essential dispute concerned who had the authority to decide on the content and scope of the rule of law frameworks: member states pushed for only a narrow set of guidelines on SAR and disembarkation only in the scope of Frontex joint operations in the 2010 Decision, and ended up with a full-fledged regulation and the full involvement of the EU's legislature.[106]

Carrera and den Hertog assert that member states in the end could accept Regulation 656/2014 only if it was not applicable to their national authorities' activities, not creating additional obligations, responsibilities and liabilities,[107] and argue that the scope of Regulation 656/2014 should be extended to member states national authorities' sea border surveillance activities, which constitute the majority of European sea border activities.[108]

In conclusion, it is notable that within the scope of Regulation 656/2014, ie Frontex joint operations, border surveillance even explicitly encompasses detection, interception and SAR, which is not the case according to the definition of 'border surveillance' in the Schengen Borders Code.

3.3 EUROPEAN AGENCY FOR THE MANAGEMENT OF OPERATIONAL COOPERATION AT THE EXTERNAL BORDERS – FRONTEX

Frontex is an actor in multilevel system of actors, in a field subject to multilevel governance. Therefore, despite the fact that Frontex involvement in the Swedish Coast Guard's activities can be described as limited, it is necessary to take account of Frontex' role. For the purpose of this text it is relevant, first, to try to describe Frontex' role as an EU agency in border surveillance activities primarily in relation to such activities by a member state, and second, to describe accountability possibilities regarding specifically Frontex' activities.

Frontex was initially established in 2004 through the first Frontex Regulation[109] to improve integrated border management and the implementation of EU instruments for the management of external borders. Subsequently the Frontex Regulation has been amended

[103] ibid; Regulation 656/2014, recitals 1, 3, art 1.
[104] Carrera, den Hertog (n 1) 12.
[105] ibid, 11f: 'Six member states with Mediterranean borders (Greece, Spain, France, Italy, Cyprus and Malta) argued that the 'regulation of search and rescue and disembarkation in an EU legislative act is unacceptable'.
[106] ibid 13.
[107] ibid.
[108] ibid 26.
[109] 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 [2004] OJ L 349/1.

on several occasions.[110] The latest regulation dates from November 2019.[111] Its legal basis is found in arts. 77 and 79 TFEU.

Migratory pressures in the Mediterranean, and events such as the 2015 Paris attack, were reasons for the Commission's proposal 2015 for an even stronger Frontex. The aim was to provide Frontex with stronger executive powers over member states.[112] The establishment of Frontex in 2004 came out of a compromise between the Commission's ambition to create a European Corps of Border Guards, and the reluctance of member states to devolve too much of their sovereign competences to the supranational level. The to some extent ambiguous text of the 2016 Frontex Regulation was also the result of difficulties to move forward in an area which is closely linked to members states' national sovereignty,[113] although the role of Frontex is above all still to coordinate and facilitate cooperation between member states. According to art. 7 in the Frontex Regulation, integrated border management is to be implemented as a shared responsibility of Frontex and of the national authorities responsible for border management, including coast guards to the extent that they carry out maritime border surveillance operations.[114] Every Frontex-EU member state joint operation also requires an operational plan, according to art. 38 in the 2019 Frontex Regulation,[115] which gives the member state an influence on the actions to be taken: Frontex and the host member state, in consultation with participating member states, shall agree on the operational plan detailing the organisational and procedural aspects of the joint operation. It is also of relevance to note the mandates (in the respective regulations) for cooperation between the European Fisheries Control Agency (EFCA), the European Maritime Safety Agency (EMSA) and Frontex.[116] The modalities of the cooperation between the agencies have been defined in a Tripartite Working Arrangement (TWA), managed by a Steering Committee and implemented according to an Annual Strategic Plan.

There are elements in the Frontex Regulations that have been adopted that seem to challenge the sovereignty of member states. In 2016 a new wording was included in art. 19 (now in arts. 41-42), perhaps the most controversial element at the time, which ruled that in situations 'at the external borders requiring urgent action', it is possible for the EU Council to require the member state in question to cooperate with Frontex in the implementation of certain measures. It created a possibility that a member state can be overruled by the Council regarding how a specific border situation should be handled. The essential elements of this

---

[110] The regulation on Frontex has been reformed for instance through Regulation (EU) 1168/2011 of 25 October 2011, and Regulation (EC) 863/2007 of 11 July 2007 Establishing a Mechanism for the Creation of Rapid Border Intervention Teams […] [2007], OJ L199/30 establishing a mechanism for the creation of Rapid Border Intervention Teams.

[111] 2019 Frontex Regulation.

[112] Herbert Rosenfelt, 'Establishing the European Border and Coast Guard: all-new or Frontex reloaded?' (2016), available at http://eulawanalysis.blogspot.com/2016/10/establishing-european-border-and-coast.html.

[113] David Fernández Rojo, 'It's a new agency. It's a federal agency. It's the European Border Coast Guard! No wait… it's Frontex' (2017), available at https://eulawenforcement.com/?p=267.

[114] 2019 Frontex Regulation, art. 7(1): 'The European Border and Coast Guard shall implement European integrated border management as a shared responsibility of the Agency and of the national authorities responsible for border management, including coast guards to the extent that they carry out maritime border surveillance operations and any other border control tasks. Member States shall retain primary responsibility for the management of their sections of the external borders.'

[115] 2016 Frontex Regulation, art 16 and 2019 Frontex Regulation, art 28.

[116] 2019 Frontex Regulation, art 69.

provision remain the same in the 2019 Frontex Regulation. Both in 2016 and 2018 a majority of member states rejected calls for Frontex to carry out completely independent controls at EU external borders, as this would violate their national sovereignty.[117] The main responsibility for border security remains with the member state in question which retain the primary responsibility to control its part of the external borders.[118] Furthermore, the reform in 2019 could not be used to strengthen Frontex specifically for the task of sea rescues in the Mediterranean.[119]

In the aim of the 2016 reform of Frontex was similar to the aim of the 2019 reform. However, many of the measures envisaged in 2016 have not yet been fully implemented, for example the creation of a European reserve of 1,500 border guards, the posting of Frontex liaison officers to member states or the establishment of an EU vehicle pool.[120]

A new element which received attention in the debate in the run-up to the adoption of the 2019 Regulation was the creation of a Frontex task force of 10,000 EU border guards. However, this Frontex task force of 10,000 EU border guards will not be fully deployed until 2027.[121]

The 2019 Frontex Regulation is a core piece of legislation in a border surveillance context, but the Regulation does not contain any explicit definition of border surveillance – it makes reference to the definition of it in the Schengen Borders Code.

In sum: As indicated, Frontex of today cannot be seen as an independent actor in the EU border management field, rather, its role can still be characterized as supportive. The main responsibility for border security remains with the member state in question, with its own security structures and operational capacities.

3.3[a] The Accountability of Frontex

This section strives to give an overview of the accountability of Frontex, since in multilevel system of actors this is relevant for the understanding also of the Swedish Coast Guard's accountability regarding border management and border surveillance issues.

Frontex' accountability has been widely discussed and analysed. For instance, at a general level, Mungianu's view is that Frontex has moved from pure border guard culture to fundamental rights culture,[122] and Carrera and den Hertog have stated that Frontex has gradually become embedded in a rule of law framework.[123] However, it is assessed by several experts that there are still shortcomings, of which examples are given below.

As an EU agency, Frontex is under the obligation to perform its tasks in line with the requirements in the EU Charter, and to ensure the protection of the fundamental rights (eg

[117] Raphael Bossong, 'The Expansion of Frontex Symbolic Measures and Long-term Changes in EU Border Management' (2019) Stiftung Wissenschaft und Politik/German Institute for International and Security Affairs.
[118] eg 2019 Frontex Regulation, recital 12, art 7, Annex V (3).
[119] Bossong (n 117) 2.
[120] ibid.
[121] ibid 4.
[122] Roberta Mungianu, *Frontex and Non-Refoulement. The International Responsibility of the EU* (Cambridge University Press 2016) 225.
[123] Carrera, den Hertog (n 1) 11, 21.

physical integrity and dignity, and effective remedy and the protection of personal data).[124] This is important not least since the use of force, including service weapons and ammunition, is allowed for Frontex officers participating in operations.[125]

According to the 2019 Frontex Regulation, Frontex will be subjected to more oversight obligations to uphold fundamental rights than what was previously the case. The EU's more recent data protection laws will be applied, since Frontex processes rising volumes of personal data. The individual Complaints Mechanism, in which a Fundamentals Rights Officer (FRO) receives and handles complaints, is to be strengthened. For instance, the executive director of Frontex now will have to justify his or her decisions with regard to an individual complaint. The scope has been expanded to actions in third countries and to 'failures to act'. However, it has been assessed that all in all, the Complaint Mechanism entails an internal procedure conducted by internal bodies, and therefore it lacks independence.[126] It has been suggested that one way of making it stronger is to allow appeal against decisions by the FRO to the European Ombudsman or an independent complaints commission.[127]

With the entry into force of the Lisbon Treaty, the jurisdiction of the CJEU was extended to cover also the review of the legality of acts of EU agencies:[128] Frontex can be brought before the CJEU to account for the conformity of its conduct with EU law.[129] The principal direct actions available to individuals against acts of Union bodies, including Frontex, are the action for annulment according to Article 263 TFEU and the action for damages according to Article 340 TFEU. However, border management is largely consisting of 'factual conduct', as pointed out by Melanie Fink, and therefore action for annulment does not seem to be a useful avenue.[130] Fink argues that the action for damages may be the means through which to close the accountability gap that arises when EU administration is delivered in the form of informal or factual conduct, at least as long as there are no good alternatives internally or externally.[131] It remains to be seen how this will play out.[132]

Turning to other possible accountability mechanism than purely legal avenues, the European Ombudsman (who urged Frontex to establish a complaint mechanism in 2013 and continued to monitor Frontex) is pivotal.[133] The Ombudsman has a mandate to inquire into cases of maladministration by EU institutions, bodies, offices, and agencies,[134] and has an important role in overseeing and ensuring the respect of fundamental rights of migrants.[135]

---

124 EU Charter art. 51, 2019 Frontex Regulation art.80. Carrera, Stefan, *Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective Remedies for Victims of Human Rights Violations?* (n 20) 23.
125 2019 Frontex Regulation, art 82 and Annex V.
126 ibid; Jari Pirjola, 'Complaint mechanism during return flights The European border and Coast Guard Agency' in Sergio Carrera, Marco 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) 223.
127 Pirjola (n 126) 229.
128 TFEU, art 263. Gkliati (n 22) 25.
129 Melanie Fink, 'The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable' (2020) 3 (21) German Law Journal , 532.
130 Fink (n 29).
131 ibid 533, 548.
132 Gkliati (n 22) 7.
133 Carrera, Stefan, 'Human rights complaints at international borders or during expulsion procedures International, European, and EU standards' (n 61) 240.
134 TFEU, arts 20, 24, 228, EU Charter, art 43.
135 Carrera, Stefan, 'Human rights complaints at international borders or during expulsion procedures International, European, and EU standards' (n 61) 265.

Finally, it is useful for the purposes of this text to mention, concerning accountability of the Frontex officers that are deployed to national authorities, that these remain subject to the national institution with which they are affiliated.[136]

4 THE COAST GUARD IN SWEDEN

The aim of this section is to attempt to describe the role of the Coast Guard, and the accountability aspects related to the Coast Guard's maritime border surveillance activities for the purpose of attempting to establish whether the EU rules undermine the accountability. First, the regulatory framework and the actors that apply the multilevel rules related to border control issues in Sweden are (briefly) described, and, second, an overview of accountability mechanisms is made and discussed.

There is no single border or immigration authority in Sweden. The police authority is the main responsible for border control of persons in Sweden. The core legal provisions governing the police authority are the Police Act (1984:387), the Ordinance (2014:1102) containing instructions for the Police Authority, and the Police Ordinance (2014:1104). These acts and ordinances do not include provisions on border surveillance. The rules on border control of persons are found in the Aliens Act (2005:716): In Chapter 9 sec. 1 in the Aliens Act it is stated that the police authority is responsible for the border control of persons in accordance with the Schengen Borders Code, with the assistance of the Customs Authority, the Coast Guard and the Migration Agency. It is made clear in Chapter 9 sec. 2 in the Aliens Act that the Coast Guard has the same rights as a policeman when carrying out border checks.

The Migration Agency is the main authority assessing applications for asylum and permits to stay in Sweden and takes decisions in such cases. In certain cases, which can be assessed as 'evident', also the Police can take rejection decisions (but never when the person in question has applied for asylum).[137]

The Central Border Management Division (within the Swedish National Bureau of Investigations) of the police authority is the Frontex National Point of Contact. The Police is also responsible for the EUROSUR National Coordination Center (NCC), but the Coast Guard participates in the NCC.[138] Both the Police and the Coast Guard are included in the Frontex list of national authorities.[139]

However, the authority in charge of the 'control of the maritime traffic'[140] is the Coast Guard,[141] and, as mentioned, it assists the Police with border control and border checks. (The scope of the term maritime traffic has been discussed in Swedish Government Reports, for instance in 2004[142] and 2008).[143] The Coast Guard is a civilian authority, operating under the

[136] Carrera, Stefan, 'Introduction Justicing Europe's frontiers: effective access to remedies and justice in bordering and expulsion policies' (n 27) 19.
[137] Aliens Act (2005:716) chap. 8 sec. 17.
[138] The Coast Guard's Annual Report (Kustbevakningens årsredovisning) 2018 (28) and 2019 (43)
[139] Frontex webpage <https://frontex.europa.eu/partners/national-authorities/a> accessed 5 April 2020.
[140] In Swedish: 'sjötrafik'.
[141] Aliens Act (2005:716) sec. 9.1.
[142] Swedish Government Report SOU 2004:110.
[143] Swedish Government Report SOU 2008:55.

Ministry of Justice. It is responsible for a broad range of issues, like fisheries inspection, environmental protection and search and rescue (SAR).[144]

The Coast Guard exercises 'maritime surveillance'[145] in accordance with the Ordinance with an instruction for the Coast Guard.[146] In the latest version of the Ordinance it is made clear in sec. 1 that the Coast Guard is responsible for maritime surveillance and Search and Rescue (SAR), but maritime surveillance is not explicitly defined. In sec. 15 it is stated that the Coast Guard is tasked to coordinate civilian needs of 'maritime surveillance' and transfer civilian 'maritime information' to concerned authorities. The Coast Guard's National Strategy for Maritime Surveillance 2016 (elaborated by the Swedish Coast Guard in cooperation with several other authorities) clarifies that the involved authorities have arrived at a joint interpretation of 'maritime surveillance', which *inter alia* includes that maritime surveillance is a systematic surveillance of marine and maritime objects and activities, including monitoring, information gathering and analysis of relevant information.[147]

Besides vessels and boats, the Coast Guard has three advanced aircraft (Dash 8 Q-300) for maritime surveillance, as well as a range of other kinds of technological equipment.

It is of interest to examine the term border surveillance in the national context a bit further: The term border surveillance[148] has earlier been reserved for the application of the Act 1979:1088 on Border Surveillance in Wartime. In a Government Report 2002 the term border surveillance[149] was discussed.[150] It was stated in the report that there is no single provision in the Swedish legal system that lays down the difference between border surveillance and border control.[151] The conclusion in the report is that based on the then applicable legal provisions, border surveillance can be described as surveillance that has been coordinated according to the provisions in the Act on Border Surveillance in Wartime, with *inter alia* the purpose of preventing crime against the security of the nation. However, as clarified above, the term border surveillance is now used in the supranational EU provisions; the current Swedish translation of the Schengen Borders Code includes the term 'border surveillance' (Swedish: 'gränsövervakning') and a definition of it.

Before 2015 there was no national legal provision mentioning that provisions on border control of persons crossing the internal and external borders could be found in the Schengen Borders Code. In Government Bill 2014/15:32 it was proposed that a new section should be inserted in the Aliens Act, explicitly referring to the Schengen Borders Code. In 2015 such a provision was inserted into the Aliens Act in chap. 1 sec. 16.

Furthermore, it is not completely out of place to mention that there are also national rules related to territorial integrity of Sweden. The Ordinance (1982:756) concerning Intervention by Defence Forces in the event of Violations of Swedish Territory in Peacetime

---

144 The Coast Guard also assists the Police in checks on the 'foreigners' staying in Sweden, Aliens Act (2005:716) chap. 9, sec. 9.
145 In Swedish: 'sjöövervakning'.
146 Ordinance with an instruction for the Coast Guard (2019:84).
147 In Swedish: 'Sjöövervakning är en systematisk övervakning av marina och maritima objekt, aktiviteter och skeenden för att skapa en sjölägesbild. Sjöövervakning omfattar insamling, bearbetning, analys, förmedling av sjöläges- och sjöinformation. Syftet är att samordna och inrikta resurser effektivt'.
148 In Swedish: 'gränsövervakning'.
149 ibid.
150 Swedish Government Report SOU 2002:4.
151 In Swedish: 'gränskontroll'.

and in Neutrality etc. (IKFN Ordinance) (applicable in peace time)[152] states that the Defence Forces are the main responsible for detecting violations of the Swedish territory.[153] According to secs. 28-34 in the IKFN Ordinance, the Defence Forces can assist in the control of the maritime traffic. There are no provisions explicitly mentioning 'surveillance' or 'border surveillance' in the IKFN Ordinance. In a 2002 Government Report[154] it is emphasised that the Defence Forces actions according to the IKFN Ordinance do not fall within border control.[155] Instead such actions are regarded as control of admission.[156]

On the same note, it could be of interest to mention that the cooperation between the Coast Guard and the Marine has been discussed extensively at government level, for instance in the Government Bill 'The New Defense',[157] where it was stated that the division of responsibilities should be clarified. It was suggested in the Government Report 'Maritime Cooperation' 2012 that the Coast Guard and the Marine should be joined to a common Sea Defense (along the lines of the Norwegian model).[158] The Swedish Government has not proceeded along those lines. The purpose of describing these aspects related to 'military border surveillance' is to show that also in Sweden there are other actors involved in (what is also termed) border surveillance, but who are not, or are not seen as, participating in in the implementation of the Schengen acquis and remain exempt from its legal obligations and scrutiny systems.[159] However, it is interesting to note that the exchange and cooperation in the field of maritime surveillance between the Marine and the Coast Guard seemingly is not that extensive.[160]

Returning to the activities of the Coast Guard, it can be noted that the Coast Guard, as mentioned, can take certain 'control' decisions according to the Aliens Act. Examples of this are taking a person (foreigner) into custody (the decision by the Coast Guard in such a case must as soon as possible be assessed by the Police),[161] subjecting a person to a personal search, investigating luggage, and requiring a person, under certain circumstances, to present the passport or other documents to the Coast Guard.[162] A Coast Guard official is allowed to use a certain amount of force when exercising her or his 'control activities'.[163]

---

152 Ordinance (1982:756) concerning Intervention by Defence Forces in the event of Violations of Swedish Territory in Peacetime and in Neutrality (IKFN Ordinance). In Ordinance (1982:314) there are provisions on the Defence Forces' use of the Coast Guard under reinforced alert and war time.
153 IKFN Ordinance (n 152) sec. 3.
154 Swedish Government Report 2002:4 (n 150).
155 In Swedish: 'gränskontroll'.
156 In Swedish: 'tillträdeskontroll', which is dealt with in the Ordinance (1992:118) concerning the Admission to Swedish Territory of Foreign State Vessels and State Aircraft (Admission Ordinance).
157 Swedish Government Bill 1999/2000:30.
158 Swedish Government Report SOU 2012:48.
159 Carrera, Stefan, *Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective Remedies for Victims of Human Rights Violations?* (n 26) 19.
160 Niklas Wiklund, [*Övervakning av svenskt sjöterritorium Rationell samverkan eller vattentäta skott?*] (Surveillance of Swedish Sea Territory: Rational cooperation or separate lanes?), Bachelor thesis (Lund University 2018).
161 Aliens Act (2005:716) chap. 10, sec. 17.
162 Aliens Act (2005:716) chap. 9.
163 Coast Guard Act (2019:32) chap. 6 sec. 2, Chap. 2 sec. 4.

4.1 THE ACCOUNTABILITY OF THE COAST GUARD

Applying the framework elaborated on above regarding accountability, the mechanisms of interest are, first, possible internal instruments, and, second, external avenues, both legal and other institutions.

The first level, an internal oversight body within the authority, is missing. There is a council (Insynsråd) connected to the Coast Guard, and but it does not engage in, or follow up, individual cases or decisions. The Council gives advice to the leadership of the Coast Guard and its members are appointed by the Swedish Government.

Turning to external avenues, first, it is necessary to describe the possibilities to appeal decisions by the Coast Guard. As mentioned, the Coast Guard is a public authority. In general decisions by a public authority are appealed to an administrative court (the first level constitutes of the local Administrative Court), according to rules in the Administrative Procedure Act (2017:900). However, there are several exceptions to this provision related to the activities of the Coast Guard, which is active regarding a range of substantial issues according to a number of Acts. A prominent exception is the Guard's crime combatting and maintenance of order competencies, normally police duties: The new Coast Guard Act that came into force in April 2019 meant that the Coast Guard's crime combatting and maintenance of order competences were reinforced in different ways.[164] Decisions taken within that field are appealed according to the Code of Judicial Procedure, which governs the public courts' proceedings (the first level constitutes of the local District Court). Other rules of relevance are the provisions in the Aliens Act, according to which most decisions, usually taken by the Swedish Migration Agency, on issues like deportation or refusal of entry, are appealed to the special Administrative Courts; the Migration Courts. Without exploring the Coast Guard's border surveillance activities empirically and exhaustively in this field, that is examining whether there are decisions within the field of the Coast Guard's border surveillance activities that actually have been appealed, it is clear that legal appeal avenues exist, depending on what type of decision that is concerned.

However, it can be assumed that a good deal of border surveillance activities constitutes factual conduct (cf Melanie Fink's elaboration on border management as factual conduct, in a discussion of the accountability of Frontex)[165] and therefore, it seems even more useful to investigate complaints possibilities, both at national and international level.

A national human rights institution has not yet been established in Sweden, but the issue has been debated extensively. The classification B, on the scale A-C, has been used by the Global Alliance of National Human Rights Institutions, GANHRI, for the Swedish Equality Ombudsman (DO),[166] but no institution has been classified as a 'fully compliant with the Paris Principles'. There are several government agencies whose tasks correspond in part, or are related, to the tasks that a national human rights institution should have according to the Paris Principles. Besides the Equality Ombudsman (DO), these include the Parliamentary Ombudsmen (JO), the Chancellor of Justice (JK), and the Ombudsman for

164 ibid.
165 Fink (n 129) 8.
166 Accreditation Status as of 4 March 2019, Global Alliance of National Human Rights Institutions (GANHRI).

Children (BO). In the 2017 Swedish Strategy for national efforts with human rights, [167] the Swedish Government proposed that an NHRI be established with the Parliament as a principal. However, the Parliament was of the view that a human rights institution for various reasons should not be established under the Parliament. In the Swedish 2019 Universal Periodic Review (UPR) report it was stated that the Prime Minister in 2019 had given the information that an independent institution for the protection of human rights will be established,[168] even though that is not yet the case.

Nevertheless, the Parliamentary Ombudsmen (JO) constitute an avenue for lodging a complaint by anybody who believes that he or she has been treated wrongly or unjustly by a public authority or an official employed by the civil service or local government. The Ombudsmen are appointed by the Swedish Parliament to ensure that public authorities and their staff comply with the laws governing their actions. The Ombudsmen are independent and acts outside of the division of the powers of the state, legislative, executive, and judicial.[169] The Ombudsmen can be considered as an independent institution, based on a strong constitutional mandate.[170] There have not been any 'Coast Guard cases' dealt with by the Ombudsmen of relevance for this text.

A claim can also be submitted to the Office of Chancellor of Justice, similarly, as in cases before the JO, by anybody who believes that he or she has been treated wrongly or unjustly by a public authority. The Office of the Chancellor of Justice is an independent authority and the Chancellor performs his or her duties from a strictly legal point of view.[171]

Finally, as concerns the international level, the recourse to the ECtHR, if domestic remedies have been exhausted, should be mentioned,[172] as should the possibility for individuals to lodge complaints with the Committees that monitor the implementation of UN human rights conventions, for instance with the Human Rights Committee that monitors the implementation of the International Covenant on Civil and Political Rights (ICCPR).

Finally, as regards recourse to the CJEU for individuals, there is no direct recourse when it comes to border surveillance conducted by the Swedish Coast Guard, including when the Coast Guard is implementing the binding EU regulations on border surveillance. However, the instrument of preliminary rulings provides an indirect recourse when the Coast Guard is implementing EU law, which *inter alia* serves the purpose of securing legal unity: According to art. 267 TFEU the courts and tribunals of the member states may refer a question to the CJEU on the interpretation or validity of EU law where they consider that a

167 Strategy for National Efforts with Human Rights, 2017.
168 National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21 (2019) A/HRC/WG.6/35/SWE/1.
169 cf Pirjola (n 126) 226.
170 ibid.
171 The webpage of Office of Chancellor of Justice <https://www.jk.se/other-languages/english/> accessed 5 April 2020.
172 It can be noted that on 1 October 2018 Protocol No. 16 to the ECHR entered into force, which allows the highest national courts to ask the ECtHR for advisory opinions in pending cases before them regarding the rights and freedoms defined in the Convention or the protocols thereto. The new procedure resembles to a certain extent the preliminary ruling procedure of the CJEU. Sweden has not yet ratified the Protocol (as of 10 June 2020).

decision of the Court on the question is necessary to enable them to give judgment.[173] A question concerning interpretation cannot concern the national rules; it must concern the EU rules. With regard to references for a preliminary ruling concerning the interpretation of the EU Charter, under art. 51(1) of the EU Charter, the provisions of the Charter are addressed to the member states only when they are implementing EU law.[174] It must be clear from the request for a preliminary ruling that a rule of EU law other than the Charter is applicable to the case. The individual cannot by himself or herself involve the CJEU in a specific case since it is for the national court to make the decision to refer a case to the CJEU, not the individual. The question of whether an ombudsman can refer a preliminary question to the CJEU is of interest here. Generally member states' ombudsmen issue recommendations which are not legally binding on the public authorities in question. Therefore, they are not – generally – considered as courts or tribunals for the purposes of art. 267 TFEU. However, whether an ombudsman could fulfil the criteria and be considered courts or tribunals for the purposes of art. 267 TFEU, and can refer preliminary questions to the CJEU, will need to be considered on a case-by-case basis.[175] In a case involving an Austrian Environment Ombudsman (Umweltanwalt) the CJEU has concluded that it was a legally established, permanent and independent body with compulsory jurisdiction which applies rules of law.[176] The Swedish JO would seemingly not qualify as a court for the purposes of art. 267, taking into account its legally non-binding decisions. In sum, based on the individual accountability concept applied in this contribution, the instrument of preliminary rulings does not seem to constitute a 'strong' accountability avenue.

5 CONCLUDING COMMENTS

An attempt at tentative concluding comments is made here.

Ever since the Schengen rules were incorporated into EU law in 1999 through the Amsterdam Treaty, numerous policy initiatives, and changes in the EU legislation, have been presented. The point of the above account of the developments regarding the EU rules is to show that there has been a gradual development towards the EU supranational rules, but that the 'sovereignty dimension' and the 'human rights dimension' have created tensions and have influenced both the development of the treaties and secondary legislation. However, the 'de-pillarisation' in the post-Lisbon Treaty era allows for a new cross-sectoral alliances – although there are still legal boundaries – and a different mindset that results in other actors emerging and exercising influence.[177]

---

[173] TFEU, art 267: 'The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
(a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union; Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. […]'.

[174] Court of Justice of the European Union, Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings [2018] 2018/C 257/01 2.

[175] Jaime Rodriguez-Medal, 'Concept of a court or tribunal under the reference for a preliminary ruling: who can refer questions to the Court of Justice of the EU?' (2015) 8 European journal of legal studies 1, 135-136.

[176] C-205/08 *Umweltanwalt von Kärnten v Karntner Landesregierung* [2009] ECLI:EU:C:2009:767, para 36.

[177] Carrera, den Hertog (n 1) 22.

As concerns the definitions of maritime border surveillance in the EU regulations discussed above, the following can be noted: The definition and scope of 'border surveillance' are not identical in the legally binding EU regulations; the Schengen Borders Code, and Regulation 656/2014. The 'core' border surveillance definition is included in the Schengen Borders Code. A wider scope of 'border surveillance of maritime borders' in the EU is found in Regulation 656/2014. The fact that border surveillance according to that Regulation encompasses detection, interception, including on the high seas, and even SAR, can be seen as a complicating factor conceptually – even though the Regulation is limited to the scope of being applied in Frontex joint operations concerning maritime surveillance. It can be noted that from a pragmatic view the wide scope is perhaps not of a great interest in the Baltic Sea, since the large joint sea operations that have attracted much attention in the Mediterranean have not been used in the Baltic Sea. If they would, the integrated approach of the Swedish Coast Guard, in that it has responsibilities both for border surveillance and SAR, could be useful. In this context it can be noted that it might be a challenge for Frontex to execute border surveillance of varying scope, for different reasons, such as issues related to resources and expertise, as it would also for some national authorities. When trying to pinpoint what EU 'maritime border surveillance' actually encompasses, Advocate General Mengozzi's statement comes to mind: that surveillance is defined in the Schengen Borders Code essentially through its objectives and that the definition sets out a particularly broad concept, capable of encompassing any measure aimed at avoiding or preventing circumvention of border checks,[178] and that the concept of surveillance must be interpreted in a dynamic and flexible manner.[179]

In this context it is interesting to note that in Sweden the concept 'maritime surveillance', which does not entirely correspond to the (different) EU concepts, is part of a legal Ordinance, adopted at state level. Furthermore, the involved authorities in Sweden have arrived at a joint interpretation of 'maritime surveillance'.

At this point it seems appropriate to return to the research question: How does EU law, and the instruments that are directly applicable in the member states, impact on the accountability of the Swedish Coast Guard in the field of maritime border surveillance?

The article has given an overview of the division of competencies, and accountability possibilities, at EU level and the national level in Sweden.

Concerning the answer to the question whether multi-level regulation promote or undermine accountability accessible for individuals, it is to some extent dependent on which concept of accountability one holds.[180] Applying the concept of accountability that I have chosen, seemingly an overarching conclusion of the investigation above of the Coast Guard and the multilevel context in which its activities are performed, both concerning rules and actor, is that the existence of a range of accountability avenues regarding the Coast Guard's activities is at hand, accessible also for third-country nationals. On the face of it, this could seem satisfactory with two important reservations: first, the *regulatory* framework regarding maritime border surveillance and the *existence* of accountability mechanisms have been described above, with just some pieces of empirical information on actual 'cases', and,

[178] Opinion of AG Mengozzi (n 103).
[179] ibid.
[180] Reinold, Heupel (n 9).

second, as soon as more actors are involved in the operations, the conditions for accountability could change drastically.

Regarding the former reservation, theoretically, the reasoning often heard in connection with Mediterranean states and border surveillance could also be applied to Sweden: Maritime border surveillance takes place on out-of-sight locations (where for instance physical integrity could be at risk),[181] as well as through technological means (where for instance the protection of personal data could be at risk), and, in most cases, if a person is no longer in the territory of the concerned state, the initiation of an accountability procedure could be less easily accessible.[182]

Regarding the latter reservation, one important conclusion is that increasing involvement of additional actors (Frontex, other member states, third states), which takes place in accordance with the multilevel rules, decreases accountability possibilities, in the sense that it would make it more difficult for the individual to address the 'right' actor. The attempt to answer the research question has shed further light on the fragmentation caused by the complex multi-actor landscape related to maritime border surveillance in the EU, a fact which apparently impact the accountability.

Frontex has become one of the major players in European external border management. and the importance of the accountability of Frontex is increasing. While member states can be held accountable before their own national courts and before international courts, neither of these options are available in relation to Frontex. It can be brought before the CJEU to account for the conformity of its conduct with EU law, but in practice this does not, for different reasons, such as the limited actions available to individuals, play an important role, as things stands today.[183]

[181] Giuseppe Campesi, 'Police accountability and human rights at the Italian borders' in Sergio Carrera, Marco 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) 137.
[182] Drakopoulou, Konstantinou and Koros (n 28) 159.
[183] Fink (n 129) 532.

