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Guest Note

The Most Important Legislation Facing Humanity? The Proposed EU Regulation on Artificial Intelligence

Eduardo Gill-Pedro*

At the start of his recent book *Human Compatible*, Stuart Russell poses what he considers "possibly the most important question facing humanity".[1] The question is what happens if we succeed in creating human-level or superhuman artificial intelligence. Whilst we are nowhere near developing such systems[2] and we may never be, most would nonetheless agree that artificial intelligence (AI) is set to be "one of the most transformative forces of our time, and is bound to alter the fabric of society".[3]

AI technologies have the potential to bring tremendous benefits to the companies and organisations who use them, as well to society in general: it is expected to bring about substantial increases in productivity, innovation, growth and job creation.[4] As AI capabilities improve, it may provide us with the answer to some of the world's most intractable problems, such as climate change, widespread poverty or resource depletion.[5] We have had a little insight into that transformative potential during the current Covid-19 pandemic: AI has played a key role in the rapid development of the vaccines against the SARS-CoV-2 virus,[6] and is being deployed in both the tracking of the spread of the disease and in planning the effective distribution of the vaccine.[7]

On the other hand, AI technologies have the potential to "radically transform welfare, wealth, or power",[8] and these transformations will probably not all be benign. AI may exacerbate existing inequalities,[9] entrench structures of discrimination,[10] bring about mass

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1 Stuart Russell, *Human Compatible: Artificial Intelligence and the problem of control* (Viking, 2019).

2 Many AI researchers are skeptical of the possibility of developing human or superhuman level artificial intelligence in this century, though there are others that consider it may occur within the next 30 to 50 years. All appear to agree that it is very difficult to forecast. (AI Impacts 'Surveys on Fractional Progress towards HLAI' (2016) at <https://aiimpacts.org/surveys-on-fractional-progress-towards-hlai/)>.

3 High Level Expert Group 'Draft Ethics Guidelines for Trustworthy AI ' (European Commission, 18 December 2018), p. i.

4 James Eager et al, 'Opportunities of Artificial Intelligence' (Report for the European Parliament, PE 652 713, 2020)

5 Russell (n 1), 98.

6 Arash Arshadi et al, 'Artificial Intelligence for COVID-19 Drug Discovery and Vaccine Development' (2020) 3 Frontiers in Artificial Intelligence 65.

7 Susan Caminiti 'How AI is helping the Covid 19 vaccine roll-out', Nasdaq News, 9 December 2020, at <https://www.nasdaq.com/articles/how-ai-is-helping-the-covid-19-vaccine-roll-out-2020-12-09>.

8 Alan Dafoe 'AI Governance: a research agenda' (Future of Humanity Institute, 2018).

9 Cristian Alonso, et al 'Will the AI Revolution Cause a Great Divergence?' IMF Working Paper 2020/184, at <https://www.imf.org/en/Publications/WP/Issues/2020/09/11/Will-the-AI-Revolution-Cause-a-Great-Divergence-49734.>

10 Phillip Hacker, 'Teaching Fairness to Artificial Intelligence: Existing and Novel Strategies against Algorithmic Discrimination under EU Law' (2018) 55 Common Market Law Review 1143.

unemployment,[11] and increase the power of dominant market actors.[12] The use of AI technologies may facilitate mass surveillance, enhance the state's ability to control its citizens,[13] and undermine democratic processes.[14] Already the use of AI in a number of fields is giving rise to ethical concerns in respect of privacy and data protection; discrimination, accountability and liability.[15] The Covid 19 pandemic has unfortunately also provided an insight into the potential negative impact of AI - from helping to speed up the spread of disinformation about the vaccine to facilitating the covert monitoring of individuals private lives.[16]

In light of these enormous actual and potential impacts of AI on our society, the debate as to whether, and if so how, to regulate AI has grown in intensity.[17] While some affirm that specific AI regulation as unnecessary and premature,[18] and as stifling the development of the enormous potential of this technology,[19] others argue that regulation is vital both to prevent potentially catastrophic risks,[20] and to ensure that the enormous potential of AI to improve the lives of billions of lives is realized.[21]

Enter the EU

On 21 April 2021 the European Commission issued a proposal for a Regulation on Artificial Intelligence.[22]. The proposal is the outcome of a long running process, that included the setting up of a High Level Expert Group, bringing together representatives from academia, civil society and industry. The Group engaged with a wide range of actors, and produced a

[11] Eager (n 4) 9.
[12] Jacques Cremér et al 'Competition Policy for the Digital Era' (European Commission Report, 2019), at >https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>.
[13] Birgit Schippers, 'Artificial Intelligence and Democratic Politics' (2020) 11 *Political Insight* 32.
[14] There are those who argued that this is already started to happened, pointing to evidence related to the US elections in 2016 and the Brexit referendum in the UK. (Vyacheslav Polonski 'How artificial intelligence conquered democracy' The Conversation, 8 August 2017 at <https://theconversation.com/how-artificial-intelligence-conquered-democracy-77675)>.
[15] Eager (n. 4), p. 10. For an overview of the actual and potential human rights impact of AI, see CAHAI Secretariat 'Towards regulation of AI systems (Council of Europe, 2020), at <https://www.coe.int/en/web/artificial-intelligence/-/-toward-regulation-of-ai-systems->.
[16] Laura Spinney, 'Let's make sure our personal data works for us – not against us – after the pandemic', The Guardian, 21 May 2021, at <https://www.theguardian.com/commentisfree/2021/may/21/data-working-for-us-covid-pandemic-information-sharing-rights>.
[17] Amitai Etzioni and Oren Etzioni 'Should Artificial Intelligence be Regulated (2017) 33 Issues in Science and Technology 4.
[18] House of Lords Report AI in the UK: No room for complacency (2020) HL Paper 196 <https://publications.parliament.uk/pa/ld5801/ldselect/ldliaison/196/196.pdf>; Chris. Reed 'How should we regulate artificial intelligence' (2018) Philosophical Transactions of the Royal Society 376.
[19] Gonenc Gurkaynak et al, 'Stifling Artificial Intelligence: Human perils' ((2016) 32 Computer Law and Security Review 5.
[20] 'Stuart Dredge, 'Artificial Intelligence and Nanotechnology 'threaten civilization' *The Guardian* 18 February 2015, at <https://www.theguardian.com/technology/2015/feb/18/artificial-intelligence-nanotechnology-risks-human-civilisation>.
[21] Sunder Pichai, 'Why Google thinks we need to regulate AI' *Financial Times* 20 January 2020, at <https://www.ft.com/content/3467659a-386d-11ea-ac3c-f68c10993b04>. Pichai is the Chief Executive of Alphabet, a company that has invested heavily in the development of AI.
[22] Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (2021/0106 (COD)).