LIST OF REFERENCES

Bache I and Flinders M, *Multi-level governance* (OUP 2004)
DOI: https://doi.org/10.1093/0199259259.001.0001

Bigo D, *Police en Réseaux: l'Expérience Européenne* (Press de Science Po. 1996)

Bossong R, *The Expansion of Frontex Symbolic Measures and Long-term Changes in EU Border Management* (Stiftung Wissenschaft und Politik/ German Institute for International and Security Affairs 2019)
DOI: https://doi.org/10.18449/2019C47

Campesi G, 'Police accountability and human rights at the Italian borders' in Carrera S and Stefan M (eds), *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union Complaint Mechanisms and Access to Justice* (Routledge 2020)
DOI: https://doi.org/10.4324/9780429203275

Carrera S and den Hertog L, 'Whose Mare? Rule of Law Challenges in the Field of European Border Surveillance in the Mediterranean', Liberty and Security (2015) No. 79 January, Centre of European Policy Studies

Carrera S, Blockmans S, Cassarino J-P, Gros D and Guild E, *The European Border and Coast Guard: Addressing Migration and Asylum Challenges in the Mediterranean?* (2017) Centre for European Policy Studies

Carrera S and Stefan M, *Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective Remedies for Victims of Human Rights Violations?* (2018) Centre for European Policy Studies

Carrera S and Stefan M, 'Introduction Justicing Europe's frontiers: effective access to remedies and justice in bordering and expulsion policies' in Carrera S and Stefan M (eds), *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union Complaint Mechanisms and Access to Justice* (Routledge 2020)
DOI: https://doi.org/10.4324/9780429203275

Carrera S and Stefan M, 'Human rights complaints at international borders or during expulsion procedures International, European, and EU standards' in Carrera S and Stefan M (eds), *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union Complaint Mechanisms and Access to Justice* (London Routledge 2020)
DOI: https://doi.org/10.4324/9780429203275

Chowdhury N and Wessel R A, 'Conceptualising Multilevel Regulation in the EU: A Legal Translation of Multilevel Governance?' (2012) 18 European Law Journal 3
DOI: https://doi.org/10.1111/j.1468-0386.2012.00603.x

Craig P and de Burca G, *EU Law: Text, Cases and Materials* (OUP 2003)

Daase C, 'Security, Intervention, and the Responsibility to Protect: Transforming the State by Reinterpreting Sovereignty' in Leibfried S, Huber E, Lange M, Levy J D, Nullmeier F and Stephens J D (eds), *The Oxford Handbook of Transformations of the State* (OUP 2015)

Damen M, 'Accountability in a multilevel setting: Cohesion Policy', Paper presented at Regional Studies Association European Conference (2013)

Krisch N, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (OUP 2010)
DOI: https://doi.org/10.1093/acprof:oso/9780199228317.001.0001

Drakopoulou A, Konstantinou A and Koros K, 'Border management at the external Schengen Borders: Border controls, return operations, and obstacles to effective remedies in Greece' in Carrera S and Stefan M (eds), *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union Complaint Mechanisms and Access to Justice* (Routledge 2020)
DOI: https://doi.org/10.4324/9780429203275

Fernández Rojo D, 'It's a new agency. It's a federal agency. It's the European Border Coast Guard! No wait… it's Frontex' (2017) EU Law Enforcement, available at: <https://eulawenforcement.com/?p=267> (Accessed 5 April 2020)

Fink M, 'The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable' (2020) 21 German Law Journal 3
DOI: https://doi.org/10.1017/glj.2020.20

Føllesdal A, 'Epilogue: Toward More Legitimate Multilevel Regulation' in Føllesdal A, Wessel R A and Wouters J (eds), *Multilevel regulation and the EU: The interplay between global, European, and national normative processes* (Martinus Nijhoff Publishers 2008)

Gkliati M, 'A Nexus Approach to the Responsibility of the European Border and Coast Guard: From Individual to Systemic Accountability' (2018) SSRN Electronic Journal, <https://ssrn.com/abstract=3118551> accessed 15 April 2020
DOI: https://doi.org/10.2139/ssrn.3118551

Guiraudon V, 'European and Integration Policy: Vertical Policy Making as Venue Shopping' (2000) 38 Journal of Common Market Studies 2
DOI: https://doi.org/10.1111/1468-5965.00219

Gustafsson Å, The Baltic Sea Region Border Control Cooperation (BSRBCC) and border management in the Baltic Sea region: A case study (2018) 98 Marine Policy
DOI: https://doi.org/10.1016/j.marpol.2018.09.028

Heidbreder E G, 'Multilevel Elements of EU Migration Policy' (2014) 2 King Project-Political Science Unit, In-depth Study

Hooghe L and Marks G, *Multi-level Governance and European Integration* (Rowman & Littlefield 2001)

Hooghe L and Marks G, 'Types of multi-level governance' in Enderlein H, Wälti S and Zürn M (eds), *Handbook on multi-level governance* (Edward Elgar 2010)

Isiksel T and Thies A, 'Changing subjects: Rights, remedies and responsibilities of individuals under global legal pluralism' (2013) 2 Global Constitutionalism
DOI: https://doi.org/10.1017/S2045381713000117

Jacobsson M, 'Maritime Security: an Individual or Collective Responsibility?' in Petman J M and Klabbers J (eds) *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Martinus Nijhoff 2003)

Jenness V, Smith D A and Stepan-Norris J, 'Taking a Look at Surveillance Studies' (2007) 36 Contemporary Sociology: A Journal of Reviews 2
DOI: https://doi.org/10.1177/009430610703600201

Jumbert Gabrielsen M, 'Controlling the Mediterranean Space through Surveillance: The Politics and Discourse of Surveillance as an All-Encompassing Solution to EU Maritime Border Management Issues' (2012) 3 Espace Populations Sociétés 35
DOI: https://doi.org/10.4000/eps.5272

Maurer A and Parkes R. *Democracy and European Justice and Policies under the Shadow of September 11* (Stiftung Wissenschaft und Politik/ German Institute for International and Security Affairs, Working Paper 2005)

Miller L, *The Emergence of EU Contract Law: Exploring Europeanization* (Oxford University Press 2011)
DOI: https://doi.org/10.1111/eulj.12038_3

Monar J, 'The External Shield of the Area of Freedom, Security and Justice: Progress and Deficits of the Integrated Management of External EU Borders" in de Zwaan J and Goudappel F A N J (eds), *Freedom, Security and Justice in the European Union: Implementation of The Hague Programme* (T.M.C. Asser Press 2006)

Mungianu R, *Frontex and Non-Refoulement. The International Responsibility of the EU* (CUP)

Nollkaemper A and Curtin D, 'Conceptualizing Accountability in International and European Law' (2007) 36 Netherlands Yearbook of International Law

Nollkaemper A, Wouters J and Hachez N, 'Accountability and the Rule of Law at International Level' (2008) Policy brief

OSCE, Guidebook on Democratic Policing, by the Senior Police Adviser to the OSCE Secretary General (2008)

Panara C, 'Multi-Level Governance as a Constitutional Principle in the Legal System of the European Union' (2016) 16 Croatian and Comparative Public Administration 4
DOI: https://doi.org/10.31297/hkju.16.4.7

Peers S, 'Immigration and Asylum' in Bernard C and Peers S (eds), *European Union Law* (OUP 2014)

Piattoni S, *The Theory of Multi-level governance: Conceptual, Empirical, and Normative Challenges* (OUP 2010)
DOI: https://doi.org/10.1093/acprof:oso/9780199562923.001.0001

Pirjola J, 'Complaint mechanism during return flights The European border and Coast Guard Agency' in Carrera S and Stefan M (eds), *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union Complaint Mechanisms and Access to Justice* (Routledge 2020)
DOI: https://doi.org/10.4324/9780429203275

Reinold T and Heupel M, 'Introduction: The Rule of Law in an Era of Multi-level Governance and Global Legal Pluralism' in Reinold T and Heupel M (eds), *The Rule of Law in Global Governance* (Palgrave Macmillan 2016)

Rodriguez-Medal J, 'Concept of a court or tribunal under the reference for a preliminary ruling: who can refer questions to the Court of Justice of the EU?' (2015) 8 European journal of legal studies 1

Rosenfelt H, 'Establishing the European Border and Coast Guard: all-new or Frontex reloaded?' (2016) EU Law Analysis

Thym D, 'Legal framework for entry and border controls', in Hailbronner K and Thym D (eds), *EU immigration and asylum law – a commentary* (C.H. Beck/Hart/Nomos 2016)

von Arnauld A and Buszewski S, 'Modes of Legal Accountability: The Srebrenica Example' (2013) 88 Die Friedens-Warte ¾ 15

Wessel R A and Wouters J, 'The phenomenon of multilevel regulation: Interactions between global, EU and national regulatory spheres' in Føllesdal A, Wessel R A and Wouters J (eds), *Multilevel regulation and the EU: The interplay between global, European, and national normative processes* (Martinus Nijhoff Publishers 2008)

Wiklund N, *Övervakning av svenskt sjöterritorium Rationell samverkan eller vattentäta skott?* (Surveillance of Swedish Sea Territory: Rational cooperation or separate lanes?), Bachelor thesis (Lund University 2018)

Wolff S, 'EU Integrated Border Management Beyond Lisbon: Contrasting Policies and Practice' (Clingendael European Studies Programme 2009)

A MATTER OF (A)POLITICAL INTERPRETATION: SOME REFLECTIONS ON CASE C-457/18 *SLOVENIA V CROATIA*

DAVOR PETRIĆ*

This contribution reflects on the EU law side of the story of Slovenia and Croatia's border dispute. It discusses some of the key parts of the Advocate General's opinion and the Court of Justice's judgment in this case, including the issue of the scope of EU law, the status of international law in EU law, the interpretation of international law for the purposes of EU law adjudication, and the rule of law dimensions of the border dispute between the two neighbouring Member States. It also offers some general remarks on the nature of legal scholarship that can be read as a response to some of the academic commentary of this case.

1 INTRODUCTION

On the day the European Union (EU) was bidding adieu to its 47-years long Member, the Court of Justice of the EU (CJEU, the Court) delivered a ruling that somewhat flew under the radar of the EU legal and political audience save for the two neighbouring Member States of the Union's southeast.[1] The dispute involved Slovenia alleging Croatia's violation of EU law, the violation stemming from the latter's refusal to accept the Arbitral Award settling the longstanding border dispute between the two.[2] It is one of the extremely rare 'Member State versus Member State' infringement actions, unique moreover for having strong elements of territoriality – borders and territorial application of law – at its heart. As such, it might have 'some substantial precedent-setting characteristics'.[3] The Court eventually rejected the jurisdiction to decide on this matter. Thirty years old quarrel between the two neighbours thereby failed to reach its conclusion, thus prolonging what some may see as the 'Balkanization' of the Union's political scene.[4]

---

*Assistant Lecturer and PhD Candidate at the Department of European Public Law, University of Zagreb (Croatia). Email: dpetric@pravo.hr; orcid.org/0000-0001-7737-2150. I am thankful to NJEL editors and anonymous reviewer for their helpful comments and suggestions. The usual disclaimer applies.

1 Case C-457/18 *Slovenia v Croatia* EU:C:2020:65.

2 The Permanent Court of Arbitration, Final Award of 29 June 2017, *PCA Case No. 2012-04 in the Matter of an Arbitration under the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, signed on 4 November 2009*, available at <www.acerislaw.com/wp-content/uploads/2017/07/PCA-Arbitration-Between-Slovenia-and-Croatia.pdf>.

3 Thomas Bickl, 'CJEU judgement on Slovenia v Croatia: What role for international law in EU-accession dispute settlement?' (*The NCLOS Blog*, 18 February 2020), available at <site.uit.no/nclos/2020/02/18/cjeu-judgement-on-slovenia-v-croatia-what-role-for-international-law-in-eu-accession-dispute-settlement/>.

4 With 'Balkanization', I do not mean what is usually taken under this term, that is, a breakup (often aggressive, even violent) of a whole into smaller (conflicting) pieces. See Robert W. Pringle, 'Balkanization', *Encyclopædia Britannica*, available at <www.britannica.com/topic/Balkanization>. Rather, with this term I simply refer to the 'tainting' of the EU affairs with what is seen as a parochial, primitive, senseless, irrational quarrel between those of the Balkan Other, 'down under' from the peaceful, progressive, civilised democracies of *Mitteleuropa* (or Western Europe). cf Slavoj Žižek, *The Fragile Absolute* (Verso 2000) 3-5.

This contribution comments on the Court's judgment and the Advocate General's (AG) opinion in this case, as well as the academic responses to these two. Following the introductory remarks and historical overview (section 2), its central part (section 3) covers some of the most important points that appear throughout these sources; namely, the scope of EU law (subsection 3.a); the nature of international law and its status in EU law (subsections 3.b and 3.c); the interpretation of international law for the purposes of EU law (subsection 3.d); the 'political' interpretations of law by different institutional actors in the EU legal community (subsection 3.e); and the rule of law dimensions of the dispute between Slovenia and Croatia (subsection 3.f). On all these counts, my assessment of the outcome of the case is favourable. Finally, going beyond what would be a mere commentary of the present case, this contribution concludes with several remarks on the nature of (EU) legal scholarship in general (sections 4 and 5). Through them, I try to present a dialectical and politically engaged approach to discussing contemporary legal problems, which at times ends up in reasonable interpretive disagreements, as nothing scandalous, notwithstanding how dreadful it may sound for the mainstream view.

But before all this, for those uninvolved or uninterested in Slovenia and Croatia's border affair, it might be worth reminding briefly in the following section: where did it all come from?

2 BACKGROUND

After the breakup of ex-Yugoslavia, newly independent countries found themselves with some of their borders undefined. During the socialist regime, after all, this was not seen as an issue since 'It [was] all Yugoslavia'. Efforts by Slovenia and Croatia in trying to resolve their border dispute roughly split into three decade-long periods following their independence. During the first decade (1990s), two countries tried with diplomacy and attempted to negotiate a bilateral agreement, but to no avail.[5]

The second decade (2000s) was marked by Slovenia's entry into the EU and Croatia's protracted accession negotiations. During this period, bargaining positions regarding the means of settling the dispute solidified: whereas Croatia proposed the UN Tribunal for the Law of the Sea or the International Court of Justice (ICJ) as its preferred adjudication forum, Slovenia insisted on ad hoc arbitration. Both sides were perfectly logical in their position when applicable law comes to mind. Croatian choice of international tribunals that would first and foremost apply *international law*, which at first glance favoured its arguments; Slovenian choice of arbitration tribunal that would apply *law and principles agreed upon by the parties* (such as equity and good neighbourliness), which left more room for a decision in its favour. When the agreement on the adjudication forum proved to be evasive, being the EU Member State Slovenia played its strongest card: it kept blocking Croatia's progress in the EU accession negotiations and pulled

[5] For a detailed overview of the history and the present of the border dispute between the two, see Thomas Bickl, *The Border Dispute between Croatia and Slovenia. The Stages of a Protracted Conflict and its Implications for EU Enlargement* (PhD Thesis, University of Duisburg-Essen), available at <duepublico2.uni-due.de/servlets/MCRFileNodeServlet/duepublico_derivate_00070268/Diss_Bickl.pdf>.

back only after Croatia gave in and signed the Arbitration Agreement.[6] This historically unprecedented move of using the EU membership status to force the settlement of a bilateral issue vis-à-vis a candidate country found little understanding or support on the part of other EU countries and institutions.[7]

In the third decade (2010s), Croatia finally acceded to the EU. The Arbitration Tribunal started its proceedings. The proceedings were disrupted after the 2015 'Arbitration-gate', in which the media leaked ex parte communications between Slovenian arbiter and Slovenian government's agent. Croatia immediately announced its withdrawal from any further proceedings before the Tribunal. It claimed that Slovenia committed a grave procedural misconduct that resulted in a material breach of the Arbitration Agreement, which allowed it to terminate and withdraw from the ongoing arbitration. However, the Tribunal disagreed. It 'reconstituted' itself with the Partial Award,[8] and decided to continue and complete the proceedings. It rendered the Final Award in 2017, which Croatia to this day refuses to accept.

3 ENTER EU LAW

Hence, nowadays Slovenia and Croatia, both being EU Member States, still dispute their border limitations despite repeated attempts to resolve them though diplomacy and arbitration, and despite 'It is now all EU'.[9] But, precisely since 'it is now all EU', Slovenia decided to pursue legal path opened to it within the framework of EU law. Based on Article 259 of the Treaty on the Functioning of the EU (TFEU),[10] Slovenia launched an infringement action against Croatia for alleged breaches of EU law that stem from the violations of international law, that is, Croatia's rejection of the final arbitral award. In this procedure, as a first step the suing Member State has to alert the European Commission to hear its position on the alleged breaches of EU law by the sued Member State. Since Commission remained silent during the three months period left to it to respond to Slovenia's arguments and brought no action before the CJEU against Croatia –

---

[6] Text of the Arbitration Agreement is available in Vladimir Ibler, 'Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia' (2012) 49 Rad Hrvatske akademije znanosti i umjetnosti. Razred za društvene znanosti 168-172. Vladimir Ibler, Croatian academic and international law doyen, strongly criticized the Agreement for what in his view was, inter alia, a clear deviation from the norms of international law and an unequal treatment of one of the contractual parties.

[7] Bickl (n 5) 147.

[8] The Permanent Court of Arbitration, Partial Award of 30 June 2016, *PCA 166428 in the Matter of an Arbitration under the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, signed on 4 November 2009*, available at <pcacases.com/web/sendAttach/1787>.

[9] Klemen Slakonja, 'Sad je tu sve EU', available at <www.youtube.com/watch?v=8Zf8z9-vouE>.

[10] Article 259 TFEU: '1. A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union. 2. Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission. 3. The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing. 4. If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court.'

despite its Legal Service opined, in another leaked document, that Croatia indeed violated EU law[11] – Slovenia itself finally brought the matter before the Court.

The Slovenian lawsuit alleged Croatia's violations of EU primary law: more specifically, the duty of loyal cooperation from Article 4(3) of the Treaty on the EU (TEU), and the principle of rule of law from Article 2 TEU; as well as EU secondary law with territorial application: several regulations and directives in the area of common fisheries policy and cooperation on border control.[12] In Slovenia's view, all these violations of EU law stemmed from Croatia's refusal to accept and implement the final arbitral award that claims to settle the border between the two.

In his Opinion published in December 2019, AG Pikamäe advised the Court not to assume the jurisdiction to decide the dispute between the two Member States. In his view, the violations of EU law were merely 'ancillary' to the dispute the two are having under public international law, which the Court does not have jurisdiction to resolve authoritatively in the framework of the TFEU infringement procedure.[13] In January 2020, the CJEU followed with a ruling that essentially mirrors the AG's position.

Interestingly, and perhaps somewhat surprisingly, 'Slo-Cro saga' barely received any coverage in the EU legal commentary. It received a more vivid treatment from international law scholars, at least for the time being. A thoughtful response worth mentioning that argued (predominantly) from the position of EU law was published following the AG's Opinion and few weeks before the judgment.[14] It essentially follows the arguments of Slovenian government, which were eventually rejected by the Court, as proposed by its AG. Six points of law identified in this contribution represent the most relevant and contentious parts of the AG's Opinion, which were afterwards in essence endorsed in the CJEU's judgment. In this respect, it seems fair to assume that AG Pikamäe's treatment of the legal issues at stake informed the CJEU's analysis, even where the Court stopped short of explicitly referring to the Opinion. These six points, all interrelated in fact, I now take up in turn.

3.1 WHAT IS WITHIN THE SCOPE OF EU LAW?

In order to bring in the CJEU to decide on the merits of the matter before them, Slovenia had to successfully establish that the Arbitral Award, from which spring all Croatia's alleged violations of EU primary and secondary law, is within the scope of EU law. To substantiate this claim, one could point to the EU's special role in negotiating and signing the Arbitration Agreement, as well as the reference in the Accession Treaty between the EU and Croatia.

---

[11] European Commission Legal Service, *Note for the Attention of Clara Martinez Alberola, Chef de Cabinet of the President. Follow up to the hearing on the dispute between Slovenia and Croatia*, Ares(2018)2492481 SECEM (Brussels, 14 May 2018).
[12] Summary of Slovenia's six grounds for suit are provided in Opinion of AG Pikamäe in Case C-457/18 *Slovenia v Croatia* EU:C:2019:1067, paras 53-61.
[13] The Court might have jurisdiction to deal even with this issue, as some have suggested, under the TFEU Article 273 that reads 'The Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties.'
[14] Jakob Gašperin, 'When Violations of International and EU Law Overlap: On the Lack of Jurisdiction of the ECJ in the Advocate General's Opinion in Slovenia v. Croatia' (*Verfassungsblog*, 6 January 2020), available at <verfassungsblog.de/when-violations-of-international-and-eu-law-overlap/>.

The claim that '[t]he EU was monitoring [the negotiation] process and co-signed the Arbitration Agreement as a witness', supporting the assertion that '[t]he Arbitral Award therefore at least indirectly entered the EU legal system'[15] had to be rejected for the following reason. 'To co-sign' something in this context sounds more powerful than it was. The EU, however, did not co-sign the Arbitration Agreement so that it became an EU agreement, which would obviously become part of EU law and would be subjected to different TFEU procedures regulating EU's foreign policies. The EU did not take upon any international obligation under that Agreement. Notwithstanding some engagement, the EU institutions have not acted in the capacity required by the Treaties. The then-Presidency of the Council merely signed it as a 'witness'. This cannot be equated to 'the EU co-signed it'.

Neither can the EU's 'formal involvement', albeit short of being a party to the treaty, put it in 'a special sui generis position' and make the Arbitral Award 'uniquely related with the EU', thus triggering the application of EU law, and consequently the CJEU's jurisdiction.[16] To hold otherwise would be devoid of any explanatory value. Here, one can only be reminded how, in lack of a positive argument that would successfully support a claim, resorting to vague characterizations reveals the vacuum behind the proposition in question. When it cannot be proven that X *exists* or what X *is*, shortcut to evading this effort is to claim that X is special, unique, *sui generis*. However, from these characterizations, it is left unclear what X really is.[17]

Furthermore, AG Pikamäe recalled the Court's case law that clarifies the narrow situations in which the Union can be considered as bound by international law. First are international agreements signed by the Union in accordance with the Treaty procedures that become an integral part of the EU's legal order.[18] Second are international agreements signed by the Member States in the areas of competences subsequently taken over by the Union.[19] Third are norms of customary international law that the Union must respect in the exercise of its competences.[20] Everything that falls outside of these three categories, concluded the AG, cannot be considered EU law or binding the Union; hence, the CJEU has no jurisdiction to interpret it or rule on its validity. And such is the case with the Arbitration Agreement between Slovenia and Croatia.[21]

Nevertheless, the follow-up claim bears somewhat greater weight: '[T]he Accession Treaty between the EU and Croatia, which is EU law, expressly refers to the Arbitration Agreement and the anticipated Arbitral Award with regard to (secondary) EU law […]'.[22] This certainly is

---

[15] Gašperin (n 14). Similar claim appeared in Thomas Bickl, 'The Advocate General's Opinion on Slovenia v Croatia: A proper reflection of international law and the EU's role in the Arbitration Agreement?' (*The NCLOS Blog*, 7 January 2020), available at <site.uit.no/nclos/2020/01/07/the-advocate-generals-opinion-on-slovenia-v-croatia-a-proper-reflection-of-international-law-and-the-eus-role-in-the-arbitration-agreement/>.

[16] Gašperin (n 14); Bickl (n 15).

[17] cf Robert Schütze's criticism of the explanatory value of the 'sui generis' theory of the EU's (federal) nature, in Robert Schütze, *European Constitutional Law* (CUP 2015) 63-65.

[18] Opinion of AG Pikamäe (n 12), para. 104, referencing Case C-266/16 *Western Sahara Campaign UK* EU:C:2018:118, paras 45-46.

[19] ibid, referencing Case C-301/08 *Bogiatzi* EU:C:2009:649, para 33 and Case C-366/10 *Air Transport Association of America and Others* EU:C:2011:864, para 63.

[20] ibid, referencing Case C-286/90 *Poulsen* EU:C:1992:453, paras 9-10; Case C-104/16 P *Council v Front Polisario* EU:C:2016:973, para 88; Case C-15/17 *Bosphorus Queen Shipping* EU:C:2018:557, para 45.

[21] Opinion of AG Pikamäe (n 12) paras 122-127; *Slovenia v Croatia* (n 1) para 102. For a critique, see Bickl (n 15).

[22] Gašperin (n 14).

true. However, the AG characterized the Accession Treaty's requirement to end the border dispute with Slovenia as a political condition of Croatia's accession to the EU, not a legally binding obligation imposed on it.[23] This interpretation was supported by the Commission in the proceedings before the Court,[24] and subsequently endorsed by the latter.

Accepting Croatia's argument, AG Pikamäe brought in another element of the CJEU's jurisprudence on the status of international law in the EU legal order. The Court has no jurisdiction to decide on the alleged infringements of obligations under the Treaties if those obligations are merely ancillary to another dispute (say, under international law) for which the Court also has no jurisdiction.[25] Such is the case with Croatia's alleged violations of EU primary and secondary law that are merely ancillary to the dispute under international law.[26]

The crucial point here is whether, at the moment of the Court's assessment of the matter, there existed a dispute between Slovenia and Croatia under international law to which alleged violations of EU primary and secondary law would be ancillary. To this issue I turn in the following part.

3.2 WHAT IS PENDING?

It should be noted at the outset that Slovenia's assertions are sound under the assumptions made about the finality and binding-ness of international law in question (that is, the Arbitral Award). Therefore, if one departs from this position and accepts without questioning these assumptions, the positive argument for the Court's jurisdiction to decide on alleged violations of EU law, even if they are ancillary to public international law, makes more sense. However, this is not so if one acknowledges that the issue *as a matter of international law* is not settled, the argument Croatia advanced and the CJEU and its AG seemingly accepted. Then, all arguments about the existence of a question (even ancillary) of EU law hinge on the previous settlement of international law and, absent this settlement, fail. Which raises the question whether the thing is settled or not?

Albeit there is no formal dispute pending before an international tribunal, there is a 'pending' dispute in the sense of divergent interpretations of international law. Croatia, at least, claims there exists *no* Arbitral Award that could possibly trigger any EU law obligations, or directly or indirectly, actually or potentially enter the EU legal system. Hence, the question of its alleged EU law violations is moot or hypothetical. This was one of Croatia's arguments against

[23] Opinion of AG Pikamäe (n 12) para 126; *Slovenia v Croatia* (n 1) para 103.

[24] Opinion of AG Pikamäe (n 12) para 126, footnote 58. Commission concurred that 'the text of the notes 8 and 10 of the Annex I to the Regulation 1380/2013, which reflects the content of the Act of Accession, envisages that the regime of access to coastal waters of [Croatia and Slovenia] will be applied only after the Arbitral Award […] is fully implemented'. In Commission's view, the *text* of this provision can be understood as expressing the authors' *intent* 'not to apply the access regimes with immediate effect or with automatic effect from a specified date'.

[25] Case C-132/09 *Commission v Belgium* EU:C:2010:562, referenced in Opinion of AG Pikamäe (n 12) paras 105-107; and the Court's judgment in *Slovenia v Croatia* (n 1) paras 91-92.

[26] *Slovenia v Croatia* (n 1) para 104. For some remarks on this point, see Eduardo Stoppioni, 'CJEU finds it has no jurisdiction in the Slovenia/Croatia border case' (*EU Law Live*, 3 February 2020), available at <eulawlive.com/op-ed-cjeu-finds-it-has-no-jurisdiction-in-the-slovenia-croatia-border-case-by-edoardo-stoppioni/>.

the CJEU's jurisdiction.[27] This calls for a further elaboration of international law position, to which – it should be stressed as well – I claim no particular expertise.

Slovenian government (some commentators too) repeatedly claimed that, under public international law, the Arbitral Award is final and binding.[28] In their view, there seems to be no dilemma that this is the *only* and *correct* interpretation of international law; others are dismissed as invalid or political. Well, it is still just *one possible* interpretation of international law at issue. Perhaps it is *better* or *more convincing* than the counter interpretations offered by the others, but as a matter of international law it is in no way automatically supreme to them. What do I mean by this? Public international law, although for some legal philosophers like H.L.A. Hart 'imperfect' (due to its lack of 'secondary norms'),[29] is *a legal system*. The law it is made of is created, applied and interpreted in a decentralised manner.[30] More specifically, international law is interpreted by its legal 'officials': not only by adjudicators sitting in international tribunals or representatives and public servants in international organizations, but also by state institutions – governments, national parliaments, domestic courts.

Now, the problem often associated with international law is that it is frequently subject to 'auto-interpretation'.[31] States themselves, via their organs – and in the absence of an international judicial juggernaut-umpire – interpret freely what their international legal obligations mean and are. In doing so, they are obviously led by considerations other than purely 'legal', be it political or strategic. However, that does not make their interpretations prima facie illegitimate or invalid – rather, this is a structural feature of international law and as such inevitable. True, one can argue how convincing or coherent or logically sound and consistent one or the other interpretation is. But they all equally *exist* and – unlike in municipal legal systems – international law, given its under-institutionalisation, does not know supreme judicial institutions to authoritatively rule on these interpretive disagreements or police force to enforce domestically a given decision.

The Croatian government and parliament ('one-sidedly', obviously) decided unanimously that their view of international law – their interpretation of the Vienna Convention on the Law of Treaties (VCLT) and the Arbitration Agreement – is that 'arbitral proceedings were irrevocably finished' and that it is indeed 'possible to terminate or withdraw from ongoing arbitration proceedings'.[32] This was the purest expression of the sovereign will of one nation-state. And the same international law, like any law, is not decisive but *indeterminate*. Hence, it admits of different possible interpretations.

Slovenia, on the other hand, came with its own understanding of international law, different from Croatia's. Reconstituted Arbitral Tribunal too. However, that does not mean that

---

[27] Opinion of AG Pikamäe (n 12) para 67.
[28] See Slovenia's arguments stated in *Slovenia v Croatia* (n 1) paras 81, 84, 86-87. cf Gašperin (n 14), who similarly clings to the 'facticity' of the final and binding Arbitral Award.
[29] H.L.A. Hart, *The Concept of Law* (OUP 1994), Chapter X. AG Pikamäe in his Opinion (n 12) para 147 likewise notes 'the imperfect nature of international law'.
[30] Odile Ammann, 'How Do and Should Domestic Courts Interpret International Law? Insights From the Jurisprudence of H.L.A. Hart and Duncan Kennedy' (2019) 10 TLT 391.
[31] ibid 391-392; Odile Ammann, *Domestic Courts and the Interpretation of International Law* (Brill 2019).
[32] Gašperin (n 14).

their view is the *right* view. Even though, intuitively, it may sound right that the Arbitral Tribunal's interpretation of international law (of, for example, the notions of 'grave procedural misconduct' or 'material breach of bilateral treaty') is indeed the correct one. Hence, the other (Croatian) side does not even need to be heard. After all, the well-established principles of (international) law like *Kompetenz-Kompetenz*, *res iudicata*, and *pacta sunt servanda* would speak in its favour,[33] putting premium on whatever the international tribunal asserts and the value of legal certainty, while rejecting one party's 'auto-interpretation'.

Therefore, on the one hand, in the view of the Tribunal the Arbitral Award is binding and final – hence, it must be accepted and abided by Croatia. On the other hand, however, Croatia's position is diametrically opposed. On the side of their interpretation is, most importantly, the principle of state sovereignty. (Un)fortunately, the Westphalian concept of nation-state as absolute sovereign in international relations is still there. It is a (or *the*) structural, meta-principle in international affairs, the one that presupposes the existence of international law itself.

And again, I see no reasons – other than narrow legal formalist – why the Arbitral Tribunal interpretations would be, as a matter of international law, *automatically* supreme to Croatia's. Like any state, the Tribunal is *iudex in causa sua* too – and a lavishly paid one for that matter. Policy or strategic interests, and not merely 'legal' considerations, might likewise influence its interpretations. At the same time, its interpretations might have been qualified by the majority of legal commentators as better or more convincing than the concurrent ones; hence, superior and more authoritative. However, the acceptance by the interpretive community is never unanimous. There are always solid and feasible counter arguments. For instance, some contented that – what would in their view be the 'cleaner' solution to the dispute in question – the Tribunal ought to have '*itself* terminate[d] the proceedings, citing grave procedural misconduct', lest it would deliver 'an unenforced and discredited award'.[34] Others remarked that no one could have 'sensibly assume[d] that the case can continue in any way before that arbitral tribunal'; hence, 'to set aside the whole thing and start again in order to protect the system as a whole […] was plainly the right thing to do in order to protect the integrity of the judicial process'.[35] In anticipation of the Partial Award, Savarian further noted that 'the Tribunal [was] empowered to decide procedural matters of the *arbitration*' but 'not empowered to decide the validity of termination of the *Arbitration Agreement*'.[36] In his view, regarding the former, 'it [was] legally and politically untenable for the arbitration to carry on […] PCA arbitration depend[s] on the continuous consent of the parties'.[37] Afterwards, Ilić remarked that the Arbitral Tribunal erred when in its Partial Award it nevertheless decided to carry on with the proceedings; for him, Croatia's view

[33] See Bickl (n 15); and another Croatian international law doyen, Vladimir-Đuro Degan, 'The Border Dispute between Croatia and Slovenia' (2019) 58 Poredbeno pomorsko pravo 11.
[34] Arman Sarvarian and Rudy Baker, 'Arbitration between Croatia and Slovenia: Leaks, Wiretaps, Scandal (Part 2)' (*EJIL: Talk!*, 7 August 2015), available at <www.ejiltalk.org/arbitration-between-croatia-and-slovenia-leaks-wiretaps-scandal-part-2/>.
[35] Philippe Sands, 'Reflections on International Judicialization' (2016) 27 EJIL 897.
[36] Arman Sarvarian, 'Arbitration between Croatia and Slovenia: Leaks, Wiretaps, Scandal (Part 4)' (*EJIL: Talk!*, 3 May 2016), available at www.ejiltalk.org/arbitration-between-croatia-and-slovenia-leaks-wiretaps-scandal-part-4/, (emphasis added).
[37] ibid.

of what constitutes 'a material breach' under the VCLT was correct, entitling it to withdraw from the arbitration.[38]

From all this, it likewise does not follow that the Croatian interpretation of international law is *right* or *authoritative* either. One can surely criticize the Croatian government's understanding of international law, of its obligations under it, and of procedural avenues open for it to pursue a desired outcome – all with good arguments for such a criticism. But, as a matter of international law, its interpretation is one possible, and legitimate. And it cannot be summarily dismissed. After all, Croatia is not merely refusing to accept the Arbitral Award on a whim, or violently undermining the international rule of law with no good cards to play but sheer force. Rather, it argues from *within international law*, articulates and advances some reasons and offers justification why they deem their interpretation to be *legally* warranted. This precisely is what international law – and the rule of law – require.

Where this leaves us is a conflict of rules and (meta)principles of international law – or differing interpretations of those sources of international law – with no prima facie reason why one ought to trump outright the other or vice versa. In this sense, there is a 'pending' interpretive dispute in international law between the two countries. This, much like everything else, is a matter of interpretation and juristic balancing. On my part, I admit the existing interpretive dilemma. However, I claim no interpretive supremacy for either side.

3.3 WHAT IS FACT?

Some clearly do claim supremacy to their preferred interpretation, based on its alleged 'facticity'. For them, there can be no interpretive dilemma because their position is a 'fact'. For instance, Gašperin holds that 'a final and binding res iudicata Arbitral Award is not an open dispute in public international law but *a legal fact* which Member States and the EU have to respect'.[39]

This, to me, is a strange formulation. A *legal* fact – a 'metaphysically suspicious' fact – may be a *social* fact, certainly not a *natural* fact. As such, it is socially constructed. It is interpreted and reinterpreted, possibly even misinterpreted, and thus constructed by the 'interpretive community'. Ronald Dworkin, for instance, famously saw 'law as interpretation'.[40] He holds the interpretive practices to be central for every legal order.

From the international interpretive community, it seems, Gašperin would exclude Croatia's view (and of others holding the same position). How should, then, the subject whose participation in the construction of this 'legal fact' is excluded be obliged to respect it? Insisting that something is a 'legal fact' and at the same time ignoring the social and political reality that puts that 'fact' into question seems frankly, in the words of a great American legal realist Felix Cohen, as just another 'transcendental nonsense'.[41]

---

[38] Matko Ilić, 'Croatia v. Slovenia: The Defiled Proceedings' (2017) 9 Arbitration Law Review 347.
[39] Gašperin (n 14). cf text accompanied by note 28 above (emphasis added).
[40] Ronald Dworkin, 'Law as Interpretation' (1982) 60 Tex. L. Rev. 527.
[41] Felix Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 Colum. L. Rev. 809. Note that legal positivism, more specifically its contemporary reductionist strand that proposes that 'suspicious' legal facts ought to be collapsed into 'non-suspicious' (natural or social) facts in order to be properly placed within a domain of metaphysics, also rests on a 'social facts thesis'. For a discussion, see Scott Shapiro, *Legality* (Harvard University

AG Pikamäe is less sanguine in this respect when he speaks of 'objective predetermination' that imposes itself on the EU and precedes territorial application of its law.[42] Viewing it through realist lenses, for AG the borders between Member States must not only be determined in the legal or political sense, but also implemented and operative.[43] 'To deal with reality you must first recognize it as such',[44] as if the AG was uttering.

On the other hand, for some AG's argumentation at this point becomes circular: 'The Arbitral Award would firstly have to be implemented, [AG] claims, and only then could the EU take it into account. *But the violation of EU law obviously only arises because the Arbitral Award is not implemented – otherwise there would be no EU law violation*'.[45] Unfortunately, this critique misses the point. It is not true that if the Arbitral Award were implemented, there could be no EU law violation. Obviously, the Award could be implemented *incorrectly*. Suppose that Croatia accepts 'the final and binding Award', and – misinterpreting or misunderstanding the content of its obligation under the Award – proceeds to act on its newly-established border towards Slovenia in a way that would for some reason be contrary to EU law. Then, arguably, the Award would be 'implemented' in the way the AG sees it, but EU law violations would still emerge.

3.4 WHAT IS INTERPRETATION?

However, there is even a bigger problem with such a reasoning of AG Pikamäe, we are told.[46] It is the AG's 'curious' yet 'deeply problematic' *interpretation* of international law that he proposed when assessing whether the Arbitral Award is 'implemented' or not. Something that he, ironically, claims the CJEU has no jurisdiction to perform.

The learned AG is probably more versed in law than he is given credit in this respect. True, in principle the AGs or the CJEU cannot and should not interpret public international law. But, the very concept of 'interpretation' is ambiguous. There is some difference between the factual (*in concreto*) and textual (*in abstracto*) interpretation (although that difference might be exaggerated, since the two interpretive exercises often overlap in practice).[47] Usually, however,

---

Press 2011) 269: 'Legal facts are ultimately determined by social facts alone'; Andrei Marmor, 'Farewell to Conceptual Analysis (in Jurisprudence)' in Wil Waluchow and Stefan Sciaraffa (eds), *Philosophical Foundations of the Nature of Law* (OUP 2013) 216: 'The idea of a metaphysical reduction is to show that a distinct type of phenomenon is actually constituted by, and fully reducible to, some other, more foundational type of phenomenon. In our case, the idea is to show that law is constituted by social practices that can be fully explained by the way people actually behave, the kind of beliefs they share about their behavior, and the attitudes and dispositions that they exhibit in the relevant contexts'.

[42] Opinion of AG Pikamäe (n 12) para 111.

[43] ibid, paras 143-144: 'To be possible to apply EU law, state borders must not only be *determined* from the perspective of public international law but also *actually demarcated*' (emphasis added; author's translation). See the Court's endorsement of the AG's view in *Slovenia v Croatia* (n 1) paras 105-106. Both AG and the Court were, nevertheless, criticised by Bickl (n 3), (n 15) for a 'mechanistic' reading that fails to fully appreciate the character of the obligation of the parties under international law to execute the arbitral decision without questioning.

[44] Laurence Gonzales, *Deep Survival: Who Lives, Who Dies, and Why* (Norton 2004).

[45] Gašperin (n 14) (emphasis added).

[46] ibid.

[47] Riccardo Guastini, 'Legal Interpretation. The Realistic View' in Mortimer Sellers and Stephan Kirste (eds), *Encyclopedia of the Philosophy of Law and Social Philosophy* (Springer forthcoming in 2021).

factual interpretation precedes textual interpretation.[48] In many cases, even in EU law, the former is inevitable. So, the way I see what the AG is doing is more akin to factual interpretation: cognition of the social fact of whether there exist a valid and binding legal decision that both parties voluntarily accept. (Of course, here one has to presuppose some knowledge of public international law as to the importance of having both parties voluntary accepting a decision for it to be 'legally binding'.)

Therefore, the AG should not be seen as assuming the competence to authoritatively decide on the *meaning* of international law, that is the *content* of the Arbitral Award. Rather, as a preliminary matter on which depends the EU law question at his hand, he is engaging in factual interpretation of the situation: whether there *exists* international law that is *applicable* and under which the factual situation is subsumed. He tries to answer the *is*-questions: *Is* there an award that settles the border between the two? Where *is* the border? *Are* they both *agreeing* on it? With this, he is not interpreting *in abstracto* the Award in order to answer the *ought*-questions: *Should* there be an award that settles the border between the two? Where *should* the border between the two stand? *Should* one or the other *accept* that that is what the Award says and where the border stands? Likewise, he urges the Court not to do the same.[49] And in its judgment, the CJEU refrains from doing it.

Hence, I believe, AG Pikamäe is not inconsistent in what he is doing as he is being accused of. And again, this is not to say that the AG is *correct* in his interpretive approach either; he might as well be wrong, or unconvincing. But, the illegitimacy and logical fallacy of his argumentation is overstated.[50]

As a general matter, to me there is nothing controversial in either AGs or the Court *interpreting* international law, when having the abovementioned ambiguity of the concept of 'interpretation' in mind. The following might sound almost trivial, but is nevertheless worth mentioning. Consider, for example, this paragraph from *Poulsen*:

> '[T]he [EU] *must respect international law* in the exercise of its powers and […], consequently, [the provision of EU law in question] *must be interpreted*, and its scope limited, *in the light of the relevant rules of the international law* of the sea'.[51]

In order to interpret EU law in *the light of* international law, the Court surely must know the *meaning* of that international law. How can it know the meaning of international law without

---

[48] Riccardo Guastini, 'Interpretive Statements' in Ernesto Garzón Valdés, Werner Krawietz, George Henrik von Wright and Ruth Zimmerling (eds), *Normative Systems in Legal and Moral Theory. Festschrit for Carlos E. Alchourrón and Eugenio Bulygin* (Duncker & Humblot 1997) 291-292.

[49] cf Bickl (n 5) 204 and 210: '[I]t appears that the CJEU has jurisdiction and should be in a position to establish a violation of several of the above provisions of primary and secondary EU law on the part of Croatia, and therefore order Croatia to stop the infringements by implementing the arbitration award for the purposes of full implementation of EU law. […] [The CJEU] cannot look into the substantive decision of the Arbitral Tribunal (which, in the view of this author, is a definite settlement of the case under international law), but will assess the Slovenian claims of failure to fulfil obligations of EU law on the part of Croatia' (footnotes omitted).

[50] Gašperin (n 14). Bickl (n 15), albeit equally critical of the AG's views, concludes in a more sober fashion that he simply 'appears to be at one end of the spectrum of viewpoints on the issue'.

[51] *Poulsen* (n 20) para 9 (emphasis added).

interpreting relevant international legal acts? This has been widely acknowledged in international law scholarship. When interpreting international law, the CJEU is considered to act as a domestic court due to specificities and autonomy of the EU legal order.[52] Obviously, the Court's interpretations of international law apply only within the EU legal system and are not authoritative beyond that.

The same goes for the Court's AGs, as well as other EU institutions. Take, for instance, the Commission's Legal Service in the dispute between Slovenia and Croatia, who interpreted – contrary to Croatian government's interpretation – the notion of 'full implementation' from footnote of the Annex I to the Common Fisheries Policy Regulation[53] 'in the light of Article 7 of the Arbitration Agreement'.[54] For this claim to make any sense, the Commission's Legal Service first must have ascertained the meaning of that provision of the Arbitration Agreement before interpreting the EU law provision in its light.[55]

In this context, equally indicative are the things that get (selectively) omitted and undiscussed before the CJEU or in legal commentaries. Take, for instance, paragraph 1137 of the Arbitral Award regarding the 'Regime of the Junction Area' that says '*nothing* in this Award *purports* to *address any rights or obligations* of the Parties arising *under EU law*'.[56] Could this somehow have affected the analysis of violations of EU law that stem from the alleged violation of international law? What could have the arbiters possibly meant by this statement? Did they really mean what would be its *literal meaning* taken at face value? Is there any *context* that might clarify it? What was the arbiters' *intention*? Was it intended at all, or did it somehow mistakenly end up in the final version of the Award?

Now, this might not mean a lot (and given the outcome of the present case before the CJEU might even seem pointless). Perhaps there is a good explanation of the meaning of this paragraph (albeit I have not heard one as of yet). But note how – beautifully – this becomes the subject of interpretation itself! Both Slovenian and Croatian side could have understood this part differently for the purposes of the infringement dispute or any other future dispute (perhaps, a preliminary reference to Luxembourg from a Slovenian court) under EU law. The Award now, from being final and binding and (for one party) the undisputed 'fact' and interpretation (in the sense of the outcome of the interpretative process) of international law becomes *interpretandum* itself, the interpretive object subject to legitimate interpretations (in the sense of the interpretive process itself) by the EU 'legal officials'. And here, time and again, enters the possibility of interpretive disagreements that some seem to be blind towards.

---

[52] Helmut Philipp Aust, Alejandro Rodiles and Peter Staubach, 'Unity or Uniformity? Domestic Courts and Treaty Interpretation' (2014) 27 LJIL 75; Ammann (n 31).

[53] Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC, OJ L 354, 28. 12. 2013, 22-61.

[54] European Commission Legal Service (n 11) 6.

[55] cf Opinion of AG Pikamäe (n 12) para 126, footnote 58, from which it is apparent that in the proceedings before the Court the Commission adopted a position different from what its Legal Service suggested regarding the interpretation of the said footnote. Eventually, the AG concluded that the Article 7 of the Arbitration Agreement was not 'self-executing' (see para 148).

[56] The Final Award (n 2) (emphasis added).

3.5 WHAT IS POLITCAL?

Besides these matters of interpretation, there is another leitmotif that permeates criticism of the AG's Opinion, and by extension the CJEU's judgment. AG Pikamäe's Opinion 'appear[ed] to be fuelled by *political rather than legal* considerations'. The CJEU was hence called upon to assume the jurisdiction to decide the EU law dispute between the two neighbouring Member States 'regardless of the *political sensibility* of the subject matter'. It was frequently lamented that '*the political* arguably play[ed] a considerable role' in this case.[57]

Well, is not it always the case in disputes like this? For everyone who understand *law* as another social 'artifact' or 'tool' for achieving certain *political* ends, this should come as no surprise.[58] Some interpretations of law might indeed appear as more *political* than *legal*. But what could possibly be wrong with that? *The political* is embedded in *the law*. *The law* gives expression to *the political*. There is no one without the other. There is no *apolitical law*. And in a way, the courts – especially the high courts – are inherently, institutionally predisposed to deal with the controversies thrown at them from the political arena. Put differently, they are *legal forums* for dealing, in a procedurally structured manner, with *the political*.

In the EU, the infringement procedure itself is envisaged as *political*, and the political dispute does not miraculously transform into *apolitical* once it reaches the judicial (or *legal*-proper) stage. Furthermore, the Commission is a *political* actor. This is what it is meant to be within the system of the Treaties. Its *political* decisions not to follow the *legal* advice of its Legal Service are probably not that infrequent. I cannot see why this would delegitimize it so badly in a case like this.

Similarly, the 'auto-interpretations' of (international and EU) law by Slovenia and Croatia are inevitably self-interested and political. Even the critics recognize this, but only partially, when we are told that 'the rejection of the validity of the Award is solely *political* since Croatia has not initiated any *legal* proceedings e.g. before the ICJ trying to annul the Award, which might be a potential *legal* way to challenge the proceedings'.[59]

Such a statement begs the question – what has Slovenia 'legally' done in response to such a political (mis)interpretation of international law by the Croatian government? If the Slovenian side was so convinced in their righteous position *as a matter of international law*, international law surely has to offer it some legal remedies to vindicate that position. Why, then, not resort to countermeasures and retaliation under the VCLT, given that Croatia so blatantly rejects the 'legal fact' and hence keeps violating the international law? Because, mind you, the CJEU was never in the position to authoritatively resolve the dispute as a matter of international law and redraw the borders between the two countries. That *legal* problem remains for Slovenia and would likewise remain had the Court decided the dispute under EU law differently. How (a)political,

[57] Gašperin (n 14) (all emphases added).
[58] cf Luka Burazin, 'Legal Systems as Abstract Institutional Artifacts' in Luka Burazin, Kenneth Einar Himma and Corrado Roversi (eds), *Law as an Artifact* (OUP 2018) 112; Luka Burazin, 'Law as an Artifact' in Mortimer Sellers and Stephan Kirste (eds), *Encyclopedia of the Philosophy of Law and Social Philosophy* (Springer, forthcoming in 2021).
[59] Gašperin (n 14) (emphasis added).

then, was Slovenia's decision not to even bother with this and immediately run before the CJEU? Alas, we hear little word on this from the legal commentary.

Nevertheless, the point and the beauty of the 'interpretive pluralism'[60] remains precisely in this – different EU legal officials adopting different interpretations of the law: the Commission's Legal Service says one thing, Commission says the other, Slovenia comes up with the third, Croatia follows with the fourth, the AG offers the fifth. Luckily, for better or for worse, EU law knows its ultimate interpretive authority. The CJEU might have adopted the sixth interpretation – or side with any interpretation already entertained in the EU interpretive community, as it did – but one thing is certain: its interpretation is always the final one. However, there is a possibility that some disagreement between the judges sitting in the Luxembourg benches might occur. Although we do not have access to internal deliberations and the EU judiciary does not know dissenting opinions,[61] what we are presented with as collegiate unanimous decision might conceal the disagreement behind it.[62] The fact that the CJEU's judgments are often 'cryptic' and 'terse'[63] does not help with clarifying their meaning beyond reasonable doubt. Then, an interpretation given by the Court (the result of the process of interpretation) might become (and often does) the *interpretandum* – a given 'interpretation' becomes subject to different interpretations by the EU interpretive community (Member States, national courts, academia, EU political institutions).[64] Is there even a way for it not be *political* then?

Another thing was perhaps also predictable: there will always be at least one side in the dispute (if not both) that will characterize any decision of the Court – be it (i) to reject jurisdiction or (ii) to assume jurisdiction, or (iii) to assume jurisdiction but find no violation of EU law or (iv) the opposite of that – as 'political' and hence unjust and repugnant for them. Had, one the one hand, (ii) or (iv) materialized, Croatian side probably would have argued from the principle of conferral and claimed that the Court ruled on an issue lying outside the scope of EU law and thus overstepped the limits of its jurisdiction.[65] Or, that the Court sided in what is *in essence* a political dispute and acted against what would be a proper judicial role. Since, on the contrary,

---

[60] cf the treatment of the same concept of 'interpretive pluralism' by Gareth Davies, albeit in somewhat different context. Gareth Davies, 'Interpretative Pluralism within EU Law' in Matej Avbelj and Gareth Davies (eds*), Research Handbook on Legal Pluralism and EU Law* (Edward Elgar 2018) 323; Gareth Davies, 'Does the Court of Justice Own the Treaties? Interpretative Pluralism as a Solution to Over-constitutionalisation' (2018) 24 ELJ 358.

[61] Vlad Perju, 'Reason and Authority in the European Court of Justice' (2009) 49 Va. J. Int'l L. 307.

[62] Joseph H.H. Weiler, 'Epilogue: Judging the Judges – Apology and Critique' in Maurice Adams, Henri de Waele, Johan Meeusen and Gert Straetmans (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart 2013) 235.

[63] Perhaps the most famous example is the early landmark decision in *van Gend en Loos*, the founding stone of the entire EU constitutional edifice, passed by a split 4:3 majority in the Court, plus the Advocate General who opined contrary to the majority. For a full account, see Morten Rasmussen, 'Revolutionizing European Law: A History of the Van Gend en Loos Judgment' (2014) 12 ICON 136.

[64] Tamara Ćapeta, 'Ideology and Legal Reasoning at the European Court of Justice' in Tamara Perišin and Siniša Rodin (eds), *The Transformation or Reconstitution of Europe. The Critical Legal Studies Perspective on the Role of the Courts in the European Union* (Hart 2018) 93-94.

[65] With this seems to agree leading Slovenian EU law expert Damjan Kukovec who, following the CJEU's judgment, further commented that Slovenia's lawsuit 'was doomed to fail' whereas criticism of AG Pikamäe was 'completely misplaced'. In his view, the Court 'had no realistic choice whatsoever'. See Damjan Kukovec, 'Zakaj Slovenija pred Sodiščem EU nikakor ni mogla zmagati?' (*Delo*, 15 February 2020), available at <www.delo.si/mnenja/gostujoce-pero/zakaj-slovenija-pred-sodiscem-eu-nikakor-ni-mogla-zmagati-279362>.

in this case (i) materialized, the Slovenian side will probably argue the position it held in the proceedings before the CJEU, or something similar.[66]

Interestingly, moreover, the Slovenian side offered an interpretation of the CJEU's judgment that, while rejecting the Court's jurisdiction to decide the dispute under EU law, nevertheless acknowledged the Arbitral Award's as final and legally binding. Slovenian Prime Minister thus invoked the Court's press release, which in his reading contained a formulation, albeit absent from the judgment's final version, that 'Croatia and Slovenia must implement the Arbitral Award' and that 'the border between the two has been determined'.[67] This view was supported by the current Slovenian (apolitical) Commissioner.[68] Some renowned Slovenian EU law experts also noted the Court's 'indirect' endorsement of the Arbitral Award's validity as vindication of the Slovenia's arguments.[69] Furthermore, some other Slovenian scholars suggested that the judgment was 'tactically prudent', 'political' and 'diplomatic', expressing regret that Slovenia did not request the exclusion of the CJEU's President Lenaerts from the case due to his earlier extra-judicial remarks about the Court's lack of jurisdiction and invitation to submit the dispute before the Court under Article 273 TFEU.[70]

In any event, reasonable disagreements over the CJEU's pronouncements are 'the name of the game' in EU law. However, none of the Court's responses should ever be collapsed into a populist argument most recently advanced by the Brexiteers: 'Let's take our sovereignty back from the Luxembourg Court', when one side feels dissatisfied with the outcome of a case.

3.6 WHAT IS RULE OF LAW?

In the context of 'political' (in the sense previously explained) interpretive pluralism, it seems odd to frown upon the Court's 'political' decisions on the limits of its jurisdictions (or lack thereof). Granted, the CJEU is not among the high courts that explicitly subscribe to the

---

[66] Gašperin (n 14); see text accompanied by note 57 above.

[67] Which is strange, given that the Court's press releases contain a default disclaimer that says 'Unofficial document for media use, not binding on the Court of Justice'. In any event, Croatian side immediately dismissed this interpretation as 'factually incorrect' and 'taken outside of context'. See 'Cerar: S Hrvatskom su mogući razgovori samo o tome kako provesti arbitražu' (*Index*, 2 February 2020), available at <www.index.hr/vijesti/clanak/cerar-s-hrvatskom-su-moguci-razgovori-samo-o-tome-kako-provesti-arbitrazu/2153258.aspx>.

[68] 'Vprašajmo Sodišče EU, ali je arbitražna razsodba zavezujoča' (*Delo*, 3 February 2020), available at <www.delo.si/novice/slovenija/vprasajmo-sodisce-eu-ali-je-arbitrazna-razsodba-zavezujoca-275604>.

[69] For statements of Professor Janja Hojnik and the CJEU's ex-AG Verica Trstenjak, see Larisa Daugul, 'Odločitev Sodišča EU-ja bi težko bila drugačna, a je vseeno razočaranje' (*RTV SLO*, 31 January 2020), available at <www.rtvslo.si/slovenija/odlocitev-sodisca-eu-ja-bi-tezko-bila-drugacna-a-je-vseeno-razocaranje/513205>; 'EU court says Slovenia's lawsuit against Croatia inadmissible' (*The Slovenia Times*, 31 January 2020), available at <www.sloveniatimes.com/eu-court-says-slovenia-s-lawsuit-against-croatia-inadmissible>. What might be an argument for this claim seems to appear in paragraph 109 of the judgment. Whether or not the argument holds, observed in the overall structure of the judgment it comes out as a mere dictum, added after the judgment has already been 'sealed'. This insight I owe to Professor Tamara Ćapeta. For a view characterising the paragraph 109 as 'puzzling', yet concurring with aforementioned Slovenian scholars on this point, see Bickl (n 3).

[70] Statement of Professor Marko Pavliha, in Daugul (n 69). Nota bene, in 2019 Pavliha was nominated as Slovenian judge for the General Court but eventually rejected by the 'Panel 255' (advisory panel on appointments to the CJEU established under Article 255 TFEU), citing inter alia his involvement in Slovenia's suit against Croatia.

'political question doctrine' when aiming to stay away from being drawn into a political controversy. However, a student of introductory course on EU law may instantly come up with a number of classic 'political' decisions of a sort some advocated against.[71] Both in which the CJEU declined jurisdiction to rule on an issue arguably within the scope of EU law yet sensitive from the perspective of national constitutional traditions, and in which it overstretched its jurisdiction – even where previously in identical situations the Court stubbornly rejected it[72] – to decide on a pressing political issue. For the former, think of *Grogan*.[73] For the latter, more recent *Associação Sindical dos Juízes Portugueses*.[74]

In neither situation, importantly, did the academia or public react with a fear for erosion of the rule of law or whatever. It is curious why one would propose such a scenario in *Slovenia v Croatia* case, regardless of a direction the Court's decision eventually took. Perhaps critics could be trusted to have in mind a particular conception of the rule of law concept when talking about this.[75] But, under none – be it formal,[76] substantive[77] or procedural[78] – does it seem plausible that interpretive disagreement over a single issue would have catastrophic consequences for the entire EU legal order. It is also certainly far from obvious why and how would only the interpretation of law advocated by the losing party in this dispute save the rule of law in the EU.

Similarly, the argument that establishes connection between the present situation and the ongoing 'rule of law backsliding' in several Member States borders the 'slippery slope'.[79] This understanding of the current political situation in Poland and Hungary does disservice to the gravity of the issue. In the present case, there is a one-time (legitimate, I submit) disagreement between the two Member States, followed by the (dis)agreement by other actors in the EU interpretive community (Commission's Legal Service, Commission itself, academia, AG, CJEU), about the meaning of (international) law (and its repercussions for EU law). In the case of other two (or more) Member States, we have multiple instances of alleged systemic breaches of (EU) law, including the media capture, persecution of NGOs and academia, manipulations of the election law, and attacks on the independence of national judiciaries by illiberal political parties

---

71 Gašperin (n 14).

72 Matteo Bonelli and Monica Claes, 'Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary (ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juízes Portugueses)' (2018) 14 EuConst 622.

73 Case C-159/90 *SPUC v Stephen Grogan and Others* EU:C:1991:378.

74 Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* EU:C:2018:117.

75 Speaking of peculiar conceptions of the rule of law concept, Croatian Prime Minister argued it was actually Slovenia that undermined the rule of law with their ex parte communications with Slovenian arbiter. See PM Andrej Plenković, *Address at the 72nd Session of the UN General Assembly* (21 September 2017), as referenced in Bickl (n 5) 196.

76 Lon Fuller, *The Morality of Law* (Yale University Press 1969).

77 Ronald Dworkin, 'Political Judges and the Rule of Law' in *A Matter of Principle* (Harvard University Press 1985) 9.

78 Jeremy Waldron, 'The Rule of Law as a Theater of Debate' in Justine Burley (ed), *Dworkin and His Critics* (Blackwell 2004) 319.

79 Gašperin (n 14): 'The rule of law should be the essence of the EU project and the EU institutions should demonstrate non-biased commitment to protect it equally among all Member States. How else could one *revert the rule of law backsliding in other Member States* – often claiming that the rule of law argument only serves as a political tool to put in line their political decisions – *if it is not taken seriously every time*?' (emphasis added).

that seem to work towards establishing authoritarian regimes in their respective countries.[80] In such scenario, vital institutional actors are structurally prevented from legitimately disagreeing on *the meaning of any law*. There, *the only interpretation of the law* becomes the one held by the party in power. Any access to courts to advance a different interpretation thus becomes disabled. Then, the law indeed fails to rule. To even attempt a comparison of the two situations sounds… well, irresponsible, to say the least. Similarly, to suggest that by backing up Slovenia's claim in this dispute the EU would somehow be better equipped in reverting the rule of law backsliding in Poland and Hungary. This is simply off putting.

4 THE ELEPHANT IN THE MOUSEHOLE OR 'NO VIEW FROM NOWHERE'[81]

Finally, few general remarks on the nature of legal scholarship, which came to me while reading and listening to some of the recent responses to *Slovenia v Croatia*. Some contributions, referenced here among others, were seemingly written with a tone of a genuine belief that everything proposed therein was 'fact', undisputed, neutral, objective, unbiased, and detached. Could this be an issue?

First, critical philosophers and political theorist like Fredric Jameson explained that 'neutrality and ideology-free objectivity can never obtain in the realm of social knowledge' and that 'every position (including the supposedly objective and ideologically neutral one) is ideological and implies the taking of a political stance and the making of social judgment'.[82] Contrary to what some might think, there can be no 'view from *nowhere*'. You always stand *somewhere*.

Second, interpretive operations that legal scholars pursue, as ascertained by Hans Kelsen[83] and more recently Riccardo Guastini,[84] are different. On the one hand is what we may call 'cognitive interpretation', where one identifies different possible meanings of a legal text, but refrains from opting in favour of any of those meanings.[85] Put simply, it would look something like this: 'Legal text T might have meanings M1, M2, M3, …'. On the other hand is what we may call 'adjudicative interpretation', where one chooses one definite meaning of a legal text and rejects all other possible meanings.[86] Again, simplified, its formulation would be: 'Legal text T means M1'.

---

[80] Laurent Pech and Kim Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 C. Y. E. L. S. 3; Laurent Pech, Dimitry Kochenov, Barbara Grabowska-Moroz, Joelle Grogan, 'The Commission's Rule of Law Blueprint for Action: A Missed Opportunity to Fully Confront Legal Hooliganism' (*RECONNECT*, 4 September 2019), available at <reconnect-europe.eu/blog/commission-rule-of-law-blueprint/>.

[81] This refers to the ideas of US legal philosopher Thomas Nagel from his classical work *The View from Nowhere* (OUP 1986), in which he writes about the human capacity to adopt passive or objective and active or subjective perspectives in their interactions with the world, the former being detached and independent – 'the view from nowhere'.

[82] Fredric Jameson, *The Geopolitical Aesthetic. Cinema and Space in the World System* (Indiana University Press 1995) 36-37.

[83] Hans Kelsen, *Pure Theory of Law* (University of California Press 1967).

[84] Riccardo Guastini, 'A Realistic View on Law and Legal Cognition' (2015) 27 Revus 45; Guastini (n 47).

[85] Guastini (n 84) 52-53; Guastini (n 47).

[86] Guastini (n 84) 52-53; Guastini (n 47).

The former is merely a cognitive operation with no practical effects or purposes. The latter is political. It implies taking sides. It is a scholarly equivalent of Justice Oliver Wendell Holmes's 'bad man',[87] whose attitude is not of a disinterested legal scientist in search for a 'true' meaning of the law, but of an interested agent 'working the law'[88] (in Duncan Kennedy's words) for its own (political) purposes.

By disregarding other possible interpretive options as invalid or even non-existent when commenting on a dispute before a court, these legal scholars seem to be performing adjudicative interpretation. They sound like they have a horse in the race. Recognizing the same phenomenon, one legal theoretician in a private conversation recently remarked that legal scholars nowadays essentially 'write like judges' (plus flamboyant vocabulary and stylistic freedom). They write one-sidedly and struggle to justify their preferred outcome, with a single (obvious) difference that their ruminations do not have the authority of judicial pronouncements.

Going back to *Slovenia v Croatia*: while advertising neutrality, objectivity and apolitical stance, some authors became precisely what they were accusing Croatia and AG Pikamäe of – and invited the CJEU to evade[89] – they became *political*. As they should! I find zero problem with scholarly accounts in which there is no perceived attempt to hide their *political* behind the façade of objectivity and neutrality.

This much one can learn from Slovenian – how conveniently! – contemporary critical philosopher Slavoj Žižek, who suggests that declaring a contestable issue as 'apolitical' and 'non-ideological' is the most effective *political act* performed by an advocate that one should immediately be suspicious of.[90] Therefore, the very declaratory negation of *political* in one's account is for a critical scholar a clear sign of its existence. In this, Žižek built upon Louis Althusser's proposition – another Marxist philosopher – that:

> '[W]hat seems to take place outside ideology, in reality takes place in ideology […] One of the effects of ideology is *the practical denegation of the ideological character of ideology by ideology*: ideology never says, "I am ideological"'.[91]

Third, and final, to remain honest to my critique, I must acknowledge the existence of own 'priors', borrowing this term from Richard Posner:[92] my background, education, predispositions, attitudes, the reality I live in (which, hopefully, become obvious when checking this author's profile and bio). Some would say 'Check your privilege'[93] before making a statement about delicate political issues, so I too should 'check my priors' before concluding this assessment of *Slovenia v Croatia* judgment. To reference another famous line from Judge Alex Kozinski, it seems

---

[87] Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 Harv. L. Rev. 457.
[88] Duncan Kennedy, 'Freedom and Constraint in Adjudication: A Critical Phenomenology' (1986) 36 J. Leg. Ed. 518.
[89] Gašperin (n 14).
[90] Slavoj Žižek, *The Sublime Object of Ideology* (Verso 1989).
[91] Louis Althusser, *Lenin and Philosophy and Other Essays* (Monthly Review Press 2001) 118 (emphasis added).
[92] Richard A. Posner, *How Judges Think* (Harvard University Press 2008).
[93] Hadley Freeman, 'Check your privilege! Whatever that means' (*The Guardian*, 5 June 2013), available at <www.theguardian.com/society/2013/jun/05/check-your-privilege-means>.

inevitable that 'what I ate for breakfast'[94] will somehow find way into my beliefs, thoughts and writings. However, I see no problem in that. And after acknowledging it, we can proceed with arguing about the substantive points of law, in this or any other case.

All this being said, my sole intention in these concluding sections (and in the bigger part of this contribution, albeit indirectly) was to call for a recognition of the importance of interpretation and an acknowledgment of the legitimacy of reasonable interpretive disagreements. Also, to plead for a more dialectical approach in legal scholarship; and to demystify the 'political' in the 'adjudicative' approach to legal scholarship. I definitely do not consider myself an expert in the substantive matters of EU law in question and claim no superiority of own interpretations towards anyone else's engaged in this debate. But I welcome diverse reactions and commentaries, on this and other judgments of the CJEU. To me that is the whole point of an informed and respectful legal – academic and political too – debate.
The very last personal though I share echoes what AG Pikamäe wrote in one of the final paragraphs of his Opinion:

> 'I have to note with sadness that an agreement over the border dispute could not be reached [and still is not reached] between the two states, not even after the disputed Arbitral Award was rendered. However, I am convinced that solution of this dispute should be sought in the political arena'.[95]

From his lips to God's ears.

5 POST SCRIPTUM

Shortly after hearing some of the arguments I raised here, a well-known legal scholar summarily dismissed them, accusing me of '[p]ouring the *thin acid of relativism* over [the legal issue in question] that won't convince anyone, [he] suppose[d] (or certainly hope[d])' and advising to 'at least mak[e] a *legal* argument, applying norms of international and EU law to a concrete case'.[96]

---

[94] Alex Kozinski, 'What I Ate for Breakfast and Other Mysteries of Judicial Decision Making' (1993) 26 Loy. L.A. L. Rev. 993 (though Judge Kozinski is, unlike legal realists, more critical of attempts at explaining the judicial decision-making in this manner, urging 'to doubt your own leanings, to be sceptical of your instincts […] not to yield to these impulses with abandon, but to fight them').

[95] Opinion of AG Pikamäe (n 12) para 165 (translation is mine and lax). Bickl (n 3) suggested that the solution might appear in the process of Croatia's prospective entry into Eurozone and the Schengen Area, a decision which would require unanimity of all other participating Member States, including Slovenia. So, Slovenian side might use again this leverage against Croatia, similarly to what it did during the latter's EU accession negotiations, when it kept blocking any progress until it successfully 'bullied' Croatia to sign the arbitration agreement. See text accompanied by note 6 above.

[96] Personal correspondence with one of the editors of a leading blog on EU and constitutional law (29 January 2020), to which an earlier short version of this note was initially submitted (emphasis added). Although some winds of change seem to be appearing in other parts of the blogosphere, where it was recently noted how '[c]onstitutional law can no longer be treated as if it were independent and insulated from politics. It never was. [T]he shockwaves that have rippled through the European political order have exposed the artificial character of the law vs politics distinction, forcing constitutional law scholars to adapt'. See Bart Caiepo and Frederico Benetti,

I understand one's uneasiness about any degree of relativism, constructivism or postmodernism in a field of 'hard science' such as law. But this is just a matter of perspective.[97] From their *absolutist* tradition of rigid legal formalism-bordering-*Begriffsjuriprudenz*, the law indeed appears as having fixed – objective and neutral – meaning. Nothing is outside the law, understood narrowly. But this is only as it *appears*, not as it *exists*. For someone standing outside their tradition, it appears differently. The same problem is *relative*. For me, theirs is a very limited and unfortunate understanding of the law and the legal. In my view, the law and legal science are something wider. Like other social sciences and humanities, law deals not only with transcendental concepts and legal fictions but also with giddy flesh-and-blood human beings, their interactions and power hierarchies, and the socio-political reality they thus create. From the *relativist* perspective, then, law can have multiple meanings. Over its meanings we may reasonably disagree. The difference is, they tend to delegitimize and reject as unworthy anything outside their tradition. On the other hand, I would prefer not to reciprocate but rather accept and welcome every of their narrow and formalist views. Even when they reject mine.

'How Political Turmoil is Changing European Constitutional Law: Evidence from the Verfassungsblog' (*Verfassungsblog*, 12 April 2020), available at <verfassungsblog.de/how-political-turmoil-is-changing-european-constitutional-law-evidence-from-the-verfassungsblog/>.

[97] From here, I follow the central argument rehearsed by the CJEU judge Siniša Rodin in 'Telos of a Method' Paper prepared for the project *Beyond Method: Politics of Legal Research* (forthcoming in 2020).

LIST OF REFERENCES

Althusser L, *Lenin and Philosophy and Other Essays* (Monthly Review Press 2001)

Ammann O, 'How Do and Should Domestic Courts Interpret International Law? Insights From the Jurisprudence of HLA Hart and Duncan Kennedy' (2019) 10 Transnational Legal Theory 385
DOI: https://doi.org/10.1080/20414005.2019.1639355

Ammann O, *Domestic Courts and the Interpretation of International Law* (Brill 2019)
DOI: https://doi.org/10.1163/9789004409873

Aust HP , Rodiles A and Staubach P, 'Unity or Uniformity? Domestic Courts and Treaty Interpretation' (2014) 27 Leiden Journal of International Law 75
DOI: https://doi.org/10.1017/S0922156513000654

Bickl T, 'CJEU judgement on Slovenia v Croatia: What role for international law in EU-accession dispute settlement?' (*The NCLOS Blog*, 18 February 2020), available at <site.uit.no/nclos/2020/02/18/cjeu-judgement-on-slovenia-v-croatia-what-role-for-international-law-in-eu-accession-dispute-settlement/>

Bickl T, 'The Advocate General's Opinion on Slovenia v Croatia: A proper reflection of international law and the EU's role in the Arbitration Agreement?' (*The NCLOS Blog*, 7 January 2020), available at <site.uit.no/nclos/2020/01/07/the-advocate-generals-opinion-on-slovenia-v-croatia-a-proper-reflection-of-international-law-and-the-eus-role-in-the-arbitration-agreement/>

Bickl T, *The Border Dispute between Croatia and Slovenia. The Stages of a Protracted Conflict and its Implications for EU Enlargement* (PhD Thesis, University of Duisburg-Essen), available at <duepublico2.uni-due.de/servlets/MCRFileNodeServlet/duepublico_derivate_00070268/Diss_Bickl.pdf>

Bonelli M and Claes M, 'Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary (ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juízes Portugueses)' (2018) 14 European Constitutional Law Review 622
DOI: https://doi.org/10.1017/S1574019618000330

Burazin L, 'Legal Systems as Abstract Institutional Artifacts' in Burazin L, Himma KE, and Roversi C (eds), *Law as an Artifact* (Oxford University Press 2018) 112
DOI: https://doi.org/10.1093/oso/9780198821977.003.0006

Burazin L, 'Law as an Artifact' in Sellers M and Kirste S (eds), *Encyclopedia of the Philosophy of Law and Social Philosophy* (Springer forthcoming in 2021)
DOI: https://doi.org/10.1007/978-94-007-6730-0_217-1

Caiepo B and Benetti F, 'How Political Turmoil is Changing European Constitutional Law: Evidence from the Verfassungsblog' (*Verfassungsblog*, 12 April 2020), available at <verfassungsblog.de/how-political-turmoil-is-changing-european-constitutional-law-evidence-from-the-verfassungsblog/>

Cohen F, 'Transcendental Nonsense and the Functional Approach' (1935) 35 Columbia Law Review 809
DOI: https://doi.org/10.2307/1116300

Ćapeta T, 'Ideology and Legal Reasoning at the European Court of Justice' in Perišin T and Rodin S (eds), *The Transformation or Reconstitution of Europe. The Critical Legal Studies Perspective on the Role of the Courts in the European Union* (Hart 2018) 89
DOI: https://doi.org/10.5040/9781509907281.ch-005

Davies G, 'Interpretative Pluralism within EU Law' in Avbelj M and Davies G (eds), *Research Handbook on Legal Pluralism and EU Law* (Edward Elgar 2018) 323
DOI: https://doi.org/10.4337/9781786433091.00026

Davies G, 'Does the Court of Justice Own the Treaties? Interpretative Pluralism as a Solution to Over-constitutionalisation' (2018) 24 European Law Journal 358
DOI: https://doi.org/10.1111/eulj.12298

Degan V-Đ, 'The Border Dispute between Croatia and Slovenia' (2019) 58 Poredbeno pomorsko pravo 11
DOI: https://doi.org/10.21857/ydkx2crzx9

Dworkin R, 'Law as Interpretation' (1982) 60 Texas Law Review 527

Dworkin R, *A Matter of Principle* (Harvard University Press 1985)

Fuller L, *The Morality of Law* (Yale University Press 1969)

Gašperin J, 'When Violations of International and EU Law Overlap: On the Lack of Jurisdiction of the ECJ in the Advocate General's Opinion in Slovenia v. Croatia' (*Verfassungsblog*, 6 January 2020), available at <verfassungsblog.de/when-violations-of-international-and-eu-law-overlap/>.

Gonzales L, *Deep Survival: Who Lives, Who Dies, and Why* (Norton 2004)

Guastini R, 'Interpretive Statements' in Garzón Valdés E, Krawietz W, von Wright GH and Zimmerling R (eds), *Normative Systems in Legal and Moral Theory, Festschrit for Carlos E. Alchourrón and Eugenio Bulygin* (Duncker & Humblot 1997) 279

Guastini R, 'A Realistic View on Law and Legal Cognition' (2015) 27 Revus 45
DOI: https://doi.org/10.4000/revus.3304

Guastini R, 'Legal Interpretation. The Realistic View' in Sellers M and Kirste S (eds), *Encyclopedia of the Philosophy of Law and Social Philosophy* (Springer forthcoming in 2021)
DOI: https://doi.org/10.1007/978-94-007-6730-0_727-1

Hart HLA, *The Concept of Law* (2nd Edition) (Oxford University Press 1994)

Holmes OW, 'The Path of the Law' (1897) 10 Harvard Law Review 457

Ibler V, 'Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia' (2012) 49 Rad Hrvatske akademije znanosti i umjetnosti. Razred za društvene znanosti 145

Ilić M, 'Croatia v. Slovenia: The Defiled Proceedings' (2017) 9 Arbitration Law Review 347

Jameson F, *The Geopolitical Aesthetic. Cinema and Space in the World System* (Indiana University Press 1995)

Kelsen H, *Pure Theory of Law* (University of California Press 1967)

Kennedy D, 'Freedom and Constraint in Adjudication: A Critical Phenomenology' (1986) 36 Journal of Legal Education 518

Kozinski A, 'What I Ate for Breakfast and Other Mysteries of Judicial Decision Making' (1993) 26 Loyola of Los Angeles Law Review 993

Kukovec D, 'Zakaj Slovenija pred Sodiščem EU nikakor ni mogla zmagati?' (Delo, 15 February 2020), available at <www.delo.si/mnenja/gostujoce-pero/zakaj-slovenija-pred-sodiscem-eu-nikakor-ni-mogla-zmagati-279362>

Marmor A, 'Farewell to Conceptual Analysis (in Jurisprudence)' in Waluchow W and Sciaraffa S (eds), *Philosophical Foundations of the Nature of Law* (Oxford University Press 2013) 209
DOI: https://doi.org/10.1093/acprof:oso/9780199675517.003.0010

Nagel T, *The View from Nowhere* (Oxford University Press 1986)

Pech L Scheppele KL, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 Cambridge Yearbook of European Legal Studies 3
DOI: https://doi.org/10.1017/cel.2017.9

Pech L, Kochenov D, Grabowska-Moroz B and Grogan J, 'The Commission's Rule of Law Blueprint for Action: A Missed Opportunity to Fully Confront Legal Hooliganism' (*RECONNECT*, 4 September 2019), available at <reconnect-europe.eu/blog/commission-rule-of-law-blueprint/>

Perju V, 'Reason and Authority in the European Court of Justice' (2009) 49 Virginia Journal of International Law 307

Posner RA, *How Judges Think* (Harvard University Press 2008)

Rasmussen M, 'Revolutionizing European Law: A History of the Van Gend en Loos Judgment' (2014) 12 International Journal of Constitutional Law 136
DOI: https://doi.org/10.1093/icon/mou006

Rodin S, 'Telos of a Method' Paper prepared for the project Beyond Method: Politics of Legal Research (forthcoming in 2020)

Sands P, 'Reflections on International Judicialization' (2016) 27 European Journal of International Law 885
DOI: https://doi.org/10.1093/ejil/chw052

Sarvarian A and Baker R, 'Arbitration between Croatia and Slovenia: Leaks, Wiretaps, Scandal (Part 2)' (*EJIL: Talk!*, 7 August 2015), available at www.ejiltalk.org/arbitration-between-croatia-and-slovenia-leaks-wiretaps-scandal-part-2/

Sarvarian A, 'Arbitration between Croatia and Slovenia: Leaks, Wiretaps, Scandal (Part 4)' (*EJIL: Talk!*, 3 May 2016), available at <www.ejiltalk.org/arbitration-between-croatia-and-slovenia-leaks-wiretaps-scandal-part-4/>

Schütze R, *European Constitutional Law* (Cambridge University Press 2015)
DOI: https://doi.org/10.1017/cbo9781316481790

Shapiro S, *Legality* (Harvard University Press 2011)
DOI: https://doi.org/10.2307/j.ctvjnrsd5

Stoppioni E, 'CJEU finds it has no jurisdiction in the Slovenia/Croatia border case' (*EU Law Live*, 3 February 2020), available at <eulawlive.com/op-ed-cjeu-finds-it-has-no-jurisdiction-in-the-slovenia-croatia-border-case-by-edoardo-stoppioni/>

Waldron J, 'The Rule of Law as a Theater of Debate' in Burley J (ed), *Dworkin and His Critics* (Blackwell 2004) 319
DOI: https://doi.org/10.1002/9780470996386.ch17

Weiler JHH, 'Epilogue: Judging the Judges – Apology and Critique' in Adams M, de Waele H, Meeusen J, Straetmans G (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart 2013) 235
DOI: https://doi.org/10.5040/9781474200257.0006

Žižek S, *The Sublime Object of Ideology* (Verso 1989)

Žižek S, *The Fragile Absolute* (Verso 2000)

FACING THE 'BAD FAITH' – THE CHALLENGES AND TOOLS TO COMBAT THE BLOCKING STRATEGIES OF THE FIRMS IN THE EU TRADE MARK LAW

TAMAR KHUCHUA*

The Court of Justice of the European Union has suggested that when the concept set out in the EU regulation is not defined by that regulation, it should be understood according to its usual, everyday meaning. There is no doubt that the understanding of 'bad faith' might differ from one person to another and especially from one firm to another. Indeed, 'bad faith' in trade mark law might take many different forms which are not easy to detect as the large number of cases concerning the issue of 'bad faith' in relation to national and EU trade marks illustrate. By analysing the current legislative framework as well as the case law of the Court of Justice of the European Union, the paper suggests that in order to maintain and even extend the smooth functioning of the EU trade mark system, legislative changes should be introduced. In particular, it is argued that it is reasonable to examine the intention of trade mark applicants already at the application stage in order to avoid the waste of resources and the burden of dealing with the trade marks registered in 'bad faith' in the invalidity proceedings post factum and to provide a non-exhaustive list of what elements the 'bad faith' can consist of. These amendments should also do good in terms of serving the broader goals of the EU law, which amongst others include, undistorted competition, legal certainty and sound administration.

1 INTRODUCTION

This paper aims to draw attention to the issue of trade marks which are registered in 'bad faith'. Though this is a well-known problem in the European trade mark law, there are still many new 'shapes' and 'forms' of the bad faith practices arising and the literature needs to follow in the footsteps of such new practices. The illustration of the latest, new developments is the very recent case from January 2020 *Sky and Others*[1] which will be discussed in greater detail later on.

Prior to turning to the nuances, the paper first introduces the issue of 'bad faith' by explaining briefly, what it constitutes and why it is a problem for the proper functioning of the EU trade mark system. Subsequently, the EU legislative framework around the 'bad faith' issue is reviewed in order to provide the context for understanding where the EU and the national trade mark systems as harmonised by the EU law stand currently. Then the discussion delves into the case law of the Court of Justice of the European Union (CJEU or

* Tamar Khuchua (LL.M. Lund University, European Business Law Programme) is an Early Stage Researcher within the EIPIN Innovation Society doctoral programme supported by the European Commission within a Horizon 2020 Marie Skłodowska-Curie Innovative Training Networks European Joint Doctorates (ITN-EJD). She is a researcher and a PhD candidate at the Centre for International Intellectual Property Studies (CEIPI) at the University of Strasbourg and the Centre for Commercial Legal Studies (CCLS) at the Queen Mary University of London.

[1] Case C-371/18 *Sky and Others* EU:C:2020:45.

the Court)[2] both of the General Court and the Court of Justice concerning the topic of 'bad faith'. The main concepts and elements pronounced by the Court are captured in chronology in order to highlight that examination and determination of 'bad faith' is not an easy task and number of circumstances need to be considered.

Having analysed the 'state of the art', the following section outlines the implications of the current legislative and judicial standing and argues that in the light of the Union goals and specifically the EU trade mark principles, certain legislative changes are needed. These changes are further concretised in the final section followed by the conclusion where it is maintained that minimising the marks registered in 'bad faith' is surely a challenge which requires certain action on the legislative level through the methodological tools in order to combat these dishonest practices.

2 FRAMING THE ISSUE – WHAT IS BASICALLY A 'BAD FAITH'?

Trade marks create the link between on the one hand, the undertakings and on the other hand, the goods and services in order to guarantee that the customers recognise their commercial origin and repeat the pleasant experience. This is why the trade mark rights are needed, yet, they should be given effect in the light of the principles of fair competition. In other words, the application of the principle of undistorted competition 'increases the threshold for access to trade mark protection'.[3]

Contrary to other IP rights, such as patents, the objective of the trade mark law is not to enable acquisition of the exclusive market position for certain goods or services by granting a registered trade mark but in fact, the market remains free to enter with the same or similar products simply by using other signs.[4] However, since the commercial significance of the trade marks grows, the number of unlawful registrations also grows, resulting in the abuse of the trade mark system by certain undertakings. Such behaviour in trade mark law is qualified as the registrations made in 'bad faith' which is a long-discussed problem in European trade mark law.[5]

It constitutes a behaviour in 'bad faith' when for example someone other than the original owner of a trade mark applies for the registration of a mark in those jurisdictions where the mark is not registered with the intention to later sell the registered trade mark to the owner with an artificially increased price. Such dishonest behaviour is called 'trolling' and essentially means to dishonestly take advantage of the reputation of somebody else's mark.

---

[2] In this paper, both terms 'CJEU' and 'the Court' means the whole institution of the Court of Justice of the European Union and are sometimes used as a supplement to the longer name. While the terms 'General Court' or 'Court of Justice' are used for the courts of first and second instance of the Court of Justice of the European Union, respectively. Depending on the context, such as in the analysis of a specific case heard by each court, the term 'the Court' might also be adopted to substitute the 'General Court' or 'Court of Justice' hearing that specific case.

[3] Directorate-General for Financial Stability, Financial Services and Capital Markets Union of the European Commission, Max Planck Institute for Intellectual Property and Competition Law, 'Study on the Overall Functioning of the European Trade Marks System' (2013) EU Publications, 51 <https://op.europa.eu/en/publication-detail/-/publication/5f878564-9b8d-4624-ba68-72531215967e> accessed 15 March 2020.

[4] ibid 52.

[5] See for example Alexander Tsoutsanis, *Trade Mark Registrations in Bad Faith* (Oxford University Press 2010).

Such form of the 'bad faith' practice is especially known in patent field where the non-practicing entities are filing or buying patents without the intention to use them with their primary function but simply to enforce them via the court proceedings and be awarded damages or gain financial advantages upon the settlement agreement with another party.[6]

Another form of 'bad faith' behaviour in trade mark field is when an applicant's primary intention, while applying for the registration of a mark, is to exclude the competitors from entering the market, in other words, to block them. However, proving that an applicant only had bad intention is a difficult task as there can be a combination of honest and dishonest motives when lodging the application.[7]

The problem with the marks registered in 'bad faith' is that once they enter the register, there is a risk of hampering the free competition, therefore, whether the 'bad faith' applications should already be detected at the initial stage, in particular, at the time of registration or only at the time when the validity of already registered marks is challenged, remains a controversial issue.[8]

Another issue is that the concept of 'bad faith' referred to in Article 59(1)(b) of EU Trade Mark Regulation (EUTM Regulation or the Regulation) is not defined, delimited or described in any way in the legislation of the European Union. In spite of the guiding case law of the Court of Justice of the European Union it is not very clear as to what actually constitutes 'bad faith'.[9] In fact, 'bad faith' can take any form[10] and there are number of acts of the undertakings that might suggest that they have or have had a dishonest intention at the time of application for registration of the marks. All these factors need to be considered with special care.

3 EU REGULATORY FRAMEWORK ON 'BAD FAITH' IN TRADE MARK LAW

In the EU, the core provision about the 'bad faith' in trade mark law is Article 59(1)(b) of the EUTM Regulation according to which an EU trade mark shall be declared invalid on the basis of the counterclaim in the infringement proceedings 'where the applicant was acting in bad faith when he filed the application of trade mark'.[11] However, this norm applies to situations when the validity of a trade mark is challenged and not to the opposition of a trade

---

[6] Sarah Turner and others, 'The Many Facets of Bad Faith in Trademark Law' (*Managing IP Correspondent*, 29 April 2019) <www.managingip.com/article/b1kbm0214n1xm2/the-many-facets-of-bad-faith-in-trademark-law> accessed 16 March 2020.

[7] ibid

[8] Phillip Johnson, 'So Precisely What Will You Use Your Trade Mark for? Bad Faith and Clarity in Trade Mark Specifications' (2018) 49 IIC 940, 955.

[9] Tobias Cohen and others, *European Trademark Law: Community Trademark Law and Harmonized National Trademark Law* (Kluwer Law International 2010) 200.

[10] Sara Parello, Fabio Angelini, 'Bad Faith Maybe Found Also for Different Goods and Services Says the Court of Justice' (*Kluwer Trademark Blog*, 23 October 2019) <http://trademarkblog.kluweriplaw.com/2019/10/23/bad-faith-may-be-found-also-for-different-goods-or-services-says-the-court-of-justice/?doing_wp_cron=1588087800.9761099815368652343750> accessed 8 March 2020.

[11] Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017, on the European Union trade mark (EUTM Regulation) [2017] OJ L154/1 art 59(1)(b).

mark during the time of the application.[12] In other words, in the EUTM Regulation, 'bad faith' is the absolute ground for invalidity on the basis of the counterclaim in infringement proceedings. On the contrary, the provisions on the absolute and relative grounds for refusal of registration – Articles 7 and 8 of the EUTM Regulation do not contain a precondition that would render the registrations with bad intention/ 'bad faith' impossible.

In addition, trade marks can be revoked, similarly on the basis of counterclaim in the infringement proceedings if the trade mark has not been put to genuine use in connection to the goods and services in relation to which it was registered within the continuous period of five years.[13]

The EU Trade Mark Directive (Trade Mark Directive or the Directive) which, by its nature, is a harmonising instrument, aiming at the approximation of laws of the EU Member States in certain areas, also considers the possibility to invalidate the trade mark where the application for registration was made in 'bad faith' by the applicant. Unlike the Regulation, the Directive in addition makes it possible for the Member States to not register such marks at all.[14] Thus, according to the Directive, 'bad faith' can be not only the absolute ground for invalidity but also a ground of refusal of registration. Moreover, under the relative grounds for refusal, the Directive states that a trade mark shall not be registered and if registered shall be declared invalid where the trade mark is liable to be confused with an earlier trade mark protected abroad, provided that, at the date of the application the applicant was acting in 'bad faith'.[15] And finally, another mention of the application made in 'bad faith' is provided in the Article 9(1) of the Directive which is about the preclusion of a declaration of invalidity due to acquiescence, except when the later mark was registered in 'bad faith'.[16]

From the texts of the Regulation and the Directive, the difference between the application of the 'bad faith' argument for invalidating the trade mark for the EU and the national trade marks is that in case of the former, it can be raised only in the infringement proceedings but not at the time of the registration, while for the latter, the Member States, in other words, the national trade mark offices can use the 'bad faith' ground to support their decision of refusal of registration of a mark.

As for the meaning of 'bad faith' itself, in spite of the consideration in the relevant provisions that the application made in 'bad faith' is the ground to invalidate the mark later on, no definition is provided either by the EUTM Regulation, or by the Trade Mark Directive.[17] This gives the Court of Justice of the European Union the leading authority to give interpretation to 'bad faith' which is why it is essential to analyse its case law and see to what extent the 'bad faith' practices have revived in Europe and with what level of rigidity the Court has responded to shield such dishonest practices.

---

[12] Guy Heath and others, 'Annual Review of EU Trademark Law: 2017 in Review' (2018) 108(2) The Trademark Reporter: The Law Journal of the International Trademark Association 423, 533.
[13] EUTM Regulation, art 58(1)(a).
[14] Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks (Trade Mark Directive) [2015] OJ L336/1 art 4(2).
[15] Trade Mark Directive, art 5(4)(c).
[16] ibid art 9(1).
[17] Guy Heath and others, 'Annual Review of EU Trademark Law: 2017 in Review' (n 12) 536.

4 CASE LAW ON 'BAD FAITH' PRACTICE IN THE EU

4.1 FIRST APPREARANCE OF 'BAD FAITH' ARGUMENTS BEFORE THE CJEU

The first wave of the cases that contained the term 'bad faith' and was discussed in the Union legal order unsurprisingly concerned the competition law issues rather than the intellectual property law. One of such first cases was *Vichy v Commission* from 1992[18] where the undertaking was arguing before the First Instance Court of the Court of Justice (now the General Court) that there had not been 'bad faith' on its part and therefore, the Commission's decision not to apply the exception provided in the Union legislation on competition law at that time, in particular EEC Regulation No 17 implementing Articles 85 and 86 of the Treaty, and not to exempt the undertaking from imposition of the fine supposedly for its anticompetitive practice, was infringement of that regulation.[19]

The cases where the intellectual property was the subject matter of the dispute and the 'bad faith' argument had been raised by applicants, started to appear relatively frequently only from the early 2000s onwards. Yet, it was mentioned rather briefly, both when invoked by the parties in their pleas and when discussed by the Court. One of the first cases where the applicant argued in the opposition proceedings that the third party had acted in 'bad faith' when applying for the registration of a mark was *Durferrit v OHMI - Kolene (NU-TRIDE).*[20] The case ended up at that time at the First Instance Court of the Court of Justice where the applicant argued that since the third party had the intention to copy its mark, it had acted in 'bad faith' and therefore, had abused the whole process. Accordingly, the applicant claimed that such behaviour was contrary to public policy and morality within the meaning of the absolute grounds for refusal of the Union Regulation of that time.[21] The Court on its part stated that the absolute grounds for refusal pertained the intrinsic qualities of the mark itself and not the circumstances in which the applicant was acting. Therefore, the 'bad faith' argument was dismissed.[22]

Hence, already in its early case the Court highlighted that for the consideration of 'bad faith' it is the circumstances that matter. The applicant had indeed hinted on the circumstances but chose 'wrong' legal basis. It would be interesting to see how the Court would respond, had the applicant chosen another legal ground. Yet, it must be remembered that the Regulation did not (and does not) offer much choice if not none when it comes to the 'bad faith' applications during the opposition proceedings.

---

[18] Case T-19/91 *Vichy v Commission* EU:T:1992:28.

[19] The undertaking argued the misapplication of the article 15(6) of the Council Regulation (EC) No 17 of 13 March 1962, First Regulation implementing articles 85 and 86 of the Treaty [1962] OJ L204/87 (former articles 85 and 86 are now 101 and 102 of the Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU)). According to the said article 15(6) the exemption from fines as provided in the article 15(5) of the same Regulation shall not apply where the Commission had informed the undertakings concerned that after preliminary examination it was of opinion that prohibition of anticompetitive agreement (article 85(1) applied and the application of exceptions (article 85(3) was not justified.

[20] Case T-224/01 *Durferrit v OHMI - Kolene* EU:T:2003:107.

[21] Council Regulation (EC) 40/94 of 20 December 1993 on the Community trade mark [1994] OJ L11/1, art 7(1)(f).

[22] *Durferrit v OHMI – Kolene* (n 20) para 76.

The landmark case that has touched upon the issue of 'bad faith' thoroughly is *Lindt* from 2009 in which the Court came to the following conclusions:

First, the fact that the applicant knew or must have known, at the time of application for registration of a mark, that in one of the Member States there had been a similar sign used for a long time for the identical goods and therefore, capable of causing the confusion between the signs, does not constitute the sufficient ground for establishing the 'bad faith'.[23]

Second, the Court stated that the intention to prevent the third parties from marketing a product can be an element of 'bad faith' in certain circumstances, such as for example when the applicant did not intend to use the trade mark and the registration was solely aimed at preventing the third parties from entering the market.[24] In such a case, according to the Court, the trade mark does not fulfil its function which is to identify its commercial origin without any confusion.[25] Moreover, the fact that the third party's trade mark that is similar to the one for which the registration is sought, enjoys a certain degree of legal protection, is also a factor to be taken into consideration.[26]

Third, the Court held that even in those circumstances when there were similar signs marketed in different Member States for the identical goods, it is possible that the applicant had legitimate objectives when applying for registration of its sign such as, for example, preventing a newcomer who had the intention to copy the presentation of the applicant's sign.[27]

Finally, in the Court's view, the extent of the reputation of the sign for which the registration was sought might also be deemed legitimate as the applicant might be willing to establish the wider legal protection for its reputed sign.[28]

Accordingly, the CJEU established in the *Lindt* case the factors that the test for determining 'bad faith' on the applicant's side should contain which were the following:

- the fact that the applicant knows or must know that a third party is using**,** in at least one Member State, an identical or similar sign for an identical or similar product capable of being confused with the sign for which registration is sought;
- the applicant's intention to prevent that third party from continuing to use such a sign; and, finally,
- the degree of legal protection enjoyed by the third party's sign and by the sign for which registration is sought.[29]

The Court's ruling in the *Lindt* case offers a very broad and flexible approach for determining 'bad faith' which requires considering a number of relevant factors. It implies that each case should be treated individually according to the circumstances. Such approach is also in line

[23] Case C-529/07 *Chelocadefabriken Lindt & Sprungli* EU:C:2009:361, para 40.
[24] ibid paras 43-44.
[25] ibid para 45.
[26] ibid para 46.
[27] ibid para 49.
[28] ibid para 52.
[29] ibid para 53.

with the previous *Durferrit* case where the Court had stated that the way the applicant acts is a determinant for the existence of 'bad faith'.[30]

Advocate General Sharpston was also of the opinion in the *Lindt* case, that there is no simple test for deciding whether there is a 'bad faith' or not on the part of the applicant. According to her, 'bad faith' is a subjective state which is ascertainable from objective evidence on case by case basis. Such assessment requires the knowledge of the circumstances in order to conclude whether accepted standards of honest and ethical conduct might be deduced. Whether or not the applicant has such knowledge depends on the circumstances of each economic sector. In her opinion the attention must be paid to whether based on factual and legal elements the applicant's behaviour can be justified or on the contrary, whether these elements underline the dishonesty and unethical behaviour.[31]

The *Lindt* case criteria have been recalled and cited in number of cases pertaining to 'bad faith' down the line. In fact, the Court of Justice has applied the reasoning of *Lindt* not only in relation to the EU trade mark system but also in a case where the national trade marks were concerned in the light of the EU Directive,[32] such as in the case *Malaysia Dairy Industries*. In this case, the Danish Supreme Court had asked the Court of Justice as to how the EU provision concerning the invalidity of trade marks based on a 'bad faith' application[33] should have been interpreted. The Court of Justice replied that the EU Regulation on Community trade marks[34] pursued the same objectives as the Directive and therefore, due to the need of harmonising the Community and the national systems, the concept of 'bad faith' should have been interpreted in the same manner.[35] Having said that, the Court referred to the *Lindt* case and stressed the importance of the subjective nature of the applicant's intention which should have been determined by the objective circumstances of each case.[36]

4.2 FURTHER SCRUTINY OF THE 'BAD FAITH' ARGUMENTS BY THE CJEU

The elements that were established in the *Lindt* case, however, shall not be understood as the sole factors for determining the 'bad faith' behaviour. Later in 2012 the General Court has reaffirmed the factors listed in *Lindt* case, however, also made clear that those factors were only examples amongst the many factors that should be taken into consideration before deciding whether the applicant has acted in 'bad faith' or not.[37] In particular, in the *BIGAB* case, the Court while concluding that there had not been a 'bad faith' application on the part of the undertaking that had sought the registration for the word sign BIGAB, provided that the other factors to be taken into consideration could, for example, be the origin of the sign at issue and its use since the creation, or the commercial logic behind the filing of the application for registration of a mark.[38]

---

[30] *Durferrit v. OHMI – Kolene* (n 20) para 76.
[31] Opinion of Advocate General Eleonor Sharpston in *Cholocadefabriken Lindt & Sprungli* (n 23), para 75.
[32] Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks [2008] OJ L299/25.
[33] ibid art 4(4)(g).
[34] Council Regulation (EC) 207/2009 of 26 February 2009 on the Community trade mark [2009] OJ L78/1.
[35] Case C-320/12 *Malaysia Dairy Industries* EU:C:2013:435, para 35.
[36] ibid para 36.
[37] Case T-33/11 *Peeters Landbouwmachines v OHMI – Fors MW (BIGAB)* EU:T:2012:77, para 20.
[38] Case *BIGAB* (n 37), para 21.

BIGAB is indeed an interesting case as it is based on precisely these other factors. In particular, the Court stated that the mark BIGAB was created and used by the applicant years earlier than by the opponent who was arguing that the applicant was acting in 'bad faith' and that his sole intention was to prevent him from marketing his goods under the similar name BIGA. The creation and the use of the mark for a longer time by the applicant was an important point for the Court to conclude that the intention behind the application was not to create confusion with the existing sign.[39]

Regarding the commercial logic, the Court paid attention to the fact that the marketing under the BIGAB sign had been increased in a number of EU Member States by the applicant. In the eyes of the Court, such a preexisting factor rendered the registration into a commercially logical step targeting at extending the protection of the mark.[40]

As for the fact that the applicant knew or should have known about the existence of the use of the sign by a third party for which he sought the registration, the Court emphasised that this was not sufficient to conclude that the applicant was acting in 'bad faith'. On the contrary, this could even be done with the legitimate objective.[41] For the Court, in this case, the knowledge about the fact that someone else is using the same sign to market his product without the authorisation to do so, is in fact a triggering factor to file the application for the registration.[42]

Another argument for justifying the registration, relating to the commercial logic was the extent of the mark's reputation which at the time of the application was rather increasing. Once again, this proved that there had been a commercial interest of the party to protect the mark by the act of registration for ensuring the protection.[43] Such a careful consideration and a specialist approach of the Court towards the possible business strategy of a firm is definitely remarkable.

Having ascertained a good faith for the undertaking seeking the registration, the Court has definitely put a heavy weight on the entire circumstances of the case and especially on the commercial logic and the possible steps made by the applicant. On the other hand, in the case *VENMO*[44] from 2017, by similarly investigating the preconditions and the commercial logic behind, the Court arrived at a contrary conclusion. The case concerned the dispute between two US based companies about the registration of VENMO mark at the EUIPO. The companies had entered into commercial negotiations due to the potential conflict between their marks (registered mark VEN and unregistered mark VENMO), however, without finding the appropriate solutions the owner of a registered sign applied for the registration for VENMO trade mark at the EUIPO.[45] The question was thus raised whether or not the behaviour of the applicant was justified under such circumstances.

It is worth noting that the Cancellation Division held that the application was made in 'bad faith' since the undertakings held the negotiations and the applicant anyhow filed the application for the registration of the VENMO mark without prior notice to the other

[39] ibid para 22.
[40] ibid para 23.
[41] ibid para 27.
[42] ibid
[43] ibid para 31.
[44] Case T-132/16 *Paypal, Inc, v EUIPO – Hub Culture (VENMO)* EU:T:2017:316.
[45] ibid paras 1-10.

party.[46] On the other hand, the Boards of Appeal of EUIPO (the Boards of Appeal) decided that the applicant had not acted in 'bad faith', since the contested mark VENMO did not enjoy legal protection as it was neither registered nor had it acquired the reputation.[47] In addition, the registration of the sign VENMO could be seen logical since the applicant also owned the other similar signs that could have been confused with VENMO.[48] Regarding the fact that there was no evidence to prove that the applicant had the intention to use the trade mark, the Boards of Appeal stated that there was also no evidence that would prove that the applicant's sole intention was to exclude the competitor from the market, especially considering the fact that the competitor was not planning to expend its business in the European Union market.[49]

Contrary to the findings of the Boards of Appeal, the General Court arrived at a different conclusion and upheld the 'bad faith' argument after extensively analysing all the elements of the decision of the Boards of Appeal. The General Court first noted that the Boards of Appeal's finding that the application for registration for the mark VENMO was the logical commercial trajectory in order to protect the other similar marks, was wrong as their actual use was not thoroughly proven[50] – and even if they were proved to be used for the protection of these two signs, the applicant could have registered exactly those signs and not VENMO, which was identical of the sign used by the competitor.[51]

Furthermore, for the General Court, the fact that there had been negotiations between the parties - in spite of which the applicant proceeded with the registration of VENMO sign – is the indication of a 'bad faith' as it was done without the prior notice to the party and therefore constituted a 'concealed act'.[52]

The fact that the applicant had not used the mark VENMO neither before the registration nor afterwards, was also an alarming signal for the General Court, unlike the Boards of Appeal.[53] The lack of the mark's reputation in the hands of the competitor was also perceived differently by the General Court. In particular, the fact that the contested mark did not enjoy the reputation when used by another undertaking did not exclude the possibility that the applicant's motives could be dishonest.[54] In other words, the Court hinted that the applicant could hinder its competitor's potential entry into the market even if it was not planning to expend its business outside the United States in the near future. The Court by itself has deemed this plausible at some point in the future.[55]

It appears that one of the elements established in *Lindt* case which is that 'the applicant knows or must know that a third party is using an earlier mark in at least one Member State', was not so rigidly followed by the General Court and was even twisted in a way. In fact, the Court in *VENMO* acknowledged that the goods of a third party were marketed outside the EU but yet quite generously discussed of its own motion the possibility of that party

[46] *Case VENMO* (n 44), para 17.
[47] ibid para 22.
[48] ibid para 23.
[49] ibid para 25.
[50] ibid paras 52-53.
[51] ibid para 57.
[52] ibid para 62.
[53] ibid para 65.
[54] ibid para 69.
[55] ibid paras 70-71.

expending its business outside the US. Consequently, for the General Court, there was a probability of expulsion by the dishonest undertaking of the third party from the EU market which it had not even entered in the first place.

The case *VENMO* has definitely made the trade mark lawyers keep their eyes open as it did see controversial opinions on its way. Besides, the fact that the Court has delved into a tremendous amount of details to finally come to the conclusion that the applicant had acted in 'bad faith', demonstrates the importance of all relevant factors before holding the invalidity of the registered EU trade mark.[56] It is especially noteworthy that the ethical elements came under the spotlight in the discourse, especially when the Court drew its attention to the 'concealed act' of the undertaking. It seems that bringing together the ethical and commercial aspects into the discussions is widely welcome by the Court and can be seen as a positive development. Nevertheless, such a scrupulous approach also proves that the Court is very cautious about the invalidity of marks on the basis of dishonest applications.

4.3 THE RECENT CASE LAW AND WHAT THE TRADE MARK OWNERS SHOULD BE CAUTIOUS OF

Case law on the issue of 'bad faith' has been growing - and so have the guiding statements of the Court of Justice of the European Union. In another case – *STYLO & KOTON*, which was decided later in the same year (2017) as *VENMO*, the General Court dismissed the 'bad faith' argument due to the fact that the services of the disputing parties were dissimilar.[57] The case concerned the validity of the mark STYLO & KOTON which had been contested on the ground that the applicant for registration had acted with bad intention.[58] Both, the Cancellation Division and the Boards of Appeal dismissed the invalidity request since there was neither similarity nor identity between the goods and services for which the trade marks in question provided protection.[59]

The case went all the way up to the General Court and the Court of Justice. The applicant claimed that for finding that there was a 'bad faith' on the part of an undertaking, it was not necessary for the goods and services to be identical. This was a turning point in the EU case law on 'bad faith', raising the question whether the goods and services need to be similar in order to find the mark invalid on the ground of 'bad faith' argument or not.

The General Court essentially upheld the decision of the Boards of Appeal by recalling the criteria of *Lindt*. It stated that pursuant to this case, 'bad faith' should be assessed in the circumstances where 'a third party is using an identical or similar sign for *an identical or similar product or service* capable of being confused with the sign for which registration is sought'.[60]

Unlike the VENMO case discussed above, the authority of the *Lindt* case has been fully upheld here by the General Court especially by underlying that for the establishment of

---

[56] Rosie Burbidge, 'EU General Court finds bad faith in VENMO trade mark dispute' (*IPKat blogpost*, 1 July 2017) <http://ipkitten.blogspot.com/2017/07/eu-general-court-finds-bad-faith-in.html> accessed 15 March 2020.

[57] Case T-687/16 – *Koton Magazacilik Tekstil Sanayi ve Ticaret v EUIPO – Nadal Esteban (STYLO & KOTON)* EU:T:2017:853.

[58] ibid para 11.

[59] ibid paras 12-14.

[60] *STYLO & KOTON* (n 57), para 44 (emphasis added).

'bad faith', not only the marks must be identical or similar but also the goods and services of the disputing undertakings.

It is interesting to observe what the Court of Justice upon the appeal of the General Court's decision held. The Court while acknowledging the importance of the *Lindt* case criteria, went on and held that there can be situations where 'bad faith' is found without any relation to the *Lindt* case circumstances. In certain circumstances the applicant for registration can be regarded to have acted in 'bad faith' in spite of the fact that at the time of the application there was no use by a third party of an identical or similar sign for identical goods and services.[61]

The Court stated that the existence of the likelihood of confusion does not need to be necessarily established.[62] Furthermore, the contested marks and goods that are similar or identical and therefore cause the likelihood of confusion represent only one relevant factor to be taken into consideration for determining 'bad faith'.[63] As a consequence, in the absence of such likelihood of confusion, other relevant factors should be scrutinised.[64] The Court of Justice found the General Court's judgment erroneous because the latter had misread the case-law of the Court of Justice and had limited the scope of the Article 52(1)(b) of the Regulation 207/2009 by not establishing 'bad faith' only because the services of the disputing parties had been different.[65]

Thus, according to the Court's position, other factors should have been taken into consideration such as the applicant's intention to register the contested mark for the classes which were identical of that of the other party; it is that intention that should have been taken into account.[66] In these circumstances, it was up to the applicant to show that filing the trade mark application followed an 'economic logic'.[67] Although the General Court had mentioned 'the chronology of events leading to the filing', it was done only for the sake of completeness, without fully examining all the steps made by the undertaking.[68]

This case seems to open doors for wider assessment and goes further than what the *Lindt* case had considered as a 'bad faith' scenario, in particular even for the situations where goods or services are different. As AG Kokott has mentioned in her opinion concerning this case, 'the need to take into account all the relevant factors, […], is an inevitable consequence of the subjective nature of bad faith.'[69] Whether maintaining such openness is practical especially for the parties, remains an open question. For AG Kokott, it is certain that being cautious and not providing any definition of the 'bad faith', neither in the legislation nor by the Court, is reasonable since it is unclear what kind of circumstances might arise in the future which cannot be foreseen at that moment.[70]

It is true that the number of circumstances has been increasingly accumulating, the proof of which is the most recent case *Sky and Others*[71] from 2020 pertaining to registration

---

[61] Case C-104/18 P – *Koton Magazacilik Tekstil Sanayi ve Ticaret v EUIPO (KOTON)* EU:C:2019:724, para 52.
[62] ibid para 54.
[63] ibid para 55.
[64] ibid para 56.
[65] ibid para 57-58.
[66] ibid para 60.
[67] ibid para 61.
[68] ibid para 63.
[69] Opinion of Advocate General Kokott in *KOTON* (n 61) para 28.
[70] ibid para 30.
[71] *Sky and Others* (n 1).

of the marks in 'bad faith'. The case arose after the proceedings between on the one hand, the Sky plc and other companies and on the other hand, SkyKick Companies in the UK. In its preliminary ruling, the Court of Justice answered to the several questions posed by the High Court of Justice of England in its preliminary reference which was perhaps the most important referral made in trade mark law during recent years.[72] The questions asked were whether a national trade mark can be wholly or partially declared invalid if the terms used for the description of the goods and services lack clarity to make the general public understand the scope of protection of the trade mark, such as the term 'computer software'. The Court of Justice answered that 'a Community trade mark or a national trade mark cannot be declared wholly or partially invalid on the ground that terms used to designate the goods and services in respect of which that trade mark was registered lack clarity and precision'.[73]

The next question raised by the English court, even more relevant for the purposes of this paper, was whether or not it is considered as a 'bad faith' to register a trade mark without an intention to use it. It is especially interesting what the Court replied. According to the Court, for establishing that an unused trade mark was registered in 'bad faith', it must be shown that either a dishonest intention of undermining the interests of third parties existed or an intention to obtain exclusive rights, without targeting a specific third party, for purposes falling outside the functions of the trade mark.[74] Once again the Court recalled the essential function of a trade mark, which is the identification of the commercial origin of the goods and services, as stated in *KOTON* case.[75]

The Court also emphasised that 'bad faith' on the part of the applicant cannot be upheld merely on the basis of the fact that at the time of the filing for registration, the applicant has not had the economic activity corresponding to those goods and services indicated in the application, nor can he be required to indicate or even know precisely if he will make use of the mark for which he is applying.[76] In addition, the Court stated that 'when the absence of the intention to use the trade mark in accordance with the essential functions of a trade mark concerns only certain goods or services referred to in the application for registration, that application constitutes bad faith only in so far as it relates to those goods or services.'[77] Here the Court followed its argumentation in the *KOTON* case where it was stated that the applicant should have shown the economic logic behind filing the application for the rest of the part of goods and services which in turn should have been examined by the General Court.[78]

It can be deducted that for establishing the 'bad faith' in the case *Sky and Others*, the Court has applied a new test consisting in:

- having an intention of undermining, in a manner inconsistent with the honest practices, the interests of third parties, or

---

[72] See in this regard Eleonora Rosati, 'Breaking: CJEU in Sky v SkyKick Rules That a Trade Mark Cannot Be Declared Wholly Or Partially Invalid on Grounds of Lack of Clarity and Precision of Its Specifications' (*IPKat blogpost*, 29 January 2020) <http://ipkitten.blogspot.com/2020/01/breaking-cjeu-in-sky-v-skykick-rules.html> accessed 16 March 2020.
[73] *Sky and Others* (n 1) para 71.
[74] ibid para 75.
[75] *KOTON* (n 61) para 45.
[76] *Sky and Others* (n 1) paras 76-78.
[77] ibid para 81.
[78] *KOTON* (n 61) para 62.

- an intention to obtain exclusive rights, without even targeting a specific party, for purposes falling outside the functions of the trade mark.

In this case, the Court provided a very broad test for determining whether a certain action constitutes a 'bad faith' or not. Hereby, the test established in the landmark case *Lindt* has undoubtedly been extended, both in the *KOTON* and in the *Sky and Others* cases. In the former, the precondition of the existence of identical goods and services has been disregarded by saying that the *Lindt* criteria have only served as some examples out of many factors that could potentially arise in the future. And in the latter, the condition that an applicant must be preventing the third party from continuing using the sign, has been extended to the situations where an applicant has the intention not only to prevent but also to undermine the interests of third parties. In addition, not necessarily a specific party must be concerned, but in general competitors. Thus, the *Sky and Others* introduces broader possibilities for arguing that there is a 'bad faith' on the part of the applicant. Even though the Court did not find the lack of clarity to be the absolute ground for invalidity, for the software companies it will be a moment to be cautious before they file for broad terms such as 'computer software'. This is particularly true if they do not have the intention to use these terms because the Court places more weight on the rationale behind the applications.[79]

Though undertakings do not need to indicate at the time of application that they have the intention to use their trade mark for specific goods and services they might be still chased later on and held guilty of engaging in dishonest behaviour. It will be interesting to keep track of how this line of case law will develop in the national courts and whether there will be more referrals directed to the Court of Justice or whether this case will be clear enough to suffice as a wake-up call.[80]

5 IMPLICATIONS OF CURRENT 'BAD FAITH' QUALIFICATION IN THE LIGHT OF THE EU TRADE MARK GOALS

Reflecting on the case law discussed above, it becomes clear that the issue of 'bad faith' has gone through trial and error up until now and that there is no clear-cut rule for determining 'bad faith' in EU trade mark applications. Even the General Court has gone wrong as seen in the *KOTON* case. Picking up from where the Court of Justice has left us in *Sky and Others* case and considering the EU trade mark legislation in its current state, there are certain factors that need to be analysed in the light of the EU trade mark goals.

It is well established that the main capacity of trade marks is to convey information to the consumers so that they make informed choices. Therefore, trade marks are one of the tools that ensure fair competition.[81] From a practical point of view, the amount of marks which can be acquired as trade marks is almost endless, except for certain types of marks, such as colours or shapes of specific products for which there is limited availability.

---

[79] *Sky and Others* (n 1) para 77.
[80] See in this regard Peter Brownlow, Tristan Sherliker, 'Sky v Skykick' (*Bird & Bird*, January 2020) <https://www.twobirds.com/en/news/articles/2020/uk/sky-v-skykick> accessed 20 February 2020.
[81] Annette Kur and Thomas Dreier, *European Intellectual Property Law: Text, Cases and Materials* (Edward Elgar 2013) 157.

Therefore, the protection of these marks implies a certain degree of limitation of competition, which is why the law needs to interfere.[82] Sometimes, marks can be much more than a simple indication of their commercial origin but valuable assets in cases when they originate from prestigious undertakings. This can be another reason why law interferes and provides even wider protection for such marks.[83]

From the competitor's and consumer's perspective, the trade mark system is not without its risks, especially where the use of trade marks purports to go beyond its main function. In the extent to which this is allowed lies the key element that needs to be regulated and where law, once again, plays a crucial role.[84] This is the crossing point of competition law and trade mark law; in fact, the EU trade mark law is an integral part of one of the primary goals of undistorted competition featuring the EU system since its establishment.[85] Therefore, the goals of the competition law and trade mark law not only do not contradict each other but on the contrary, serve the same purpose that is to protect the integrity of internal market, the interests of commercial undertakings, i. e. competitors, the freedom of competition itself and the rights of consumers.[86]

The concept of undistorted competition has served as the guidance for the interpretation of the rules of the EU trade mark system and partially harmonised national trade mark systems. From the various articles scattered around the EUTM Regulation as well as the Trade Mark Directive on approximation of Member States' laws in relation to trade marks, the main aim of the EU trade mark law is deduced. It is to ensure the barrier-free market and undistorted competition while enabling the undertakings to distinguish their goods and services from each other.[87]

Consequently, according to the settled case law of the Court of Justice, trade mark law is 'an essential element in the system of competition in the European Union'. In such system, undertakings have the possibility to register marks in order to attract and retain the customers and to ensure that the consumers can distinguish, without any possibility of confusion, the goods and services from those of other undertakings.[88]

As a consequence, the concept of undistorted competition requires protection of the interests and the rights of the trade mark owners on the one hand and of the interests of the competitors, on the other. Therefore, using the signs for legitimate purposes in compliance with the honest practices is one of the main requirements which have been developed by the Court of Justice in order to ensure the protection of internal market and the free movement

[82] ibid 158.
[83] ibid
[84] ibid 158-159.
[85] See Directorate-General for Financial Stability, Financial Services and Capital Markets Union of the European Commission, Max Planck Institute for Intellectual Property and Competition Law, 'Study on the Overall Functioning of the European Trade Marks System' (n 3) 50.
[86] Katalin Judit Cseres, *Competition Law and Consumer Protection* (Kluwer Law International 2005) 244-245, where the goals of the European competition law are overviewed.
[87] See EUTM Regulation, recital 3, 13, art 4(a); Trade Mark Directive, recitals, 13, 18, 31, art 3(a).
[88] See Case C-48/09, *Lego Juris v OHIM*, EU:C:2010:516, para 38 and the case law cited in there; see also, *KOTON* (n 61) para 45.

of goods and services.[89] The extensive case law, partly reported in the previous section is a clear example of this.

The requirement to be in compliance with the honest practices lies at the heart of this paper and this is exactly where the analysis of and the control over the 'bad faith' practices become essential.

As seen in the Court's rulings, there are number of objective and subjective factors that should be considered when qualifying the behavior of an applicant. Such factors include, for example, the duration for which the sign was used by the applicant which, in case of being long, might suggest that the applicant seeks registration in good faith.[90] Another factor that also suggests that the application was made in good faith is the growing reputation of the mark which might trigger the applicant using the mark to apply for the registration and thus, acquire protection for the reputed mark.[91]

Disputing parties' relation prior to the application for a trade mark is also an important factor that should not be overlooked. In particular, if there had been ongoing negotiations between the parties in relation to a mark, in spite of which the applicant, without notifying the other party, applied for the registration of that mark, it is most likely that the applicant acted in 'bad faith' and had the intention to prevent the other party from marketing certain goods. Therefore, it is an important information whether the party gives 'prior notice' or not to the other party.[92]

Having guidance of the Court on some objective criteria definitely brings clarity with regard to the issue of 'bad faith' determination, yet there are other aspects which could lead to uncertainty. Such is, for instance, the requirement of clarity and precision of the goods and services and the issue of 'use' - the factors to be taken into consideration when deciding upon registration of a mark and/ or invalidity of already registered trade mark.

In order to touch upon these two important factors that play a big role for 'bad faith' qualification, it must be recalled that the entire trade mark system as being part of a bigger, Union legal order, functions in the light of the principles of legal certainty and sound administration which in itself is a an essential element of serving the primary goals EU trade mark law discussed above.

Maintaining the legal certainty and sound administration is underscored in the aims of the EUTM Regulation as well as in the Trade Mark Directive, in relation to various aspects of the functioning of the system. One of these aspects pertains the requirement of clarity and precision of the goods and services at the time of registration.

Under the recital 28 of the EUTM Regulation it is stated that:

> 'EU trade mark protection is granted in relation to specific goods and services whose nature and number determine the extent of protection afforded to the trade mark proprietor. It is therefore essential to lay down rules for the designation and classification of goods and services […] to ensure *legal certainty and sound administration* by requiring that the goods and services for which trade mark protection is sought

[89] Directorate-General for Financial Stability, Financial Services and Capital Markets Union of the European Commission, Max Planck Institute for Intellectual Property and Competition Law, 'Study on the Overall Functioning of the European Trade Marks System' (n 3) 51.
[90] Case *BIGAB* (n 37) para 22.
[91] ibid para 31.
[92] Case *VENMO* (n 44) para 62.

> are identified by the applicant with *sufficient clarity and precision* to enable the competent authorities and economic operators, on the basis of application alone, to determine the extent of the protection applied for.'[93]

Its equivalent recital in the Directive also requires that :

> '[I]n order to fulfill the objectives of the registration system for trade marks, namely to ensure *legal certainty and sound administration*, it is also essential to require that the sign is capable of being represented in a manner which is *clear, precise,* self-contained easily accessible, intelligible, durable and objective.'[94]

Moreover, the requirement that the goods and services shall be identified with sufficient clarity and precision is also stated in Article 33(2) of the Regulation, the provision on 'Designation and classification of goods and services'[95] as well as in Article 3(b) of the Trade Mark Directive, the provision stipulating what kind of signs trade marks should consist of and what they should be capable of.

Thus, the objective to ensure legal certainty and sound administration served by clarity and precision requirement is twofold. First, the market participants should know precisely about the existing signs and of their current or potential competitors in the future,[96] and second, the competent authorities must know with clarity and precision the nature of the marks before examining the applications and for the publication and maintenance of a proper register.[97]

In relation to the requirement of clarity and precision, though the Court in the case *Sky and Others,* held that lack of clarity of the terms that designate the goods and services for which the mark was registered cannot be held as the ground for invalidity of the registered trade mark[98] there are certainly opposing views questioning the logic of the Court. For example, Johnson suggests that the rule applied in *IP Translator* case, which is that the goods for which the registration is sought should be identified with sufficient clarity and precision in order to enable the competent authorities and economic operators know the extent of the protection sought[99] should also apply to those marks which are already registered (not only the marks for which the registration is sought) and therefore enable their invalidity.[100]

As the clarity and precision of goods is a standalone topic itself, it suffices to say here that for the purposes of identifying the 'bad faith' application and of serving legal certainty, it is surely crucial to analyse the breadth of the terms suggested by the trade mark applicant together with the other circumstances which should also be tackled.

---

93 EUTM Regulation, recital 28 (emphasis added).
94 Trade Mark Directive, recital 13 (emphasis added).
95 EUTM Regulation, art 33(2).
96 Case C-273/00 *Sieckmann*, EU:C:2002:748, para 51.
97 ibid para 50.
98 Case *Sky and Others* (n 1) para 71.
99 Case C-307/10 *Chartered Institute of Patent Attorneys (IP Translator)* EU:C:2012:361.
100 See Phillip Johnson, 'So Precisely What Will You Use Your Trade Mark for? Bad Faith and Clarity in Trade Mark Specifications' (n 8) 946-951, where he overviews the judgment in case *IP Translator* and the opinion of Justice Sales according to whom the clarity is a substantive requirement.

In addition to the issue of degree of clarity and precision, the extent of actual use of a trade mark for those goods and services that it has been registered for is also highly relevant for the principles of legal certainty and sound administration.

Unlike the American trade mark law, where the mark must be used for all the goods and services listed in the trade mark application for the registration to remain valid,[101] the European trade mark law does not contain such a requirement. An EU trade mark can be held invalid upon application to the EUIPO or on the basis of counterclaim in the infringement proceedings only after finding, *post factum* that there has not been a genuine use during the five-year grace period.[102] In addition, the applicant, when applying for the registration of an EU trade mark, is not required to having used the mark or to declare that he has an intention to use the trade mark[103] as it is for example provided in the UK trade mark law.[104]

Whether the absence of the requirement of 'actual use' or declaring the intention of use prior to registration creates problems for the purposes of ensuring legal certainty and sound administration is a controversial issue. As prof. Kur mentions, there is a discussion whether the register of the EUIPO is 'cluttered', so that the access to new trade marks is impeded. According to her, this can also create an issue in the sense that the register contains too much 'deadwood' which is not used or is used only for the part of the goods and services.[105] However, whether this is truly 'deadwood' in a sense that the applicant simply could not live up to the registration and use the trade mark, still remains a question. At least in some of the cases, the creation of such 'deadwood' is deliberate and boils down to the issue of 'bad faith' applications which are concealed until another undertaking challenges the validity of the registered mark on the ground that the application was made in 'bad faith' and that there was no actual intention to use the trade mark.

From a purely legal perspective and under the current framework, the 'no use' of the trade mark can only be revealed after the five-year period allocated for the genuine use. As seen from the decision in *Sky and Others*, the Court does not directly hold that the lack of intention to use the trade mark constitutes 'bad faith' in itself. In any case, it certainly does not welcome the defensive marks, in other words, marks which are filed as a weapon to shadow the marks which are in use and are not themselves intended to be used. For instance, in the case *Il Ponte Finanziaria,* the Court of Justice held that the defensive marks are not compatible with the EU trade mark regime.[106]

---

[101] Tara M Aaron, Axel Nordemann, 'The concepts of use of a trademark under European Union and United States trademark law', (2014) 104(6) The Trademark Reporter: The Law Journal of the International Trademark Association 1186, 1233.

[102] EUTM Regulation, art 58(1)(a).

[103] *Sky and Others* (n 1) para 76.

[104] Section 32(3) of the Trade Marks Act 1994 states that 'the application for registration of a trade mark shall state that the trade mark is being used, by the applicant or with his consent, in relation to the goods or services in relation to which it is sought to register the trade mark or that he has a *bona fide* intention that it should be so used'.

[105] Annette Kur, 'Evaluation of the Functioning of the EU Trademark System: The Trademark Study' in Christophe Geiger (ed), *Constructing European Intellectual Property: Achievements and New Perspectives* (Edward Elgar 2013) 129.

[106] See case C-234/06 P- *II Ponte Finanziaria v OHIM* EU:C:2007:514, para 95, at that time defensive marks were still available in Italy.

Hence, one of the primary goals of the trade mark law, which is to maintain the competition undistorted, is grappled with the issue of 'bad faith'. Criteria of 'bad faith' qualification itself, together with all surrounding legal provisions, eg requirement of clarity and precision[107] or that the trade mark can be revoked only when it shows that the genuine use was not made during the five years,[108] play an either preventing or a fostering factor for 'bad faith' applications. Minimising the 'bad faith' applications and therefore serving the main goal of the trade mark law is certainly a challenge which requires some legislative amendments. Beyond explaining these challenges, the next section suggests some possible changes.

6 NEED FOR CLARITY AND CHANGE IN THE LEGISLATION AND THE PROCEDURE

Since the EU trade mark system has started functioning, it has proven to be a smooth legal mechanism for serving the goals of the internal market.[109] However, the above tackled cases show that there is ample room for improvement.

With the market globalisation and the growth of economic activities worldwide, the use of the trade mark system in general as well as the EU trade mark regime in particular, has grown tremendously,[110] therefore ensuring the equal protection of the interests of on the one hand, the trade mark proprietors and on the other hand, the interests of the competitors has become more challenging by the legal tools which have been created at the times of less globalisation. The role of the legislation is to follow in the footsteps of the real life developments and strengthen the existing set of rules, sometimes to the extent of adopting necessary amendments.

Having in mind the recent developments of the trade mark applications made in 'bad faith', this paper aims to suggest certain modifications that could potentially if not eliminate, at least prevent the dishonest practices of undertakings.

The current model considered under the EU regime, according to which the trade marks can be challenged on the ground of 'bad faith' only after they have been registered, raises certain concerns. Firstly, such marks which are found to be registered with 'bad faith' enter the market, no matter what form that 'bad faith' took, whether by not having intention to use the mark, by indicating a too broad range of goods and services for which the mark was registered or simply by the co-existence of the many different factors taken together. The problem is that unless a third party opposes such marks, the marks freely circulate in the trade (unless they are not used at all, in which case they still remain in the register). Consequently, the competition environment amongst the actors of the relevant market might become unfair as the competitors have limited options – either to start the opposition

[107] EUTM Regulation, art 33(2).
[108] ibid art 58(1)(a).
[109] Annette Kur and Thomas Dreier, *European Intellectual Property Law: Text, Cases and Materials* (n 81) 159.
[110] 2018 Annual Report of the EUIPO (MBBC/19/S07/3/AN1/EN(O) 2018) 54, according to the Report the number of EU trade mark applications in 2018 has grown by 4,1% in 2018 compared to the previous year and reached 152,494 applications <https://euipo.europa.eu/ohimportal/de/annual-report?p_p_id=csnews_WAR_csnewsportlet&p_p_lifecycle=0&p_p_col_count=2/vi> accessed 22 March 2020.

proceedings, enter into negotiations and thus licensing agreement with the trade mark proprietor, or not to use the mark anymore and move on to the other mark.[111]

The first option requires them to do an extensive search in order to prove 'bad faith'. Since the burden of proof is purely upon the opposition applicant he needs to show that the trade mark has been applied for registration with bad intention.[112] This in itself is problematic since not all undertakings can afford themselves to file the opposition due to various reasons such as financial constraints that, for example, SMEs face. Therefore, exclusionary effect (which is not the goal of the trade mark law) of trade marks registered with 'bad faith' is high unless they are opposed. The same can be held about the second option – entering into licencing agreement can also be financially burdensome which leaves undertakings with the last option to give up their mark if not the entire product line depending on whether or not the mark also consists of the shape of the product.[113] All these scenarios fall short of the goal of the undistorted competition.

The second concern which comes along with the current regime is that the number of void registrations can be accumulated, which remain in the register and causes cluttering. Even though it is believed that the European trade mark model is built for cost-benefit and fast procedures, there is a lack of evidence whether taking the measures to impede the accumulation of marks would result in disproportionate costs.[114] For the time being, it seems to the author that if a registered mark is invalidated after the registration on the basis of the 'bad faith' argument in the infringement proceedings, all that time and resources spent on the registration by the EUIPO is certainly wasted, let alone the time and resources of the courts that need to hear the invalidity claims as well as the parties themselves. This goes back to the principle of sound administration which needs to be well preserved.

Third, once the marks enter the register, they create a certain degree of expectations for the trade mark proprietors in a first place, i. e. they believe that they are safe and continue their dishonest practice because the legal regime has offered them a certain degree of protection by granting the trade mark right; in a second place for the competitors who are suddenly faced with the registered trade mark trespassing their territory. From the legal certainty point of view it must be held that the content of the register must be sufficiently clear to provide accurate information to the third parties.[115]

In order to eliminate such practices, it is suggested that already at the registration stage the examination should involve the discovery of 'bad faith', in particular, all those circumstances that might signal the examiner about the existence of a dishonest intention.

As for the circumstances constituting the 'bad faith', they must be provided in legislation and listed in a non-exhaustive manner, as defining the elements of 'bad faith'

---

111 Phillip Johnson, 'So Precisely What Will You Use Your Trade Mark for? Bad Faith and Clarity in Trade Mark Specifications' (n 8) 965.

112 Case *VENMO* (n 44) para 33.

113 Directorate-General for Financial Stability, Financial Services and Capital Markets Union of the European Commission, Max Planck Institute for Intellectual Property and Competition Law, 'Study on the Overall Functioning of the European Trade Marks System' (n 3) 57.

114 Annette Kur, 'Evaluation of the Functioning of the EU Trademark System: The Trademark Study' (n 105) 130.

115 Directorate-General for Financial Stability, Financial Services and Capital Markets Union of the European Commission, Max Planck Institute for Intellectual Property and Competition Law, 'Study on the Overall Functioning of the European Trade Marks System' (n 3) 171, where ensuring legal certainty is discussed in the part on 'Proposals' in the context of definiteness of terms used for goods and services.

strictly might give the future applicants the possibility to find other forms and thus circumvent those elements.[116] Yet, as a starting point, certain indicators can be identified both for the examiners as well as for the judges (when cases end up at the national or EU courts). It is suggested that all these indicators are collected from thus far occurred cases and the pronouncements of the Court of Justice of the European Union, as identified in the previous section. These indicators can be the duration of the use of the mark, the origin of the mark, the extent of the reputation of the mark, the intention of use, the clarity and precision of the terms designating goods and services, the business relations between the parties, prior notice to the party concerned before the application, etc.[117]

Legally speaking, implementing the above practice in legislation means that a trade mark should not be able to be registered where the applicant is acting in 'bad faith' in addition to the current rule which is that it can only be declared invalid after the registration on the 'bad faith' ground according to the Article 59(1)(b) of the EUTM Regulation in the framework of the absolute grounds for invalidity. Thus, application made in 'bad faith' should be added to the relative grounds for refusal (Article 8 of the EUTM Regulation), meaning that the opposition should be possible by bringing the 'bad faith' argument as it is considered in the Trade Mark Directive. It is worth noting that a similar mechanism of 'third-party observations' is already in place at the European Patent Office (EPO) where patentability of the invention to which the application relates can be challenegd by third parties' submissions at any time after the publication of the European patent application and before the final decision.[118] In order to assist the trade mark examiners as well it would be perhaps reasonable to enable third parties challenge a pending application analogically to the mechanism available at the EPO.

In addition, 'bad faith' applications should even be included in the absolute grounds for refusal (Article 7 of the EUTM Regulation) which would oblige the examiner to check the intention of the applicant.

The new examining procedure would certainly be a challenge for the EUIPO but in the long run it might be a solution worth considering, in order to respond to the ever-growing applications and blocking strategies of certain firms while preserving the EU legal principles.

Approximation of the approaches deriving from the Trade Mark Directive and the EUTM Regulation is especially reasonable since the CJEU itself has expressed openly that both instruments serve the same purposes[119] and it is indeed desirable in the light of the EU agenda of ensuring uniformity of IP law and aligning the national and EU IP legal regimes.

---

[116] As AG Kokott rightly points out in her opinion in *KOTON* (n 69), it is practical to remain the bad faith definition open as it is unclear what kind of circumstances might arise in the future.

[117] Obviously, some of the elements, such as the business relation between the parties, can only be checked only when another party has opposed the mark application or brought the invalidity action.

[118] European Patent Convention of 5 October 1973 amended by the Act revising the European Patent Convention of 29.11.2000, art 115; see also, Noel Courage and Anastassia Trifonova, 'Challenging a Competitor's Patent Application to Prevent Grant' (*Bereskin & Parr*, 17 September 2018) <https://www.bereskinparr.com/doc/challenging-a-competitor-s-patent-application-to-prevent-grant> accessed 30 June 2020.

[119] *Malaysia Dairy Industries* (n 35).

7 CONCLUSION

As evidenced by the paper, the issue of 'bad faith' is a very delicate part of trade mark law treatment of which has gone a long way until reaching this point. There is no doubt that the abusive practices of undertakings have increased in recent years which puts burden on the EU trade mark office (EUIPO) as well as the Court of Justice of the European Union (both the General Court and the Court of Justice). These institutions, when facing the disputes surrounding the 'bad faith' issue, very well acknowledge the need to balance the interests of the trade mark proprietors and the interests of third parties that lie on the two sides of the scales. However, due to unforeseeable circumstances in which the 'bad faith' registrations take place, the struggle of dealing with all these issues with sufficient clarity and in a uniform manner is definitely there. This is apparent from relatively older cases brought to the surface in this paper including the most recent ones.

Such burdensome work on the part of the EUIPO as well as the Court of Justice of the European Union can be lessened, if not fully than at least partially, if certain changes take place in the Union legislation which will affect the entire procedure of examining the 'bad faith' on the part of the undertakings. Thus, it is argued that the examination of the intention of the applicants is more reasonable to conduct already during the registration phase in order to avoid the registration of marks with bad intention. This is important for the purposes of ensuring the principles of undistorted competition, legal certainty and sound administration, respectively protecting the rights of the other economic operators, the trade mark proprietors themselves and the efficiency of the proceedings in general.

Moreover, the non-exhaustive list of what can constitute 'bad faith' should be provided in the EU legislation to serve as a guidance – as a starting point for the EUIPO as well as the Court in cases which will anyway reach the phase of litigation.

This is not to argue that these tools are going to serve as a panacea and will abate the trade marks registered in 'bad faith'. Indeed, there is more evidence-based research needed which, without isolation of the issue of 'bad faith', will take into consideration all relevant factors and will help shaping the future of the EU trade mark law.

LIST OF REFERENCES

Aaron T M and Nordemann A, 'The concepts of use of a trademark under European Union and United States trademark law' (2014) 104(6) The Trademark Reporter: The Law Journal of the International Trademark Association 1186

Brownlow P and Sherliker S, 'Sky v Skykick' (*Bird & Bird*, January 2020), available at: <https://www.twobirds.com/en/news/articles/2020/uk/sky-v-skykick>

Burbidge R, 'EU General Court finds bad faith in VENMO trade mark dispute' (*IPKat blogpost*, 1 July 2017), available at: <http://ipkitten.blogspot.com/2017/07/eu-general-court-finds-bad-faith-in.html>

Cohen Jehoram T, Van Nispen C, Huydecoper T, *European Trademark Law: Community Trademark Law and Harmonized National Trademark Law* (Kluwer Law International 2010)

Cseres K J, *Competition Law and Consumer Protection* (Kluwer Law International 2005)

Courage N and Trifonova A, 'Challenging a Competitor's Patent Application to Prevent Grant', (Bereskin & Parr 17 September 2018), available at: <https://www.lexology.com/library/detail.aspx?g=13284ec7-b82b-4ed2-b743-4703a4a365e0>

Johnson P, 'So Precisely What Will You Use Your Trade Mark for? Bad Faith and Clarity in Trade Mark Specifications' (2018) 49 IIC 940
DOI: https://doi.org/10.1007/s40319-018-0747-6

Kur A, 'Evaluation of the Functioning of the EU Trademark System: The Trademark Study' in Christophe Geiger (ed), *Constructing European Intellectual Property: Achievements and New Perspectives* (Edward Elgar 2013)
DOI: https://doi.org/10.4337/9781781001646.00018

Kur A and Dreier T, *European Intellectual Property Law: Text, Cases and Materials* (Edward Elgar 2013)

Parello S and Angelini F, 'Bad Faith Maybe Found Also for Different Goods and Services Says the Court of Justice' (*Kluwer Trademark Blog*, 23 October 2019), available at: <http://trademarkblog.kluweriplaw.com/2019/10/23/bad-faith-may-be-found-also-for-different-goods-or-services-says-the-court-of-justice/?doing_wp_cron=1588087800.9761099815368652343750>

Rosati E, 'Breaking: CJEU in Sky v SkyKick Rules That a Trade Mark Cannot Be Declared Wholly Or Partially Invalid on Grounds of Lack of Clarity and Precision of Its Specifications' (*IPKat blogpost*, 29 January 2020), available at: <http://ipkitten.blogspot.com/2020/01/breaking-cjeu-in-sky-v-skykick-rules.html>

Tsoutsanis A, *Trade Mark Registrations in Bad Faith* (Oxford University Press, 2010)

Turner S, Meal D, Smith A, 'The Many Facets of Bad Faith in Trademark Law' (2019) Managing IP Correspondent, available at: <www.managingip.com/article/b1kbm0214n1xm2/the-many-facets-of-bad-faith-in-trademark-law>

IS THIS COMPLETELY M.A.D.? THREE VIEWS ON THE RULING OF THE GERMAN FCC ON 5TH MAY 2020

ANNEGRET ENGEL*, JULIAN NOWAG†, XAVIER GROUSSOT‡

This brief note, on the Bundesverfassungsgericht's Weiss judgment of 5th May 2020, highlights three implications of the German Federal Constitutional Court's landmark ruling and its constitutional significance with implications for the wider context of Member States' cooperation in the EU and European integration as a whole. We explain the relevant background of the judgment and argue that the specific issue created by the judgment might be addressed quickly but that the resulting judicial turmoil for the broader relationship between the law of the EU and the Member States can only be remedied by treaty changes in the longer term in order to avoid the Mutually Assured Destruction (M.A.D.).

1 INTRODUCTION

On 5th May 2020, the Bundesverfassungsgericht (BVerfG) in Germany, ie the German Federal Constitutional Court (FCC), has delivered a landmark ruling[1] of constitutional significance with implications not only for the specific policy areas concerned, but also in the wider context of Member States' cooperation in the EU and European integration as a whole. In this note on the judgment Annegret Engel first presents the relevant background and competence allocation highlighting the need for a better demarcation of the boundaries between EU and Member State's competences. Then, Julian Nowag looks more specifically at the BverfG's treatment of proportionality and its claim of an *ultra vires* judgment by the Court of Justice of the European Union (Court of Justice). Finally, Xavier Groussot explores the *ultra vires* review and the consequences of the judgment for constitutional pluralism. We argue that the specific issues created by the judgment might be addressed quickly but that the resulting judicial turmoil for the broader relationship between the EU's and Member States' law can only be remedied by treaty changes in the longer term in order to avoid the Mutually Assured Destruction (M.A.D.).

2 BACKGROUND TO THE CASE

The judgment concerns the Public Sector Purchase Programme (PSPP) under which the European Central Bank (ECB) via the Euro's constituent national central banks was able to purchase assets on the secondary markets with the aim to achieve market neutrality by providing securities for the rescue of the Eurozone in the aftermath of the economic crisis.

* Senior Lecturer for EU Law, Faculty of Law, Lund University.
† Associate Senior Lecturer, Associate Professor, Faculty of Law, Lund University.
‡ Professor, Faculty of Law, Lund University.
[1] BVerfG, Judgment of the Second Senate of 05 May 2020, 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR980/16.

The ECB's decisions[2] to launch the PSPP were subsequently challenged before the German FCC as *ultra vires*,[3] claiming that the German state having failed to challenge the ECB's action in accordance with the German Basic Law (Grundgesetz – GG).[4]

The main issue in the proceedings relates to the distinction between monetary and economic policies under EU law. The claimants argue that the PSPP programme exceeds the EU's exclusive competences under the monetary policy area and thus encroaching upon the Member States' coordinating competence under the economic policy area, thereby infringing the principle of conferred powers (Article 5 TEU). By Order of 18 July 2017, a preliminary reference was made by the German FCC to the Court of Justice questioning the validity of the ECB's measures and asking for clarification on the division of competences between the EU and the Member States.

In its *Weiss* judgment,[5] the Court of Justice upheld the contested decisions as being compatible with the EU's objectives under the monetary policy without infringing the prohibition of monetary financing (Article 123 TFEU) or Member States' sovereignty in budget matters. In particular, the Court of Justice relied in its judgment on the evidence provided by the ECB, mainly focusing on the (monetary) objectives of the measures in question rather than their (economic) effects. When the case came back, the German FCC heavily criticised this methodology[6] and rejected the Court of Justice's ruling as 'incomprehensible'.[7]

While criticism from a national court, in particular the German FCC, is not unprecedented,[8] the timing and the rigorousness of the decision are certainly remarkable. The discrepancies in the interpretation and application of EU law with regards to the principle of conferred powers and the principle of proportionality[9] have culminated in a dissenting judgment from the national court without much further room for dialogue.[10] In a Statement issued by the President of the Commission Ursula von der Leyen, the German FCC's decision was said to be in contempt of the principle of primacy of EU law and the

---

[2] Decision of the Governing Council of the European Central Bank of 22 January 2015 and Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme (ECB/2015/10) [2015] OJ L 121/20, in conjunction with Decision (EU) 2015/2101 of the European Central Bank of 5 November 2015 amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme (ECB/2015/33) [2015] OJ L 303/106, Decision (EU) 2015/2464 of the European Central Bank of 16 December 2015 amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme (ECB/2015/48) [2015] OJ L 344/1, Decision (EU) 2016/702 of the European Central Bank of 18 April 2016 amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme (ECB/2016/8) [2016] OJ L 121/24, and Decision (EU) 2017/100 of the European Central Bank of 8 December 2016/11 January 2017 (ECB/2017/1) amending Decision (EU) 2015/744 (ECB/2015/10) on a secondary markets public sector asset purchase programme [2017] OJ L 16/51.

[3] BVerfG, Judgment of the Second Senate of 05 May 2020, 2 BvR 859/15, para 112.

[4] Art. 38(1) first sentence in conjunction with Art. 20(1) and (2) and Art. 79(3) GG.

[5] Case C-493/17 *Weiss and Others* EU:C:2018:1000.

[6] BVerfG, Judgment of the Second Senate of 05 May 2020, 2 BvR 859/15, para 141.

[7] ibid para 153.

[8] See eg the *Solange* saga.

[9] BVerfG, Judgment of the Second Senate of 05 May 2020, 2 BvR 859/15, paras 125 and 126.

[10] See also Dimitrios Kyriazis 'The PSPP judgment of the German Constitutional Court: An Abrupt Pause to an Intricate Judicial Tango', (*European Law Blog*, 6 May 2020) <https://europeanlawblog.eu/2020/05/06/the-pspp-judgment-of-the-german-constitutional-court-an-abrupt-pause-to-an-intricate-judicial-tango/> accessed 14 June 2020.

binding nature of Court of Justice's rulings, reserving the option of infringement proceedings in accordance with Article 258 TFEU.[11]

3 THE CONUNDRUM OF THE CORRECT CHOICE OF LEGAL BASIS: DELIMITING EU COMPETENCES UNDER THE MONETARY AND ECONOMIC POLICY AREAS

As a general rule, the Union has no genuine powers itself but derives all its competences to legislate in a specific area from the Member States who have given up some of their sovereign rights by having transferred them to the EU. This principle of conferred powers is enshrined in Article 5 TEU. Any competences not conferred on the EU remain with the Member States, which are thus the ultimate masters of the treaties, also referred to as *Kompetenz-Kompetenz*. Therefore, a clear delimitation between different types of competences is an essential prerequisite for the determination of the legitimate actor(s) to be involved in the legislative process,[12] since the reliance on an incorrect legal basis and thus a wrongfully taken action would render any such measure adopted thereon invalid.

From a purely normative perspective, the conflict between the EU's monetary and economic policies derives from the different categorisation of competences introduced by the Treaty of Lisbon,[13] which classifies the former as an exclusive competence[14] of the Union according to Article 3(1)(c) TFEU, whereas the latter remains under the Member States' competence according to Article 5(1) TFEU while the EU has a coordinating function.[15] Both policy areas can be found under the same Title VIII of Part Three TFEU, although specific provisions refer to the economic policy under Chapter 1 and the monetary policy under Chapter 2. According to Article 119 TFEU, the primary objective of the Union's monetary policy is the maintenance of price stability,[16] whereas the economic policy is merely defined as based on Member States' close cooperation, the internal market and common objectives.[17] The delimitation between those two competences becomes even more obscured considering the explicit prohibition of monetary finance enshrined in Article 123 TFEU.

As a result of this unfortunate constitutional setup and artificial distinction between two concurrent policy areas, it seems unsurprising that such a conflict would reach the judiciary sooner rather than later. Indeed, legal basis litigation can be traced back a long time in the Court of Justice's history. In the quest for the correct choice of legal basis in the case

---

[11] European Commission, Statement from 10 May 2020 <https://ec.europa.eu/commission/presscorner/detail/en/statement_20_846> accessed 10 June 2020.

[12] An institution's subjective interpretation of the delimitation of competences has often led to arbitrary decisions and created inter-institutional conflicts, see Holly Cullen and Andrew Charlesworth, 'Diplomacy by other Means: The Use of Legal Basis Litigation as a Political Strategy by the European Parliament and Member States' [1999] 36(6) Common Market Law Review 1243-1270.

[13] Before the introduction of the Lisbon Treaty, there was no clear set of competences in the treaties; the scope of each policy area was defined individually in the respective treaty provision which were thus subject to a constant shift and re-interpretation by the courts in favour of the acquis communautaire.

[14] According to Art. 2(1) TFEU, only the Union is allowed to legislate and adopt legally binding acts under the exclusive competences, with Member States' actions being allowed only when empowered to do so or for the implementation of Union acts.

[15] According to Art. 2(3) TFEU, the Union has the power to provide the arrangements necessary for Member States' coordination as determined by the Treaty.

[16] Art. 119(2) TFEU.

[17] Art. 119(1) TFEU.

of overlapping competences, the European courts have developed general criteria of legal basis litigation, most notably the 'centre of gravity' theory.[18] Thus, the Court of Justice usually focuses on the main aim or objective of a measure and disregarding any incidental or ancillary effects.[19] While this rather objective-driven approach has been criticised occasionally,[20] the 'centre of gravity' theory has been a useful tool in legal basis litigation and provided at least some degree of legal certainty when determining the correct legal basis.[21] The inevitable judicial review of the delimitation between monetary and economic policies may have thus sparked hopes for clarification, hence the reason for the German FCC's question to the Court of Justice. However, the recent attempts to delimit these two areas of competence have unfortunately added more to the confusion than contributed to its diminishment.

3.1 CONFLICTING VIEWS BETWEEN THE GERMAN FCC AND THE COURT OF JUSTICE

Applying the 'centre of gravity' theory in its *Weiss* ruling, the Court of Justice thus predominantly focused on the main objective of the contested measures. Unsurprisingly from an EU law perspective, the Court of Justice found this to be in line with the primary objective of maintaining price stability under the EU's monetary policy, while disregarding any indirect effects:

> '[A] monetary policy measure cannot be treated as equivalent to an economic policy measure for the sole reason that it may have indirect effects that can also be sought in the context of economic policy'.[22]

Despite acknowledging the rather vague nature of the definition of monetary policy objective in the treaties, the Court of Justice nevertheless considered the ECB's evidence sufficient to justify the use of the Union's competences. The Court's analysis itself contributes little to further clarify the delimitation of the Union's monetary policy from economic policies. Echoing its previous reasoning in *Pringle*[23] and *Gauweiler*,[24] the Court of Justice merely states that economic effects are inevitable, adding that the ECB would be precluded from adopting such measures, thus rendering the monetary policy provisions obsolete, if it had come to a different decision.[25]

---

[18] This was established in Case C-300/89 *Commission of the European Communities v Council of the European Communities (Titanium Dioxide)* EU:C:1991:244, para 10, where the court held that the objective factors of a measure include in particular the aim and content of a measure.
[19] This was first established in Case C-70/88 *European Parliament* v *Council of the European Communities* EU:C:1991:373, para 12.
[20] See eg Marise Cremona, 'External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law' (2006) 2006/22 EUI WP LAW.
[21] An extensive discussion of the development of the 'centre of gravity' theory as well as other general criteria of legal basis litigation can be found in Annegret Engel, *The Choice of Legal Basis for Acts of the European Union: Competence Overlaps, Institutional Preferences, and Legal Basis Litigation* (Springer 2018).
[22] Case C-493/17 *Weiss and Others* EU:C:2018:1000, para 61.
[23] Case C-370/12 *Thomas Pringle v Government of Ireland* EU:C:2012:756.
[24] Case C-62/14 *Gauweiler and Others* EU:C:2015:400.
[25] Case C-493/17 *Weiss and Others* EU:C:2018:1000, paras 63-67.

But does this reasoning of *effet utile* really help in disentangling the overlap between the two policy areas? Arguably not.[26] In fact, this could very well be turned on its head, asking the question the other way around: would it not render any economic policy provisions obsolete if we do not take into account such economic effects? This is then the perspective of the national court, the German FCC, which considers the Court of Justice's ruling 'untenable'[27] and an encroachment upon its sovereign rights as part of the gradual 'competence creep' in the Union,[28] a 'structurally significant shift in the order of competences to the detriment of Member States'.[29] Disregarding the principle of conferred powers, this would consequently allow the ECB to gradually expand its own powers 'in a manner that is not necessarily noticeable from the outset'.[30] In turn, however, the German FCC's judgment calls into question the authority of the Court of Justice in the interpretation of EU law according to Article 19 TEU and the principle of supremacy when applied in the national context.[31]

As could be argued, the conflict between the BVerfG and the Court of Justice highlights the original sin which may have contributed to the extent the financial crisis actually took in the EU: How is it feasible to have a common monetary union with a common currency, but without a common economic policy (at least for the Eurozone)? Admittedly, Articles 136 to 138 TFEU are special provisions for those Member States' whose currency is the Euro, allowing the Council to adopt measures to strengthen the coordination and surveillance of Member States' budgetary discipline,[32] and setting economic policy guidelines for them, while ensuring compatibility with those adopted for the whole of the EU as well as their surveillance.[33] However, this does not ensure the level of coordination needed for an adequate protection of the financial markets through swift decision-making in the Eurozone in times of crisis.[34]

Without this inherent constitutional flaw, the EU would have most likely been able to tackle the financial crisis in a much swifter and more assertive manner, thus reducing the impact it has had on the Eurozone. This further bears the question of what would happen in a similar situation in the future: to which extent can the EU's competence under the monetary policy area continue to compensate for the lack of powers under the economic policy area, even without the constitutional rebellion of a national court such as the German FCC? And what can be done in order to avoid such a conflict of competences in the first place?

---

[26] See already with regards to the distinction made in the *Pringle* case which was criticised as mere 'legal formalism', Paul Craig, 'Pringle: Legal Reasoning, Purpose and Teleology' (2013) 20(1) Maastricht Journal of European and Comparative Law 3-11, 5.

[27] BVerfG, Judgment of the Second Senate of 05 May 2020, 2 BvR 859/15, para 117.

[28] See eg Stephen Weatherill, 'Competence creep and competence control' (2005) 23 Yearbook of European Law 1-55.

[29] BVerfG, Judgment of the Second Senate of 05 May 2020, 2 BvR 859/15, para 157.

[30] ibid para 156.

[31] Federico Fabbrini, 'Suing the BVerfG', (*Verfassungsblog*, 13 May 2020) <https://verfassungsblog.de/suing-the-bverfg/> accessed 12 June 2020.

[32] Art. 136(1)(a) TFEU.

[33] Art. 136(1)(b) TFEU.

[34] For some more detailed reflections, see Kaarlo Tuori, 'The European Financial Crisis: Constitutional Aspects and Implications' (2012) 2012/28 EUI WP LAW.

3.2 THE WAY FORWARD: ON THE VERGE OF A RE-DISTRIBUTION OF EU COMPETENCES?

As the law currently stands, the overlap between monetary and economic policies leads to a conflict of competences between the EU and Member States. Yet, a clear-cut delimitation without encroaching upon the respective other policy area seems impossible to achieve.[35] However, as has been acknowledged by the German FCC in its judgment:

> 'The distinction between economic policy and monetary policy is a fundamental political decision with implications beyond the individual case and with significant consequences for the distribution of power and influence in the European Union. The classification of a measure as a monetary policy matter as opposed to an economic or fiscal policy matter bears not only on the division of competences between the European Union and the Member States; it also determines the level of democratic legitimation and oversight of the respective policy area, given that the competence for the monetary policy has been conferred upon the ESCB as an independent authority'.[36]

Thus, the only possible solution to this conflict of interests between the national and European level directly resulting from the inherent flaw of overlapping competences in the treaties is indeed by a re-distribution of those very competences, which would require treaty change. While this might mean raising the economic leg by further 'communitarising' Member States' competences, the separation of the two policy areas into different competence categories has proven problematic and is clearly unsustainable in the longer term. A formal treaty change would be in line with the principle of conferred powers and thus provide much needed legal certainty.

Treaty changes in the EU bear a certain risk of failure, as was the case with the failed Constitutional Treaty before the Treaty of Lisbon was introduced. However, without such a change of the constitutional setup of competences and in light of the most recently announced Pandemic Emergency Purchase Programme (PEPP),[37] as a response to the coronavirus pandemic, a similar conflict could occur in the very near future. In fact, the only aspect which both the German FCC and the Court of Justice agree on is the compatibility with the prohibition of monetary financing according to Article 123 TFEU, which arguably the new PEPP might fall foul of.[38] Thus, a timely political solution in the form of a treaty change could prevent further legal uncertainty and unnecessary judicial turf wars between the Court of Justice and national courts in the longer term.

---

[35] BVerfG, Judgment of the Second Senate of 05 May 2020, 2 BvR 859/15, para 161.
[36] ibid para 159.
[37] European Central Bank, Press-release from 18 March 2020, <https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200318_1~3949d6f266.en.html> accessed 11 June 2020.
[38] Miguel Poiares Maduro, 'Some Preliminary Remarks on the PSPP Decision of the German Constitutional Court' (*Verfassungsblog*, 6 May 2020) <https://verfassungsblog.de/some-preliminary-remarks-on-the-pspp-decision-of-the-german-constitutional-court/> accessed 15 June 2020.

4 THE PROPORTIONALITY REVIEW OF THE BVERFG'S PSPP AND ITS LINK TO *ULTRA VIRES* AND CONSTITUTIONAL CORE

4.1 SOLANGE BABEL'S TOWER HAS NOT BEEN FINALISED

While the judgment may have broader implication for the relationship between EU and national law that seem best addressed by treaty change, the judgment itself addresses a particular act and situation. A substantial amount of criticism of the BVerfG's decision relates to its proportionality analysis, and most likely more criticism will follow. The reaction is maybe not surprising as it is the first time in the history of the EU that a national court refuses to comply with a direct ruling of the Court of Justice after a preliminary ruling on the matter.[39] In effect, the BVerfG apparently unhappy with the competence demarcation by the Court of Justice, uses the proportionality principle as safeguard of the economic policy domain. Reading the commentary on the use of proportionality principle by the BverfG three interrelated lines of critique seem to exist. These focus on the BVerfG having misconstrued the proportionality review under EU law, criticise the proportionality review performed in the judgment is itself as inconsistent, and identify an attitude that might be summarised as 'am deutschen Wesen mag die Welt genesen' or as Davies[40] has put it: 'colonialist'.

The commentators point out that the proportionality review applied by the BVerfG is not in line with the EU proportionality requirement[41] where it is not obvious that proportionality *stricto sensu* applies given that Article 5(4) TEU seems more narrow, only requiring the EU to 'not exceed what is necessary to achieve the objectives of the Treaties'.[42] As noted the BVerfG seems to take issue with this, citing numerous examples to show that the proportionality review in EU law is different. But rather than accepting this EU proportionality review, it replaces the Luxembourg proportionality with its own conception of proportionality.[43] It thereby seems to overlook that although the Luxembourg's proportionality review has been (deeply) inspired by the German proportionality review, it does not mean that they are the same.[44] Some go even so far to suggest that the BVerfG

---

[39] And the BVerG did not even send a second request before issuing its judgment, see eg J.H.H. Weiler and Daniel Sarmiento, 'The EU Judiciary After Weiss – Proposing A New Mixed Chamber of the Court of Justice' (*EU Law Live blog,* 1 June 2020) <https://eulawlive.com/op-ed-the-eu-judiciary-after-weiss-proposing-a-new-mixed-chamber-of-the-court-of-justice-by-daniel-sarmiento-and-j-h-h-weiler/> accessed 29 June 2020.

[40] Gareth Davies, 'The German Constitutional Court Decides Price Stability May Not Be Worth Its Price' (*European Law Blog*, 21 May 2020) <https://europeanlawblog.eu/2020/05/21/the-german-federal-supreme-court-decides-price-stability-may-not-be-worth-its-price> accessed 10 June 2020.

[41] See amongst many eg Dimitrios Kyriazis, 'The PSPP judgment of the German Constitutional Court: An Abrupt Pause to an Intricate Judicial Tango (*European Law Blog,* 6 May 2020) <https://europeanlawblog.eu/2020/05/06/the-pspp-judgment-of-the-german-constitutional-court-an-abrupt-pause-to-an-intricate-judicial-tango> accessed 10 June 2020.

[42] Gareth Davies, 'The German Constitutional Court Decides Price Stability May Not Be Worth Its Price' (*European Law Blog*, 21 May 2020) <https://europeanlawblog.eu/2020/05/21/the-german-federal-supreme-court-decides-price-stability-may-not-be-worth-its-price> accessed 10 June 2020.

[43] Pavlos Eleftheriadis, 'Germany's Failing Court' (*Verfassungsblog*, 8 May 2020) <https://verfassungsblog.de/germanys-failing-court> accessed 10 June 2020.

[44] Diana-Urania Galetta, 'Karlsruhe über alles? The reasoning on the principle of proportionality in the judgment of 5 May 2020 of the German BVerfG and its consequences' (*CERIDAP*, 8 May 2020)

invented a new proportionality test, as proportionality in the EU does not require the balancing of 'conflicting' policy objectives beyond where such balancing is explicitly recognised as for example in Article 106 (2) or 107 (3) TFEU.[45] Moreover, it has be pointed out that even if the Court of Justice's proportionality review is not up to the standards of Karlsruhe, it something rather different in a legal system to reject a judgment against which no further appeals are possible, such as the Court of Justice's.[46]

The second line of criticism concerns the proportionality test applied, or one might say imposed by the BVerfG. This test has be criticised, in particular, because it creates a kind of catch-22 situation for the ECB:[47] It requires the ECB to balance monetary and fiscal policy as having equal value[48] while the EU legal framework foresees a monetary policy as the objective of the ECB taking priority. In a similar fashion it has be criticised that such a balance would not be something familiar or easy to understand for lawyers.[49] This lack of comfortability with such a balancing possibly stems from the idea of incommensurability[50] and is reflect in a number of the arguments advanced against the BVerfG's proportionality assessment. For instance, it has been suggested that it would be impossible to carry a balancing as the 'ECB would have to identify a common denominator in order to balance the effects [..and it would be unworkable to do so] in practice because it requires the ECB to take into account an unspecified number and type of effects outside the boundaries of monetary policy.'[51] In a similar direction, Maduro criticises the balancing required by the BVerfG for its 'profound'[52] inconsistency. Such a balancing would be rather one sided: it would have to take account of the economic, fiscal and political costs but at the same time seems not to be able to take account of any 'economic, fiscal and political benefits of the

<https://ceridap.eu/karlsruhe-uber-alles-the-reasoning-on-the-principle-of-proportionality-in-the-judgment-of-5-may-2020-of-the-german-bverfg-and-its-consequences> accessed 10 June 2020.

45 Phedon Nicolaides, 'The Judgment of the Federal Constitutional Court of Germany on the Public Sector Asset Purchase Programme of the European Central Bank: Setting an Impossible and Contradictory Test of Proportionality' (*EU Law Live Blog*, 15 May 2020) <https://eulawlive.com/op-ed-the-judgment-of-the-federal-constitutional-court-of-germany-on-the-public-sector-asset-purchase-programme-of-the-european-central-bank-setting-an-impossible-and-contradictory-test-of> accessed 10 June 2020.

46 Peter Meier-Beck, '*Ultra vires*?' (*D'Kart Antitrust Blog*, 11 May 2020) <https://www.d-kart.de/en/blog/2020/05/11/ultra-vires> accessed 10 June 2020.

47 Ana Bobić and Mark Dawson, 'What did the German Constitutional Court get right in Weiss II?' (*EU Law Live Blog*, 12 May 2020) <https://eulawlive.com/op-ed-what-did-the-german-constitutional-court-get-right-in-weiss-ii-by-ana-bobic-and-mark-dawson> accessed 10 June 2020.

48 See eg BVerG (n 1) paras 133 f.,146, 163, 165, 167 f., 173, 176.

49 Peter Meier-Beck, '*Ultra vires*?' (*D'Kart Antitrust Blog*, 11 May 2020) <https://www.d-kart.de/en/blog/2020/05/11/ultra-vires> accessed 10 June 2020.

50 See eg Francisco Urbina, *A Critique of Proportionality and Balancing* (CUP 2017).

51 Phedon Nicolaides, 'The Judgment of the Federal Constitutional Court of Germany on the Public Sector Asset Purchase Programme of the European Central Bank: Setting an Impossible and Contradictory Test of Proportionality' (*EU Law Live blog*, 15 May 2020) <https://eulawlive.com/op-ed-the-judgment-of-the-federal-constitutional-court-of-germany-on-the-public-sector-asset-purchase-programme-of-the-european-central-bank-setting-an-impossible-and-contradictory-test-of> accessed 10 June 2020.

52 Miguel Poiares Maduro, 'Some Preliminary Remarks on the PSPP Decision of the German Constitutional Court' (*Verfassungsblog*, 6 May 2020) <https://verfassungsblog.de/some-preliminary-remarks-on-the-pspp-decision-of-the-german-constitutional-court> accessed 10 June 2020.

monetary oriented decisions.'[53] Overall, many commentators highlight that such balancing would be 'a highly political process […] best left to the legislature.'[54]

Thus, it is not surprising that many have criticised a BVerfG's attitude which suggests that the German standard of proportionality is the correct one to be applied. It has brought about an impressive list of claims surrounding the German Sendungsbewustsein (sense of mission) along the lines of 'am deutschen Wesen soll die Welt genesen':

- 'Why should a German standard be imposed as an EU standard.'[55]
- 'In a club of many members, it is more offensive for one to tell the others how it should be run, than for that member to simply turn their back. […] It is not so much un-European, as colonialist.'[56]
- 'Das BVerfG erklärt dem EuGH in ziemlich schulmeisterlicher Manier [… the principle of proportionality]'[57]
- '[T]hat attitude of "cultural dominance" which clearly transpires (at least in my eyes) from all the reasoning of the Zweiter Senat regarding the principle of proportionality, and the necessity that the decisions taken within the PSPP programme respect it.'[58]
- 'The FCC is teaching the CJEU how to be a court worthy of the title. And it is doing so for the most unsophisticated of all reasons: The FCC does not like the outcome.'[59]

This sense of German exceptionalism was certainly not helped by the fact that the BVerfG in its this proportionality review highlighted those interests that seem mainly relevant form a German perspective and less relevant in other Member States.[60]

Overall, the judgment certainly displays a very German understanding of proportionality but equally a very German understanding of EU law as public law all shaped by a German understanding of administrative review and judicial review of such acts. The first part of the judgment very much reads like a judgment of BVerfG examining whether a

---

[53] Miguel Poiares Maduro, 'Some Preliminary Remarks on the PSPP Decision of the German Constitutional Court' (*Verfassungsblog*, 6 May 2020) <https://verfassungsblog.de/some-preliminary-remarks-on-the-pspp-decision-of-the-german-constitutional-court> accessed 10 June 2020.
[54] Instead of many, see Gareth Davies, 'The German Constitutional Court Decides Price Stability May Not Be Worth Its Price' (*European Law Blog*, 21 May 2020) <https://europeanlawblog.eu/2020/05/21/the-german-federal-supreme-court-decides-price-stability-may-not-be-worth-its-price> accessed 10 June 2020.
[55] Toni Marzal 'Is the BVerfG PSPP decision "simply not comprehensible"? A critique of the judgment's reasoning on proportionality' (*Verfassungsblog,* 9 May 2020) <https://verfassungsblog.de/is-the-bverfg-pspp-decision-simply-not-comprehensible> accessed 10 June 2020.
[56] Gareth Davies, 'The German Constitutional Court Decides Price Stability May Not Be Worth Its Price' (*European Law Blog,* 21 May 2020) <https://europeanlawblog.eu/2020/05/21/the-german-federal-supreme-court-decides-price-stability-may-not-be-worth-its-price> accessed 10 June 2020.
[57] Franz C. Mayer, 'Auf dem Weg zum Richterfaustrecht? Zum PSPP-Urteil des BVerfG' (*Verfassungsblog*, 7 May 2020) <https://verfassungsblog.de/auf-dem-weg-zum-richterfaustrecht> accessed 10 June 2020.
[58] Diana-Urania Galetta, 'Karlsruhe über alles? The reasoning on the principle of proportionality in the judgment of 5 May 2020 of the German BVerfG and its consequences' (*CERIDAP*, 8 May 2020) <https://ceridap.eu/karlsruhe-uber-alles-the-reasoning-on-the-principle-of-proportionality-in-the-judgment-of-5-may-2020-of-the-german-bverfg-and-its-consequences> accessed 10 June 2020.
[59] Urška Šadl, 'When is a Court a Court?' (*Verfassungsblog*, 20 May 2020) <https://verfassungsblog.de/when-is-a-court-a-court> accessed 10 June 2020.
[60] Franz C. Mayer, 'Auf dem Weg zum Richterfaustrecht? Zum PSPP-Urteil des BVerfG' (*Verfassungsblog*, 7 May 2020) <https://verfassungsblog.de/auf-dem-weg-zum-richterfaustrecht> accessed 10 June 2020.

judgment of the Bundesverwaltungsgericht (the Federal Administrative Court -the ultimate appeal for administrative matters) and the review of the administrative decision performed by the Federal Administrative Court was compliant with the constitutional principles. Even the structure of the judgment very much reminds the reader of this form of review. It first examines the Court's judgment - in this case the Court of Justice's – and, then, explores in a second step whether the administrative decision - in this case the ECB's - itself is proportional. The BVerfG's judgment even finds one of the classical deficiencies of German administrative law, a failure to explain whether a proportionality assessment has been carried out. Thus, just as in administrative law cases, the BVerfG is examining not necessarily the proportionality review by the Court of Justice *per se*. Instead, it is assessing the overall review intensity and, then, in a second step the question whether the programme as a decision of a public authority could be justified – using the 'corrected' standard of review. In this sense, the judgment might not be so surprising, at least for a German public lawyer.[61]

The second element that also seems rather German relates to the incommensurability issue. For the German constitutional court, the idea of incommensurability does not exit.[62] Instead, the BVerfG uses the principle of praktischen Konkordanz[63] known expressly from the area of fundamental rights protection.[64] As such, the BVerfG does not consider it particularly problematic or difficult to balance different fundamental rights against each other or to balance eg the freedom of the arts against requirements of child and youth protection.[65] The principle of praktische Konkordanz is a method for solving norm conflicts between two objectives of equal value and could be said to be at the heart of German public and constitutional law. It is such a balancing that the BVerfG expects the ECB to perform as part of proportionality assessment. The BVerfG expects the ECB not to act blindly without regard to the consequence. Instead, it should identify possible interest affected[66] by its decision. In practise, the BVerfG does not necessarily require a 'full weighing' of the different interests but rather the performance of the usual suitability and necessity test plus finally and exploration of whether any *foreseeable* negative effects of the PSPP programme would have *manifestly* outweighed their benefits (proportionality *stricto sensu*). And in nearly traditional German administrative law fashion, the BVerfG expressed concern that it was not discernible whether such an enquiry had taken place[67] thereby emphasising the procedural element of proportionality.[68] Such an exercise is not too different from the obligations

[61] Or as Bobić and Dawson put it 'a student who was a good positivist', see Ana Bobić and Mark Dawson, 'What did the German Constitutional Court get right in Weiss II?' (*EU Law Live Blog,* 12 May 2020) <https://eulawlive.com/op-ed-what-did-the-german-constitutional-court-get-right-in-weiss-ii-by-ana-bobic-and-mark-dawson> accessed 10 June 2020.

[62] Except maybe with regard to human dignity which is not subject to any balancing, see eg BVerfG, *Luftsicherheitsgesetz*, 1 BvR 357/05 (2006) ECLI:DE:BVerfG:2006:rs20060215.1bvr035705.

[63] Principle of practical concordance.

[64] See Robert Alexy, *Theorie der Grundrechte* (Suhrkamp 1994).

[65] BVerfG *Mutzenbacher,1* BvR 402/87 (1990).

[66] Fundamental right might also come into play.

[67] Thus, the three months period to provide reasons.

[68] What Davies calls 'extra-territorial application of national administrative law' - Gareth Davies, 'The German Constitutional Court Decides Price Stability May Not Be Worth Its Price' (*European Law Blog,* 21 May 2020) <https://europeanlawblog.eu/2020/05/21/the-german-federal-supreme-court-decides-price-stability-may-not-be-worth-its-price> accessed 10 June 2020.

outlined by the GC has in its recent *Steinhoff* decision[69] regarding the ECB or those of the Commission in *Ledra*.[70] In *Steinhoff,* the GC held that even where ECB fulfils only its consultative function to the Member States it would be bound by the Charter and the requirement to contribute to the aims of the EU contained in Article 2, 3 and 6 TFEU.[71] Therefore, the ECB would have been required to take account of *possible* violations of those norms when providing its advice to Cyprus on the restructuring programme.

What becomes clear is that the BVerfG employed a rather German understanding of proportionality and that this concept might not be the same as the EU's concept. It seems like a classical lost in translation situation: just because something is called Verhältnismäßigkeit in judgments of the Court of Justice it does not mean that the German Verhältnismäßigkeit is meant. Verhältnismäßigkeit, proportionality, proportionnalité or its myriad of other translations does not mean the same thing in different legal systems. It is a concept not just a term, and concepts are difficult to translate as they are embedded in their cultural context.[72] The cultural context, in this case the constitutional context, matters.

We might, thus, think of a version of the tower of babel where people had the same intention of jointly building a tower but were hampered by the fact that they did not understand each other. The EU edifice is built by numerous actors and courts, using multiple languages, all of which have a claim to be the official language of the EU and the Court of Justice. Thus, even though the same terms are used in the different language for a concept and their actual meaning might be close, there might still be considerable difference due to the (legal) cultural background[73] in which they are embedded. The metaphor of the Babel's tower as common edifices build by numerous actors is also interesting in another way. Building successfully relies on common standards. Just because everyone involved uses 'the ell' to determine length doesn't mean the building will be stable. As long as the builders involved are not aware that there are Scottish, Polish, French, Swedish and different variations of the Danish and German 'ell'. In essence, the whole situation is also a very familiar problem encountered in the building of the EU's internal market. There might a myriad of interpretation what is a 'safe' toy for kids. The EU has managed to overcome these problems in the internal market by means of mutual trust and commonly agreed standards and entrusted the final interpretation to the Court of Justice.[74] What is however different, is

---

[69] Case T-107/17 *Steinhoff and others* EU:T:2019:353. For a comment see Diane Fromage, 'The ECB and its expanded duty to respect and promote the EU Charter of Fundamental Rights after the Steinhoff case' (*EU Law Analysis*, 9 June 2020) <http://eulawanalysis.blogspot.com/2020/06/the-ecb-and-its-expanded-duty-to.html> accessed 10 June 2020.

[70] Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising Ltd and others* EU:C:2016:701 in particular paras 67-68. For a comment see Alicia Hinarejos, 'Bailouts, Borrowed Institutions, and Judicial Review: Ledra Advertising' (*EU Law Analysis,* 25 September 2016) <http://eulawanalysis.blogspot.com/2016/09/bailouts-borrowed-institutions-and.html> accessed 10 June 2020.

[71] Case T-107/17 *Steinhoff and others* EU:T:2019:353 para 98.

[72] See eg Theo Hermans, 'Cross-cultural translation studies as thick translation' (2003) 66:3 Bulletin of the School of Oriental and African Studies 380-389.

[73] In a similar direction pointing to the different legal cultures between in terms of drafting of judgments between the BVerfG and the Court of Justice, see Diana-Urania Galetta, 'Karlsruhe über alles? The reasoning on the principle of proportionality in the judgment of 5 May 2020 of the German BVerfG and its consequences' (*CERIDAP,* 8 May 2020) <https://ceridap.eu/karlsruhe-uber-alles-the-reasoning-on-the-principle-of-proportionality-in-the-judgment-of-5-may-2020-of-the-german-bverfg-and-its-consequences> accessed 10 June 2020.

[74] See also Pavlos Eleftheriadis, 'Germany's Failing Court' (*Verfassungsblog*, 8 May 2020) <https://verfassungsblog.de/germanys-failing-court> accessed 10 June 2020.

that the Court of Justice is not, anymore, an arbiter but rather just considered another player in the game, and a player that the BVerfG does not trust, at least in this particular instance.

While these observations might explain what we see, it still leaves us with the question that Claes had already raised with regard to Gauweiler:[75] Why should the German standard be(come) the EU standard for review?

4.2 THE BVERFG PROPORTIONALITY IN ITS BROADER CONTEXT

Maybe the BverfG's judgment does not imply that the German standard of proportionality needs to become the EU standard. To focus solely on proportionality would miss the broader picture in which the BVerfG places its proportionality review. A pure violation of the BVerfG proportionality review standard alone would not justify disobeying with EU law as also the BVerfG's judgment highlights.[76] And Eleftheriadis argues the BVerfG's case law on *ultra vires* and constitutional identity review which should only come into play with regard to 'important constitutional transformations, not to any error supposedly committed by an international body to which we have delegated powers. [But] the *ultra vires* review [is reserved] for manifest failures and for what we might call violations of constitutional fundamentals.'[77] The broader context is therefore crucial to understand how the BVerfG could establish such a grave instance.

Traditionally, we have seen three distinct areas of review by the BVerfG, the Solange type fundamental rights protection, the *ultra vires*, and finally the constitutional identity as constitutional core.[78] While it has been observed previously[79] that there is an overlap between these pillars of review, this judgment further highlights this connection. Without this connection the BVerfG would not have been able to claim to have established an *ultra vires* act in line with its established case law. Hence, the BVerfG rejects the proportionality review by the Court of Justice not (solely) because it is, in its view, too lenient but rather because it occurs in a specific context that is linked to the constitutional identity/core.

The BVerfG highlights the democratic principles protected by the unamendable constitutional identity/core of the German Constitution, democratic participation by means of democratic election.[80] Or maybe more precisely equal chances for the citizens to affect the democratic process as the BVerfG has highlighted in its case law on elections to the Bundestag.[81] The *PSPP* judgment highlights the importance of this principle and requires increased judicial review in cases where such democratic legitimacy exists only in diminished

---

[75] See Monica Claes, 'The Validity and Primacy of EU Law and the "Cooperative Relationship" between National Constitutional Courts and the Court of Justice of the European Union' [2016] Maastricht Journal of European and Comparative Law 151.

[76] See eg para 110 highlighting that a transgression of the competences needs to be structurally relevant in the competence allocation and to the detriment of the Member States.

[77] Pavlos Eleftheriadis, 'Germany's Failing Court' (*Verfassungsblog*, 8 May 2020) <https://verfassungsblog.de/germanys-failing-court> accessed 10 June 2020.

[78] See section 4 for a focus on the ultra vires review.

[79] See the decision in BVerfG 15.12.2015 - 2 BvR 2735/14, ECLI:DE:BVerfG:2015:rs20151215.2bvr273514 and the comment on its relevance Julian Nowag, 'EU law, constitutional identity, and human dignity: A toxic mix?' (2016) 54 Common Market Law Review 1441-1454, available also at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2840473> accessed 10 June 2020.

[80] para 101.

[81] See eg BVerfG, *Ländersitzkontingente* - 2 BvF 3/11 - (25 July 2012) ECLI:DE:BVerfG:2012:fs20120725.2bvf000311.

from.[82] Thereby, the BVerfG picks up a theme already existent in its *Gaulweiler* decision. There it demanded a restrictive interpretation of the ECB's monetary mandate due to the ECB's independence and thus diminished democratic legitimacy.[83]

The BVerfG finds the *overall* review of ECB acts by the Court of Justice insufficient and thus *ultra vires* because Court of Justice's review is lenient both in terms of the legal basis as well as in terms of proportionality.[84] In this regard, it is important to highlight that the BVerfG could not decide with certainty that the ECB acted itself *ultra vires*. It is rather the review or more precisely the perceived lack of oversight by the Court of Justice compounded by the absence of democratic oversight over the ECB that would allow the ECB to act (potentially) *ultra vires*. The BVerfG highlights a number of times[85] that the lenient review with regard to the legal basis combined with the lenient review over how the ECB uses the power derived from this legal basis means that no meaningful control of the actions of the ECB is in takes place.[86] Or to put it bluntly: under the Court of Justice's review standards the ECB can do what it likes, as long as the ECB does not openly oversteps its competence. Thus, the BVerfG concern is that the Court of Justice essentially has handed the ECB a competence-competence: the ECB can decide how it interprets the legal basis for its actions and moreover does not face constraints in how it exercises its power under that legal basis.

Seen from this perspective the Court of Justice's failure in the view of the BVerfG was to grant the ECB with such a power. An unlimited power/competence that conceivably might be used in such a broad way that it touches upon the core of the 'the right to vote' and the 'budgetary autonomy' of the Bundestag as protected by the constitutional identity clause.[87] Thus, the combination of a light touch legal basis review with a light touch review of the actions, in particular in terms of proportionality spells the danger of *ultra vires* acts.[88] This danger is compounded where such acts are able to touch upon core values protected by the German constitution.

If this is the relevant 'danger zone' for the BVerfG, would that not also spell trouble for other areas of EU action?[89] The judgment seems to send a clear message to the ECB as an institution with less democratic legitimacy that a more stringent review will need to take place.[90] But could the same not be said about other independent EU agencies or possibly even the Commission? It is certainly not an unreasonable to point to such dangers. However,

---

[82] Ana Bobić and Mark Dawson, 'What did the German Constitutional Court get right in Weiss II?' (*EU Law Live Blog,* 12 May 2020) <https://eulawlive.com/op-ed-what-did-the-german-constitutional-court-get-right-in-weiss-ii-by-ana-bobic-and-mark-dawson> accessed 10 June 2020.

[83] Armin Steinbach, 'Ultra schwierig' (*Verfassungsblog*, 6 May 2020) <https://verfassungsblog.de/ultra-schwierig> accessed 10 June 2020.

[84] See para 156.

[85] See para 140 and 164ff.

[86] See also Armin Steinbach, 'Ultra schwierig' (*Verfassungsblog,* 6 May 2020) <https://verfassungsblog.de/ultra-schwierig> accessed 10 June 2020.

[87] See eg para 102, 103, 234, but see also the previous Lisbon judgment where the BVerfG equally highlighted these matters as core, BVerfG 30 June 2009 - 2 BvE 2/08 - para 256.

[88] See in particular para 156.

[89] Besides form well described problems that the PSPP judgment might create in terms of the rule of law procedures in Poland and Hungary.

[90] See also Ana Bobić and Mark Dawson who explain: 'Judical review of ECB needs to be more detailed as there are less political review due to independence', see Ana Bobić and Mark Dawson, 'What did the German Constitutional Court get right in Weiss II?' (*EU Law Live Blog*, 12 May 2020) <https://eulawlive.com/op-ed-what-did-the-german-constitutional-court-get-right-in-weiss-ii-by-ana-bobic-and-mark-dawson> accessed 10 June 2020.

the Commission's better regulation agenda which includes increased procedural steps in terms of the proportionality review and where relevant the oversight and involvement of the EU Parliament should mitigate against such a danger. Moreover, the EU's better regulation agenda also allows the Court of Justice to perform a more meaningful review of Commission acts.[91] However, this reasoning might well apply to a whole range of independent EU agencies depending on whether the Court of Justice applies what Öberg[92] calls administrative review or the more lenient legislative standard.

Overall, the judgment links review intensity by the Court of Justice with the *ultra vires* review by the BVerfG. And in good tradition[93] the BVerfG's judgment can be framed in a Solange fashion: As long as there is no meaningful review either at the stage of competence or in the exercise of the competence (eg by means of proportionality) for institutions of the EU with reduced democratic legitimacy, the BVerfG will carry out such a review by means requiring compliance with (its own) administrative law based proportionality review.

This judgment sends a strong massage. Yet, it seems rather surprising that BVerfG would expect that other actors in the European arena would not only fully understand the German proportionality test but also expect them to apply it. In such a situation one is indeed left with the questions whether the EU edifices suffers from an insurmountable Babel tower problem. But it doesn't have to be that way. As others pointed out the judgment's challenge might lead to a reform of the EMU.[94] More broadly it seems to challenge not only the EMU but the Court of Justice's judicial review intensity of a whole range of independent EU governance structures. Looking at this challenge not only from a narrow proportionality perspective but from the overall review intensity might help. For independent EU governance structures the BVerfG judgment seems to demand either more democratic control or a more intense judicial review, whether in the form of legal basis review or in form of how these EU institutions exercise their powers. Working on these underlying structural issues rather than debating how to define 'the ell', or 'the proportionality', might be more effective for building towers, or building the EU edifice.

If the EU were to accept the BVerfG's message and wanted to address the identified gap, the Court of Justice could obviously change its review intensity. However, another far reaching adjustment could be implemented by means of EU secondary legislation. The EU could adopt legislation to extend the Commission's Better Regulation agenda beyond the

---

[91] See Julian Nowag and Xavier Groussot, 'From Better Regulation to Better Adjudication? Impact Assessment and the Court of Justice's Review' in Sacha Garben and Inge Govaere (eds), *The EU Better Regulation Agenda: A Critical Assessment* (Hart Publishing, 2018) 185-202, available also <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3024039> accessed 10 June 2020.

[92] Jacob Öberg, 'The German Federal Constitutional Court's PSPP Judgment: Proportionality Review Par Excellence' (*European Law Blog*, 2 June 2020) <https://europeanlawblog.eu/2020/06/02/the-german-federal-constitutional-courts-pspp-judgment-proportionality-review-par-excellence/> accessed 9 June 2020; see also Jacob Öberg, 'The Rise of the Procedural Paradigm: Judicial Review of EU Legislation in Vertical Competence Disputes' [2017] 13:2 European Constitutional Law Review 248-280.

[93] See with regard to the case BVerfG *Mr R* 15.12.2015 - 2 BvR 2735/14, ECLI:DE:BVerfG:2015:rs20151215.2bvr273514. Mathias Hong 'Human Dignity and Constitutional Identity: The Solange-III-Decision of the German Constitutional Court' (*Verfassungsblog*, 18 February 2016) <http://verfassungsblog.de/human-dignity-and-constitutional-identity-the-solange-iii-decision-of-the-german-constitutional-court> accessed 9. June 2020.

[94] Ana Bobić and Mark Dawson, 'What did the German Constitutional Court get right in Weiss II?' (*EU Law Live Blog,* 12 May 2020) <https://eulawlive.com/op-ed-what-did-the-german-constitutional-court-get-right-in-weiss-ii-by-ana-bobic-and-mark-dawson> accessed 10 June 2020.

realm of the Commission and the case of adopting legislation. It would require all independent EU agencies to perform a regulatory impact assessment addressing specifically proportionality of the measure and subsidiary. The requirement to carry out such an impact assessment could take account of the distinction of Article 263 TFEU. It would thus only apply to legislative and regulatory acts but not in the case of decision addressed to individual persons.

Such a proposal might raise questions about the extent to which it would encroach on the ECB's independence and the extent to which the ECB would be bound by it. While these questions of competence are interesting, in practice it is unlikely that the ECB would be able to withstand such the pressure to adopt such measures. Moreover, such legislation could be introduced in tandem with the ECB, so that the normal legislative rules and internal ECB rules would be the same and come into force at the same time.

Measures like these should be able to address the issues identified by the BVerfG. But broader questions regarding EU law and *ultra vires* review by national courts remain and are the domain of issues surrounding theories of constitutional pluralism.

5 THE WORLDS OF CONSTITUTIONAL PLURALISM AND *ULTRA VIRES* REVIEW

5.1 CONSTITUTIONAL PLURALISM AFTER THE LISBON DECISION: AN *ULTRA VIRES*ATION OF EU LAW?

The last decade has been the seed of a reinforcement of the control of the FCC over the Court of Justice case law and its exclusive jurisdiction in the judicial review of EU acts. The *Lisbon,*[95] *Honeywell*[96] and *OMT*[97] decisions have been paradigmatic in this respect by structuring a solid *ultra vires* test. The *Weiss* case constitutes the culmination of this process of structuring, where the FCC frustration – that appears rather clearly between lines in the earlier *OMT* decision – has certainly played a role in the making of the decision delivered on 5 May 2020. In general, the national courts in the European Union have reacted differently to the claim of ultimate judicial *kompetenz-kompetenz* established and anchored in the Court of Justice case law. Most of the national courts do not see any objection to the exclusive jurisdiction of the Court of Justice. Yet, some national courts have claimed jurisdiction to review Union acts and it is so that no courts have expressly acknowledged the ultimate authority of the Court of Justice.[98] Indisputably, national constitutions of some Member States were construed in such a way that the final constitutional, legislative and judicial authority lies in the Member State.[99] The case law of the FCC in Germany provides here the best and most advanced sample of a national constitutional court reacting towards primacy of EU law and the related issue of the exclusive jurisdiction of the Court of Justice. Those issues have arisen mainly in the context of fundamental rights and the division of

[95] BVerfG, Case No. 2 BvR 2/08.
[96] BVerfG, Case No. 2 BvR 2661/06.
[97] BVerfG, Case No. 2 BvR 2728/13.
[98] See House of Lords, *The Future Role of the European Court of Justice* (2004) 6th report, para 65.
[99] ibid para 67.

competences for many decades.[100] The tension has particularly increased in the wake of Lisbon Treaty with the judgment of the FCC in the *Lisbon* decision[101] and the development of a structured test to declare an EU act *ultra vires*.

The Lisbon ruling of the FCC on 30 June 2009 reflects a defensive approach and a skepticism towards European integration.[102] The core of the ruling is focused on the concept of constitutional identity. The FCC states that the principle of conferral and the duty under EU law to respect identity are the expression of the foundation of Union authority in the constitutional law of the Member States.[103] The paragraph 241 clearly reflects a radical view on constitutional pluralism.[104] Indeed, the constitutional court considers in a systematic manner, which are the means of judicial review available to challenge Union law, ie *ultra vires* review or identity review (the so-called eternal clause). It even proposes to the national legislature an additional type of proceeding especially tailored for the review of EU legislation. The ruling of the FCC in *Honeywell* delivered in 2010 is known as building on the *Lisbon* decision and elaborating a complete *ultra vires* test often called the *Honeywell* protocol involving a preliminary ruling reference to the Court of Justice followed by a high standard of judicial review.[105] The test (or protocol) was put into action for the very first time in the *OMT* decision after sending a reference to the Court of Justice (and this is also for the very

---

[100] The assertion by the Court of Justice (Case C-11/70 *Internationale Handelsgesellschaft* EU:C:1970:114) that Community law is superior to the national law of the Member States - even their constitutional law - was the trigger of the national court's rebellion, which reacted against the evident lack of human rights within EC law in the *Solange* cases. Decision of 29 May 1974, *Internationale Handelsgesellschaft*, BVerfGE 37, 271 (1974) Common Market Law Review 540; Decision of the 22 October 1986, BVerfG 73, 339 (1987) 3 Common Market Law Review 225. See for an overview of the debate, Bruno de Witte, 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights', in Philipp Alston (ed), *The EU and Human Rights* (OUP, 1999), 859, 863-864; and Mattias Kumm, 'Who is the Final Arbiter of Constitutionality in Europe? Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice' (1999) 36 Common Market Law Review 351, 364. Notably, the possibility to control the compatibility of EU law in the light of fundamental rights guaranteed by national constitutional law was already invoked by the FCC in 1967. See *Bundesverfassungsgericht*, 18 October 1967, *BVerfGE* 22, 233.

[101] BVerfG, Case No. 2 BvR 2/08.

[102] Christian Tomuschat, 'The Ruling of the German Constitutional Court on the Treaty of Lisbon' [2009] 10 German Law Journal, 1259, 1260; and Frank Schorkopf, 'The European Union as An Association of Sovereign States: Karlsruhe's Ruling on the Treaty of Lisbon' (2009) 10 German Law Journal 1219, 1220-1221.

[103] BVerfG, Case No. 2 BvR 2/08, para 234.

[104] ibid, para 241: 'The *ultra vires* review as well as the *identity review* can result in Community law or Union law being declared inapplicable in Germany. To preserve the viability of the legal order of the Community, an application of constitutional law that is open to European law requires, taking into account the legal concept expressed in Article 100.1 of the Basic Law, that the *ultra vires* review as well as the establishment of a violation of constitutional identity is incumbent on the Federal Constitutional Court alone. It need not be decided here in which specific types of proceedings the Federal Constitutional Court's jurisdiction may be invoked for such review. Availing oneself to types of proceedings that already exist, i.e. the abstract review of statutes (Article 93.1 no. 2 of the Basic Law) and the concrete review of statutes (Article 100.1 of the Basic Law), *Organstreit* proceedings (Article 93.1 no. 1 of the Basic Law), disputes between the Federation and the *Länder* (Article 93.1 no. 3 of the Basic Law) and the constitutional complaint (Article 93.1 no. 4a of the Basic Law) is a consideration. What is also conceivable, however, is the creation by the legislature of an additional type of proceedings before the Federal Constitutional Court that is especially tailored to *ultra vires* review and identity review to safeguard the obligation of German bodies not to apply in Germany, in individual cases, legal instruments of the European Union that transgress competences or that violate constitutional identity'.

[105] See Daniel Sarmiento, 'Requiem for Judicial Dialogue. The German Federal Constitutional Court's Judgement in the Weiss Case and its European Implications' (*EU Law Live Blog*, Weekend Edition, 9 May 2020). < https://eulawlive.com/app/uploads/weekend-edition-16.pdf > 10 accessed 10 June 2020.

first time for the FCC) and following the delivery of the *Gauweiler* case.[106] The FCC though clearly showing it discontent with the standard of judicial review used by the Court of Justice came to the conclusion that the ruling was not *ultra vires*.[107] In *Weiss,* by contrast, the decision of the CJEU was declared *ultra vires*. It is true that this not the first time that previous decisions of the CJEU are declared *ultra vires* by a national court. This has already happened in the *Landtova* case[108] in Czech Republic and the *AJOS* case in Denmark.[109] Yet, the situation is quite dissimilar from the *Weiss* case since these two other cases involved a situation of interpretation of national law in light of EU law. This is different from the *Weiss* case, which involves the validity of an act taken by the ECB. Moreover, the Czech and Danish cases where followed by national legislative reforms in line with the Court of Justice case law.[110] This is obviously not a possibility in the *Weiss* situation.[111] The *Weiss* case is also at odds with the recent reasonably serene dialogue[112] established between many constitutional courts of other Member States as it is illustrated in Spain, Italy and France by the *Melloni,*[113] *Taricco*[114] and *Jeremy F* decisions.[115] The *Weiss* case appears as an ultimatum directed towards EU law. It goes against the key constitutional precepts established a long time ago in *Internationale Handelsgesellschaft.*[116] In other words, *Weiss* is a specific 'Ur-Teil' or a clear ultimatum sent in the context of a very definite situation deemed *ultra vires* (the ruling of the Court of Justice in *Weiss* from 2018) and within the broader setting of an EU constitutional pluralist world. This is quite a paradox. And this begs the essential question whether the European constitutional pluralist world is going to collapse and be destroyed from within.

---

106 BVerfG, Case No. 2 BvR 2728/13.

107 ibid paras 102-103.

108 See judgement of Czech Constitutional Court of 31 January 2012, (CZ) Pl. U´ S 5/12, Slovak Pensions XVII. See Jan Komárek, 'Playing with Matches: the Czech CC Declares a Judgment of the Court of Justice of the EU *Ultra vires*' (2012) 9 European Constitutional Law Review, 323. The decision is described an episode of the 'judicial war' opposing the constitutional and the Supreme Administrative court.

109 See eg Mikael Rask Madsen and Henrik Palmer Olson, 'Clashes Legal Certainties – The Danish Supreme Court's Ruling in AJOS and the Collision between Domestic Rules and EU Principles' in Mark Fenwick and others (eds), T*he Shifting Meaning of Legal Certainty in Comparative and Transnational Law* (Hart, 2017) 189.

110 See for development Helle Krunke and Sune Klinge, 'The Danish Ajos Case: The Missing Case from Maastricht and Lisbon' [2018] 3 European Papers 157.

111 See section 1.

112 See contra the judgment of the Hungarian Constitutional Court on the EU relocation policy of refugees ((HR) Decision 22/2016 (XII.) AB on the Interpretation of Article E) (2) of the Fundamental Law). The Hungarian Constitutional Court relied on the national constitutional identity to refuse the relocation.

113 See Case C-399/11 *Melloni* EU:C:2013:107; and of the Spanish Constitutional Tribunal, Tribunal Constitucional, order 86/2011 and judgment 26/2014. See also the position of the Constitutional Tribunal (1/2004) on 13 December 2004 where it considered the ultimate supremacy of the national constitution without overtly confronting the primacy of EC law. Indeed, dealing with the accession to the Constitutional Treaty, the Tribunal Constitucional maintained that there was no rivalry between the primacy of Community law and the principle of supremacy as proclaimed in the Spanish Constitution since they constitute categories of different orders.

114 See Case C-105/14 *Taricco* EU:C:2015:555; and Case of the Italian Constitutional Court, Corte Costituzionale, order 24/2017.

115 See Case C-168/13 PPU *Jeremy F* EU:C:2013:358. The French Constitutional Conseil received the case on 27 February 2013 and the decision was granted on the merits of the case on 14 June 2013. See Francois-Xavier Millet and Nicoletta Perlo, 'The First Preliminary Reference of the French Constitutional Court to the CJEU: Révolution de Palais or Revolution in French Constitutional law?' (2013) German law Journal. The first preliminary reference of the French Constitutional Council to the CJEU is describes as a milestone which, however, may remain an isolated example due to the limited jurisdiction.

116 See Case C-11/70 *Internationale Handelsgesellschaft* EU:C:1970:114.

5.2 IS THE CONSTITUTIONAL PLURALIST WORLD GOING TO COLLAPSE?

The world of constitutional pluralism is eclectic and opulent. It is made of many branches, many streams, deep waters, abrupt cliffs and numerous secret vales. It is appealing but easy to get lost in it.[117] To try exploring and defining the exact boundaries of the world of constitutional pluralism is the task for a legal Lara Croft or a legal Indiana Jones. One needs to be adventurous and daring for this mission. This case note, by contrast, is reductionist and merely focuses on the origins of constitutional pluralism. To map the full theory of constitutional pluralism is not the task for a case note. Yet, for fully grasping the consequences of the *Weiss* case on the doctrine, it is important to look at the origins of the constitutional pluralism and to comprehend its main claims. There is no 'one and unique' doctrine of constitutional pluralism but many doctrines of constitutional pluralism. Constitutional pluralism is, perhaps not so surprisingly, pluralist in nature. This posture adds nevertheless to the complexity of the doctrine.

The term 'constitutional pluralism' was coined by Neil MacCormick in the late 90's in his Chapter 7 on 'juridical pluralism and the risk of constitutional conflicts'.[118] It is worth noting that already at this early stage, MacCormick had difficulties to make a choice and was oscillating between two approaches or schools of Constitutional pluralism: A radical approach to pluralism ('radical pluralism')[119] and an international law approach to pluralism ('international pluralism').[120] At the end of his Chapter, McCormick made the choice of the international law approach to pluralism.[121] His new terminology was quickly and broadly endorsed by the doctrine and a new school ('discursive pluralism') grown rapidly – inspired by MacCormick original idea – from the writings of Maduro.

Discursive pluralism offers a framework for preventing constitutional conflicts. Maduro has established a set of (contrapunctal) principles, which forms the basis of this theory and aims at ensuring the coherency of the system.[122] The hallmark of his theory is based on dialogue: a horizontal discourse (between national courts) and a vertical discourse (between the Court of Justice and the national courts). In addition, *discursive legal pluralism* takes into consideration the so-called *institutional choice* and thus views the question of ultimate authority not only as a question of legal sovereignty but also as closely linked to political

---

[117] See eg Matej Avbelj and Jan Komárek, *Constitutional Pluralism in the EU and Beyond* (Hart, 2012); and Klemen Jaklic, *Constitutional Pluralism in the EU: A True Novelty* (OUP, 2014).

[118] See Neil MacCormick, Chapter 7, 'Juridical Pluralism and the Risk of Constitutional Conflicts' (97-121) in Neil MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (OUP, 1999).

[119] See Neil MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (OUP, 1999) 119. Radical pluralism is the view that 'it is possible that the European Court interprets Community law so as to assert some right or obligation as binding in favour of a person within the jurisdiction of the highest court of a member state, while that court in turn denies that such a right or obligation is valid in terms of the national constitution'. Such conflicts are 'not logically embarrassing' because 'strictly, the answers are from the point of view of different systems'. For MacCormick, it is plausible that each constitutional order recognize the legitimacy of every other within its own sphere, while none asserts or acknowledges the constitutional superiority over another.

[120] ibid, according to MacCormick, 'pluralism under international law' means that 'the obligations of international law set conditions upon the validity of state and of Community constitutions and interpretations thereof and hence impose a framework on the interactive but not hierarchical relations between systems'.

[121] ibid 122.

[122] Miguel Poiares Maduro, 'Contrapunctal Law: Europe's Constitutional Pluralism in Action', in Neil Walker (ed), *Sovereignty in Transition* (Hart, 2003) 501.

sovereignty.[123] The theory of discursive pluralism is monist in nature in the sense that European and national constitutional law constitutes two levels of a unitary system[124] and thus bears striking similarities with the federalist theory, the black sheep of constitutional theories in Europe.[125]

These three original schools (Radical-International-Discursive) offer an interesting point of departure for discussing the repercussions of *Weiss* on the doctrine of constitutional pluralism. It is also important to note that the doctrine of constitutional pluralism in the EU has been free from deep and solid criticisms for almost a decade.[126] Weiler has for instance famously stated to show the dominance of constitutional pluralism that it 'is today the only Membership Card which will guarantee a seat at High Tables of the public law professoriate'.[127] But doubts as to the doctrine have slowly started to rise and have been crystalized in the context of the litigation during the economic crisis (and this particularly after the *Gauweiler case* / *OMT* decision).[128] The critique is mostly articulated around two main claims: a theoretical claim (focusing on the monist nature of constitutional pluralism) and a contextual claim (focusing on the repercussion of the *OMT* decision on EU Law). The theoretical claim is strong and criticize the (almost) overall monist nature of the doctrine of constitutional pluralism in EU law. It can be found in the writings of Eleftheriadis (2010)[129] and Loughlin (2014).[130] In essence, the claim is that the monist and Kelsenian approach to constitutional pluralism seen in many schools[131] does not fit the pluralist nature of the doctrine. There is a conceptual misfit in constitutional pluralism or what Loughlin calls more poetically an 'oxymoron'.[132] The contextual claim arises in the wake of the *OMT* decision where the FCC and the CJEU confronted head to head the unsuitability of their views on the issue of judicial *kompetenz-kompetenz*. This case appears to indicate the end of an era. The

---

123 This is one of core link with the theory of constitutional pluralism à la MacCormick *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (n 118) See for developments, Anneli Albi, 'Supremacy of EC Law in the New Member States: Bringing Parliaments into the Equation of Co-operative Constitutionalism' [2007] 3 EuConst. 25; and Jan Komárek, 'European Constitutionalism and the European Arrest Warrant – In Search of the Contrapunctal Principles' Limits' (2007) 44 Common Market Law Review 9.

124 Ingolf Pernice, 'Multilevel Constitutionalism in the European Union' (2002) 27 European Law Review 511. *Multi-level constitutionalism* or *Verfassungsverbund* (compound of constitution) originates from Germany and more precisely from the theory of Pernice. European and national constitutional law constitutes two levels of a unitary system. The essence of multi-level constitutionalism is based on the non-hierarchical relationship between the EU and national legal orders. See also Ingolf Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution Making Revisited?' (1999) 36 Common Market Law Review 70.

125 Compare Maduro's theory of constitutional pluralism with the basic tenets of EU federalism.

126 Martin Loughlin, 'Constitutional pluralism: an Oxymoron?' (2014) 3 Global Constitutionalism 22. According to him 'since 2002, the concept of constitutional pluralism has been actively promoted, invariably with a positive inflection, and it now seems to have achieved the status of a school, perhaps even a sect'.

127 Joseph Weiler 'Prologue: Global and Plural Constitutionalism—Some Doubts' in Grainne de Búrca and Joseph Weiler (eds), *The Worlds of European Constitutionalism* (CUP, 2011) 8.

128 See BVerfG, Case No. 2 BvR 2728/13.

129 Pavlos Eleftheriadis, 'Pluralism and Integrity' (2010) 23 Ratio Juris 365.

130 Martin Loughlin, 'Constitutional pluralism: an Oxymoron?' [2014] 3 Global Constitutionalism 22.

131 See See Neil MacCormick, Chapter 7, 'Juridical Pluralism and the Risk of Constitutional Conflicts' (97-121) in Neil MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (OUP, 1999) 102–104 and 107-108.

132 The critique of Loughlin, 'Constitutional pluralism: an Oxymoron?' (n 126) is a critique against double monism what he calls the problematic of parallel play which is particularly visible in the school of 'radical pluralism'.

situation was rightly described by Sarmiento as 'deathly as enriched uranium'.[133] A major problem with the theory of constitutional pluralism is that it does not ensure the equality between the Member States.[134] Kelemen is particularly critical towards constitutional pluralism.[135] In a text post-*OMT* decision, he strongly points out the danger of the dalliance with constitutional pluralism and considered that the model of constitutional pluralism is fundamentally unsustainable since 'in any constitutional order worthy of the name, some judicial authority must have the final say'.[136] For him,

> '[T]he contemporary literature on constitutional pluralism has gone too far in the other direction, with its rejection of the Court of Justice's straightforward understanding of supremacy. Huge amounts of intellectual energy, including from leading scholars in the field, have been devoted to developing conceptual and theoretical foundations for what turns out, ultimately, to be an unsustainable position'.[137]

Is this the end of the theory of constitutional pluralism in EU law like it has been the end of the neo-functionalist movement at one point? It is a difficult question to answer particularly because the theory of constitutional pluralism as explained earlier is multi-facetted and based on a multitude of schools.[138] It is true, however, that it was easier to be a constitutional pluralist before the structuring and application of the *Honeywell* test (which requires the sending of a preliminary reference in the first step). Indeed, it was easier for the FCC and the Court of Justice to be engaged in 'parallel play' without strong direct confrontation. This is not the situation anymore after the *OMT* and *Weiss* situations. But *Weiss*, we should keep in mind, is also very different from the *OMT* decision in the sense that there is no legal and political solutions available for avoiding and resolving the constitutional conflict at issue. *Weiss* is a constitutional dead end.

Then, what is happening when there is precisely no legal or political solutions for avoiding and resolving the constitutional conflict – like it is in fact and unfortunately in the *Weiss* situation?[139] Kumm has considered two scenarios[140] if a national court would invalidate

---

133 See Daniel Sarmiento, 'The OMT Case and the Demise of the Pluralist Movement', (*Despite our Difeerences*, 21 September 2015) < https://despiteourdifferencesblog.wordpress.com/2015/09/21/the-omt-case-and-the-demise-of-the-pluralist-movement/> accessed 29 June 2020.

134 See Federico Fabbrini, 'After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States' (2015) 16 German Law Journal 1003.

135 Daniel Kelemen, 'On the Unsustainability of Constitutional Pluralism: European Supremacy and the Survival of the Eurozone' (2016) 23 Maastricht Journal of European and Comparative Law 136.

136 ibid 139.

137 ibid 150.

138 Ana Bobić, 'Constitutional Pluralism Is Not Dead: An Analysis of Interactions Between Constitutional Courts of Member States and the European Court of Justice' [2017] 18 German Law Journal 1395, 1397. The author defends constitutional pluralism and argues for a balanced approach to primacy.

139 See Alexander Somek, 'Monism: A Tale of the Undead?' in Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in EU Law and Beyond* (Hart, 2012) 343. According to Somek 'constitutional pluralists give up precisely where an answer is most needed: what happens when the constitutional conflict cannot be prevented or solved?'

140 Mattias Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (2005) 11 European Law Journal 262. See also Mattias Kumm, 'Who is the Final Arbiter of Constitutionality in Europe? Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice' (1999) 36 Common Market Law Review 351, 375, 384.

EU secondary legislation: the *Cassandra scenario* and the *Pangloss* scenario.[141] The *Cassandra scenario* is based on the prophecy and fear of a major constitutional cataclysm in such a situation. The *Pangloss* scenario views the risk of constitutional explosion as more or less inexistent and refutes the domino effect of such an attitude. Kumm ponders that there are solid grounds to deem that the second scenario comes closer to depict probable events than the first and argues for a residual and subsidiary role to be given to the national courts as ultimate arbitrators of fundamental constitutional commitments.[142] However, we may also envisage another scenario particularly in the wake of *Weiss*: the *Martin* scenario (*Martin* is the pessimistic soul in the famous Voltaire's book *Candide,* he also happens to be the realist in the book). This is an important scenario not to neglect since it is based on the reality and imminence of a race to the bottom. Indeed, there are no valid reasons to rule out that a *race to the bottom* would happen.[143] This particularly so when the *Honeywell* test exacerbates the tension between the FCC and the Court of Justice as seen before in the *OMT* decision. It is also tenable to argue that by looking for instance at the *European Warrant Arrest*[144] saga or at the rule of law crisis in Poland and Hungary that a domino effect is highly probable.[145] In this regard it should be noted that Polish and Hungarian governments members of the Ministry of Justice have already supported the '*ultra vires* position' of the FCC in *Weiss*.[146] This is pathetic.

In the end, it makes no sense to base the source of validity of EU law at the domestic level when there is a bridge based on domestic constitutional arrangement permitting EU law to travel in order to play its (primacy) role in the national legal order.[147] The '*ultra vires* position' also destroys the integrity of Article 267 TFEU by blurring the separation of functions between the Court of Justice and the national courts. In addition, it could be contended that if a national court invalidates EU secondary legislation, then the Court of Justice should have the possibility, in turn, to nullify national legislation. Symmetry ensures the coherence of the system. This is, of course, an unworkable situation. Unfortunately, the growing uses of qualified majority voting as well as the enlargement have clearly increased the risk of constitutional frictions.[148] As to the new Member States, it is not a secret that most of them boast very powerful constitutional courts using a system of *ex-post* constitutional

---

141 Mattias Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (n 140) 291-293.

142 ibid 304. The author proposes that national courts may give precedence to their specific and essential constitutional provisions for striking EU legislation.

143 ibid.

144 See for more developments, Xavier Groussot, 'Supr[i]macy à la Française: Another French Exception?' [2008] 27 Yearbook of European Law 89.

144 ibid. See also Xavier Groussot, 'Constitutional Dialogues, Pluralism and Conflicting Identities' in Avbelj and Komárek (eds), *Constitutional Pluralism in EU Law and Beyond* (Hart, 2012) 319.

145 ibid.

146 See the tweet of Polish Deputy Justice Minister Kaleta (5 May 2020, 'Rule of Law in Poland') stating: 'the EU says only as much as we, the members states, allow it.' A few days later, on 9 May 2020, the Hungarian Justice Minister Varga stated in an interview that 'the fact that ECJ has been overruled is extremely important' ('Eastern European States sense opportunity in German Court Ruling', 10 May 2020, Financial Times).

147 Stephen Weatherill, 'Competence creep and competence control' (2005) 23 Yearbook of European Law 1-55.

148 Wojciech Sadurski, 'Solange, Chapter 3: Constitutional Courts in Central Europe – Democracy – European Union' (2006) EUI LAW Working Paper No. 2006/40 <http://ssrn.com/abstract=963757> accessed 29 June 2020.

review.[149] Concerning qualified majority voting, the German *'banana'* case has offered a perfect example of the palpable tension.[150] The threat level is very high.[151] We should prevent the *Martin's scenario*. Conflicts on the meaning and range of primacy cannot be resolved by requiring the Court of Justice and the domestic courts to jettison their claims. Compromise is necessary and the dialogue is of essence. But is it possible to reach a compromise after the *Weiss* case? The answer seems unfortunately rather negative.[152]

The ruling in *Weiss* is not constructive and jeopardizes the fragile equilibrium of EU law. This is even more so in times of rule of law crisis where some national courts are ready to rely on extreme legal arguments in order to avoid their responsibility to apply EU law in a correct manner. In this explosive political context, the FCC is not here playing with matches but is playing with a bazooka when applying his vision of the right 'proportionality test'. Problematically, the proportionality test relied on by the FCC in *Weiss* is construed on a very shaky legal basis and can difficultly be applied by the ECB. There is an obvious legal impasse. At the theoretical level and borrowing the words of Tuori, there is also no perspectivism in the ruling of the FCC.[153] Put differently, the *Weiss* case is not about a joint cultural heritage or inter-legality since the reliance on the principle of proportionality[154] is clearly based on a national vision of the principle of proportionality.[155] We are facing here a clear situation of *potentia* (power over) without *potestas* (power to).[156] This is dangerous from an EU constitutional perspective but is it enough to constitute the end of constitutional pluralism?

Our view on this matter is that it is not the end yet of constitutional pluralism but the ruling in *Weiss* certainly does not help its cause. The criticism on constitutional pluralism will certainty increase substantially after *Weiss* since it shows its limits, particularly when it is formulated in its most radical form. The legal impasse in *Weiss* opens for a necessary solution

---

149 Miguel Poiares Maduro, 'Contrapunctal Law: Europe's Constitutional Pluralism in Action', in Neil Walker (ed), *Sovereignty in Transition* (Hart, 2003) 508-509. According to author, in a situation where of ex-post constitutional judicial review is lacking, the possibility of conflict between EU acts (other than treaties) and national constitutions is, to a large extent, eliminated.

150 See BVerfG 102, 147. In the *banana* case, which dealt with the Regulation 404/93, German undertakings alleged breaches of Articles 12 and 14 of the Fundamental Law, concerning the right to property, the right to freely exercise a professional activity and the principle of equality. The Court explicitly relied on the *Solange II* formula and linked it with the *Maastricht* decision. The interesting part of the judgment lies in the interpretation of the requirements for constitutional complaints regarding secondary Community law. In that respect, the control of constitutionality of secondary Community law, in conformity with Article 100 of the Fundamental Law, is granted only if detailed motivations prove that the Community law measure does not guarantee the minimum level of protection of fundamental rights.

151 ibid.

152 See Section 3(2) for a discussion on the PEPP. A preliminary ruling under Article 267 TFEU might also be sent in the PEPP by a German court to restore the dialogue in the near future.

153 See Kaarlo Tuori, 'From Pluralism to Perspectivism' in Gareth Davies and Matej Avbelj, *Research Handbook on Legal Pluralism and EU law* (Edward Elgar, 2018).

154 See discussion in section 5.1 as to Case C-11/70 *Internationale Handelsgesellschaft* EU:C:1970:114. *Weiss* goes head to head with the Court of Justice case law on primacy and proportionality.

155 Contrast the Weiss case with text of the former President of the German FCC Andreas Voßkuhle, 'Multilevel Cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund' (2010) 7 European Constitutional Law Review 175, 198. According to him, 'the case-law of the constitutional courts that form part of the Verbund proves to be a discursive struggle for the "best solution", which makes the multilevel cooperation between the European constitutional courts ultimately a multilevel instance for learning (Lernverbund). The mutually inspiring further development of the European constitutional culture, which has only been touched upon here, is extremely promising as regards European integration by constitutional law and constitutional jurisdiction'.

156 Martin Loughlin, *Foundations of Public Law* (OUP, 2010).

of the conflict in a political form at the highest level, ie it opens for a necessary reform of the Treaties. Two solutions are available here to tackle effectively the constitutional crisis created by the *Weiss* case: either an explicit formulation of a primacy clause in the new Treaty or the creation of a constitutional mixed chamber at the Court of Justice in the lines proposed by Weiler and Sarmiento.[157] The first solution with a primacy clause would create a federal framework and integrated model for the European Union but will close for good the schools of 'radical' and 'international' constitutional pluralism and lead to the possible amendment of certain national constitutions. *Un mal pour un bien*? The second solution would allow the possibility to find a legal solution to a potential *Weiss* situation in the future and create a 'red line' so desperately needed between the Court of Justice (through the mixed constitutional chamber) and the national courts making *ultra vires* appraisals. Given the circumstances, not to do anything for the future would be 'constitutionally criminal' and would probably lead to the M.A.D. (Mutual Assured Destruction) of the EU constitutional legal order.

6 CONCLUSION: OUR PROPOSALS FOR REFORM

The judgment from the German FCC requires response from the side of the EU. One of these responses could be an infringement procedure according to Article 258 TFEU. However, this would solve none of the underlying issues we have outlined above. We therefore propose much more detailed and nuanced responses in order to avoid the M.A.D. of the EU constitutional legal order.

In the short term, it will be necessary to address the differences in judicial review at the national *vis-à-vis* the European level. This could either be in the form of changing the Court of Justice's review intensity or by means of secondary EU legislation, requiring all independent EU agencies to perform a regulatory impact assessment specifically addressing proportionality and subsidiary requirements of proposed measures. These could help to re-instigate dialogue between the German FCC and the Court of Justice.

In the longer term and in order to address the structural flaws at constitutional level, it will be necessary to formally change the European treaties. We suggested that these changes should incorporate the following:

- Remedy the artificial delimitation between monetary and economic policies and putting both on an equal footing, AND
- Either adding a primacy clause in the treaty, thus creating a federal framework and integrated model for the EU at the expense of constitutional pluralism, OR
- Creating a mixed constitutional chamber at the Court of Justice according to the proposal brought forward by Weiler and Sarmiento, which would allow for a legal solution to any similar *Weiss* situation in the future

The BVerfG's judgment may be seen as a thorn in the eyes of the Court of Justice and the EU as a whole, but if responded to adequately could help to reform these weaknesses of the EU constitutional legal order to the better.

---

[157] Joseph Weiler and Daniel Sarmiento, 'The EU Judiciary After Weiss – Proposing a New Mixed Chamber of the Court of Justice' (*EU Law Live Blog*, 1 June 2020) <https://eulawlive.com/op-ed-the-eu-judiciary-after-weiss-proposing-a-new-mixed-chamber-of-the-court-of-justice-by-daniel-sarmiento-and-j-h-h-weiler/> accessed 10 June 2020.

LIST OF REFERENCES

Albi A, 'Supremacy of EC Law in the New Member States: Bringing Parliaments into the Equation of Co-operative Constitutionalism' (2007) 3 European Constitutional Law Review 25
DOI: https://doi.org/10.1017/s1574019607000259

Alexy R, *Theorie der Grundrechte* (Suhrkamp 1994)

Avbelj M and Komárek J, *Constitutional Pluralism in the European Union and Beyond* (Hart 2012)

Bobić A, 'Constitutional Pluralism Is Not Dead: An Analysis of Interactions Between Constitutional Courts of Member States and the European Court of Justice' (2017) 18 German Law Journal 1395
DOI: https://doi.org/10.1017/s2071832200022380

Bobić A and Dawson M, 'What did the German Constitutional Court get right in Weiss II?' (12 May 2020) available at: <https://eulawlive.com/op-ed-what-did-the-german-constitutional-court-get-right-in-weiss-ii-by-ana-bobic-and-mark-dawson> (accessed 10 June 2020)

Claes M, 'The Validity and Primacy of EU Law and the "Cooperative Relationship" between National Constitutional Courts and the Court of Justice of the European Union' (2016) Maastricht Journal of European and Comparative Law 151
DOI: https://doi.org/10.1177/1023263X1602300109

Craig P, 'Pringle: Legal Reasoning, Purpose and Teleology' (2013) Maastricht Journal of European and Comparative Law 20(1) 3
DOI: https://doi.org/10.1177/1023263x1302000101

Cremona M, 'External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law' (2006) EUI WP LAW 2006/22

Cullen H and Andrew Charlesworth, 'Diplomacy by other Means: The Use of Legal Basis Litigation as a Political Strategy by the European Parliament and Member States' (1999) 36 Common Market Law Review 1243

Davies G, 'The German Constitutional Court Decides Price Stability May Not Be Worth Its Price' (21 May 2020), available at: https://europeanlawblog.eu/2020/05/21/the-german-federal-supreme-court-decides-price-stability-may-not-be-worth-its-price (accessed 10 June 2020)

de Witte B, 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights', in Alston P (ed) *The EU and Human Rights* (OUP 1999) 859

Eleftheriadis Pavlos, 'Germany's Failing Court' (8 May 2020) available at: https://verfassungsblog.de/germanys-failing-court (accessed 10 June 2020)

Eleftheriadis Pavlos, 'Pluralism and Integrity' (2010) 23 Ratio Juris 365
DOI: https://doi.org/10.1111/j.1467-9337.2010.00459.x

Engel A, *The Choice of Legal Basis for Acts of the European Union: Competence Overlaps, Institutional Preferences, and Legal Basis Litigation* (Springer 2018)
DOI: https://doi.org/10.1007/978-3-030-00274-9

Fabbrini F, 'Suing the BVerfG', (14 May 2020) Verfassungsblog, available at: https://verfassungsblog.de/suing-the-bverfg/ (accessed 12 June 2020).

Fabbrini F, 'After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States' (2015) 16 German Law Journal 1003
DOI: https://doi.org/10.1017/s2071832200019970

Fromage D, 'The ECB and its expanded duty to respect and promote the EU Charter of Fundamental Rights after the Steinhoff case' (9 June 2020), available at: http://eulawanalysis.blogspot.com/2020/06/the-ecb-and-its-expanded-duty-to.html (accessed 10 June 2020)

Galetta DU, 'Karlsruhe über alles? The reasoning on the principle of proportionality in the judgment of 5 May 2020 of the German BVerfG and its consequences', (5 May 2020) available at: https://ceridap.eu/karlsruhe-uber-alles-the-reasoning-on-the-principle-of-proportionality-in-the-judgment-of-5-may-2020-of-the-german-bverfg-and-its-consequences (accessed 10 June 2020)

Groussot X, 'Constitutional Dialogues, Pluralism and Conflicting Identities' in Avbelj M and Komárek J, Constitutional Pluralism and Beyond (Hart 2012) 319
DOI: https://doi.org/10.5040/9781472561121.ch-014

Groussot X, 'Supr[i]macy à la Française: Another French Exception?' (2008) 27 Yearbook of European Law 89
DOI: https://doi.org/10.1093/yel/27.1.89

Hermans T, 'Cross-cultural translation studies as thick translation' (2003) 66(3) Bulletin of the School of Oriental and African Studies 380
DOI: https://doi.org/10.1017/s0041977x03000260

Hinarejos A, 'Bailouts, Borrowed Institutions, and Judicial Review: Ledra Advertising' available at: <http://eulawanalysis.blogspot.com/2016/09/bailouts-borrowed-institutions-and.html> (accessed 10 June 2020)

Hong M, 'Human Dignity and Constitutional Identity: The Solange-III-Decision of the German Constitutional Court' VerfassungsBlog, (18 February 2016), available at: <http://verfassungsblog.de/human-dignity-and-constitutional-identity-the-solange-iii-decision-of-the-german-constitutional-court (accessed 9 June 2020)>

Jaklic K, 'A True Novelty' in Jaklic K (ed) *Constitutional Pluralism in the EU* (OUP 2014) DOI: https://doi.org/10.1093/acprof:oso/9780198703228.003.0008

Kelemen D, 'On the Unsustainability of Constitutional Pluralism: European Supremacy and the Survival of the Eurozone', (2016) 23 Maastricht Journal of European and Comparative Law 136
DOI: https://doi.org/10.1177/1023263x1602300108

Komárek J, 'European Constitutionalism and the European Arrest Warrant – In Search of the Contrapunctal Principles' Limits' (2007) 44 Common Market Law Review 9

Komárek J, 'Playing with Matches: the Czech CC Declares a Judgment of the Court of Justice of the EU Ultra vires' (2012) 9 European Constitutional Law Review 323
DOI: https://doi.org/10.1017/s1574019612000193

Krunke H and Klinge S, 'The Danish Ajos Case: The Missing Case from Maastricht and Lisbon' (2018) 3 European Papers 157

Kumm M, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (2005) 11 ELJ 262
DOI: https://doi.org/10.1111/j.1468-0386.2005.00260.x

Kumm M, 'Who is the Final Arbiter of Constitutionality in Europe? Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice' (1999) 36 Common Market Law Review 351

Kyriazis D, 'The PSPP judgment of the German Constitutional Court: An Abrupt Pause to an Intricate Judicial Tango' (5 May 2020), available at: <https://europeanlawblog.eu/2020/05/06/the-pspp-judgment-of-the-german-constitutional-court-an-abrupt-pause-to-an-intricate-judicial-tango/ (accessed 14 June 2020)>

Loughlin M, 'Constitutional pluralism: an Oxymoron?' (2014) 3 Global Constitutionalism 22
DOI: https://doi.org/10.1017/s2045381713000166

Loughlin M, *Foundations of Public Law* (OUP 2010)
DOI: https://doi.org/10.1093/acprof:oso/9780199256853.001.0001

MacCormick N, 'Juridical Pluralism and the Risk of Constitutional Conflicts' in Neil MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (OUP 1999) 97
DOI: https://doi.org/10.1093/acprof:oso/9780198268765.003.0007

MacCormick N, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (OUP 1999) 119
DOI: https://doi.org/10.1093/acprof:oso/9780198268765.001.0001

Marzal T, 'Is the BVerfG PSPP decision "simply not comprehensible"? A critique of the judgment's reasoning on proportionality' (9 May 2020) https://verfassungsblog.de/is-the-bverfg-pspp-decision-simply-not-comprehensible (accessed 10 June 2020)

Mayer FC, 'Auf dem Weg zum Richterfaustrecht? Zum PSPP-Urteil des BVerfG' (7 May 2020), available at: https://verfassungsblog.de/auf-dem-weg-zum-richterfaustrecht (accessed 10 June 2020)

Meier-Beck Peter, 'Ultra vires?' (11 May 2020) available at: https://www.d-kart.de/en/blog/2020/05/11/ultra-vires (accessed 10 June 2020)

Millet FX and Perlo N, 'The First Preliminary Reference of the French Constitutional Court to the CJEU: Révolution de Palais or Revolution in French Constitutional law?' (2015) 16(6) German law Journal 1471
DOI: https://doi.org/10.1017/S2071832200021222

Nicolaides P, 'The Judgment of the Federal Constitutional Court of Germany on the Public Sector Asset Purchase Programme of the European Central Bank: Setting an Impossible and Contradictory Test of Proportionality' (15 May 2020) available at: https://eulawlive.com/op-ed-the-judgment-of-the-federal-constitutional-court-of-germany-on-the-public-sector-asset-purchase-programme-of-the-european-central-bank-setting-an-impossible-and-contradictory-test-of (accessed 10 June 2020)

Nowag J and Groussot X, 'From Better Regulation to Better Adjudication? Impact Assessment and the Court of Justice's Review' in Garben S and Govaere I (eds), *The EU Better Regulation Agenda: A Critical Assessment* (Hart Publishing 2018) 185
DOI: https://doi.org/10.5040/9781509917365.ch-010

Nowag J, 'EU law, constitutional identity, and human dignity: A toxic mix? Bundesverfassungsgericht: Mr R (2016) 53 Common Market Law Review 1441

Pernice I, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution Making Revisited?' (1999) 36 Common Market Law Review 70

Pernice I, 'Multilevel Constitutionalism in the European Union', (2002) 27 European Law Review 511

Poiares Maduro M, 'Contrapunctal Law: Europe's Constitutional Pluralism in Action', in Walker N (ed), *Sovereignty in Transition* (Hart 2003) 501
DOI: https://doi.org/10.5040/9781472562883.ch-021

Poiares Maduro M, 'Some Preliminary Remarks on the PSPP Decision of the German Constitutional Court' (6 May 2020) available at: https://verfassungsblog.de/some-preliminary-remarks-on-the-pspp-decision-of-the-german-constitutional-court (accessed 10 June 2020)

Rask Madsen M and Palmer Olson H, 'Clashes Legal Certainties – The Danish Supreme Court's Ruling in AJOS and the Collision between Domestic Rules and EU Principles' in Fenwick M et al (eds), *The Shifting Meaning of Legal Certainty in Comparative and Transnational Law* (Hart 2017) 189
DOI: https://doi.org/10.5040/9781509911288.ch-009

Šadl U, 'When is a Court a Court?' (20 May 2020) available at: https://verfassungsblog.de/when-is-a-court-a-court (accessed 10 June 2020)

Sarmiento D, 'Requiem for Judicial Dialogue. The German Federal Constitutional Court's Judgement in the Weiss Case and its European Implications' (9 May 2020) EU Law Live, Weekend Edition, 10 (accessed 10 June 2020)

Sarmiento S, 'The OMT Case and the Demise of the Pluralist Movement', (21 September 2015) available at: <https://despiteourdifferencesblog.wordpress.com/2015/09/21/the-omt-case-and-the-demise-of-the-pluralist-movement/>

Schorkopf F, 'The European Union as An Association of Sovereign States: Karlsruhe's Ruling on the Treaty of Lisbon' (2009) 10(8) German Law Journal 1219
DOI: https://doi.org/10.1017/S2071832200001565

Somek A, 'Monism: A Tale of the Undead?' in Avbelj M and Komárek J (eds) *Constitutional Pluralism in the European Union and Beyond* (Hart 2012) 343
DOI: https://doi.org/10.2139/ssrn.1606909

Steinbach A, 'Ultra schwierig' (6 Mai 2020) available at: https://verfassungsblog.de/ultra-schwierig (accessed 10 June 2020)

Tomuschat C, 'The Ruling of the German Constitutional Court on the Treaty of Lisbon' (2009) 10 German Law Journal 1259
DOI: https://doi.org/10.1017/s2071832200001589

Tuori K, 'From Pluralism to Perspectivism' in Davies G and Avbelj M, *Research Handbook on Legal Pluralism and EU law* (Edward Elgar 2018)
DOI: https://doi.org/10.4337/9781786433091.00009

Tuori K, 'The European Financial Crisis: Constitutional Aspects and Implications' (2012) EUI WP LAW 2012/28
DOI: https://doi.org/10.2139/ssrn.2171824

Urbina F, *A Critique of Proportionality and Balancing* (CUP 2017)
DOI: https://doi.org/10.1017/9781316796276

Voßkuhle A, 'Multilevel Cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund' (2010) 7 European Constitutional Law Review 175, 19
DOI: https://doi.org/10.1017/s1574019610200020

Weatherill S, 'Competence creep and competence control' (2005) 23 Yearbook of European Law 1
DOI: https://doi.org/10.1093/yel/23.1.1

Weiler J'Prologue: Global and Plural Constitutionalism – Some Doubts' in de Búrca G and Weiler J (eds), *The Worlds of European Constitutionalism* (CUP 2011) 8
DOI: https://doi.org/10.1017/cbo9781139026734.002

Weiler J and Sarmiento D, 'The EU Judiciary After Weiss – Proposing a New Mixed Chamber of the Court of Justice' (1 June 2020), available at: < http://www.iconnectblog.com/2020/06/the-eu-judiciary-after-weiss-proposing-a-new-mixed-chamber-of-the-court-of-justice-a-position-paper/> (accessed 10 June 2020)

Wojciech Sadurski, 'Solange, Chapter 3: Constitutional Courts in Central Europe – Democracy – European Union' (2006) EUI LAW Working Paper No. 2006/40. Available at: <http://ssrn.com/abstract=963757>

Öberg J, 'The German Federal Constitutional Court's PSPP Judgment: Proportionality Review Par Excellence' (2 June 2020), available at https://europeanlawblog.eu/2020/06/02/the-german-federal-constitutional-courts-pspp-judgment-proportionality-review-par-excellence/ (accessed 9 June 2020)

Öberg J, 'The Rise of the Procedural Paradigm: Judicial Review of EU Legislation in Vertical Competence Disputes' (2017) 13(2) European Constitutional Law Review 248
DOI: https://doi.org/10.1017/s1574019617000086