set of guidelines and recommendations[23] which the Commission could use to anchor its proposal in a way likely to garner broad support among the relevant stakeholders.

It is clear that in issuing this proposal the EU is seeking to "stake a claim to the future of AI",[24] not only within the EU and its member states, but globally. This proposed Regulation, if passed, will be the first significant binding legal instrument regulating the development and use of artificial intelligence in the world,. This gives it the potential to shape the development of AI governance for years, perhaps decades to come: transnational governance mechanisms can be deeply path dependent, and as Chihon et all point out "decision taken early on constrain and partly determine future paths" both within a particular regime but across regimes.[25] If one accepts Stuart Russell's assertion that the question concerning the control of AI is 'the most important question facing humanity' one could argue, though perhaps with some exaggeration, that the proposed Regulation is the most important piece of legislation facing humanity!

In this short note I will set out a brief overview of this provision, and provide some initial thoughts on its merits.

The Draft Regulation

The proposed Regulation has three key objectives. The first objective is market integration.[26] The Regulation's primary legal basis would be Article 114 TFEU, under which the EU has competence to adopt the measures for the approximation of national law in order to facilitate the establishment and functioning of the internal market. The Explanations to the draft regulation point out that some member states are already considering introducing legislation to regulate AI. Such developments, in the view of the Commission, are likely to lead to fragmentation of the internal market, and to loss of legal certainty, as both producers and users will be uncertain of what rules will apply in the Union both now and in the future.[27] The Regulation would seek to provide the uniformity and predictability necessary for the proper functioning of the internal market.

The second objective is to encourage development and innovation. The Proposed Regulation is certainly not intended as a restraint on AI – on the contrary, it is intended to "foster the development, use and uptake of AI in the internal market",[28] as well as to promote the competitiveness of the EU AI industry globally.[29] However, and this is the third objective, the regulation seeks to ensure that the development and deployment of AI systems in the

[23] See European Commissions webpage on Shaping Europe's Digital Future at <https://digital-strategy.ec.europa.eu/en/policies/expert-group-ai>.
[24] Brian McElligot, 'AI Regulation – the EU approach, MHC Webinar, 23 June 2020, at <https://www.youtube.com/watch?v=n8QvWxIvjtI>.
[25] Peter Cihon et al, 'Fragmentation and the Future: Investigating Architectures for International AI Governance' (2020)11 *Global Policy* 545
[26] Proposed Regulation, recital 1.
[27] Explanatory Memorandum to the Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence Comm(2021) 206 Final
[28] Proposal (n 22), recital 5.
[29] According to the Proposal "A common EU legislative action on AI could boost the internal market and has great potential to provide European industry with a competitive edge at the global scene" (p. 94).

internal market is accompanied by conditions that provide for a 'high level of protection of public interests' including a high level of protection of fundamental rights.[30]

These objectives are deeply interlinked, and underpinning them all is the concept of 'trustworthiness'. As the Commission put it, this Regulation is:

> Part of the European Union's efforts to be an active player in international and multilateral fora in the field of digital technologies and a global leader in the promotion of trustworthy AI[31]

Note that this Regulation is but a *part* of the EU's efforts. This Proposal is part of a package. It was released together with a Communication on Fostering an European Approach on AI[32] as well as the annexed Coordinated Plan with Member States on AI.[33] These measures set out the path which the Commission hopes will make the EU "a global leader in the promotion of trustworthy AI". They also build on two proposals that are already on the legislative train – the Proposal for a Digital Services Act[34] and the Proposal for a Digital Markets Act. There is a clear conscious attempt on the part of the EU, and in particular of the Commission, to position the Union as an "active player in international and multilateral fora in the field of digital technologies" and to:

> Spearhead the development of new ambitious global norms, AI-related international standardisation initiatives and cooperation frameworks in line with the rules- based multilateral system and the values it upholds.[35]

The intended outcome of this legislative activity has been claimed to be nothing less than "a new *Code Napoléon* for the internet and for the digital society".[36]

Regulatory Framework

The proposal is clearly intended to cast the regulatory net fairly wide, by providing a broad definition of AI[37] to begin with, and by endowing the Commission with the power to include

[30] ibid. The Explanatory memorandum mentions two separate objectives: ensuring that AI systems are safe and respect existing law on fundamental rights, and enhancing "governance and effective enforcement of existing law on fundamental rights and safety requirements applicable to AI systems". I suggest that these two 'objectives' are merely the substantive and procedural aspects of the objective of ensuring AI safety.
[31] Communication from the Commission Fostering a European approach to Artificial Intelligence (COM2021/205).
[32] ibid.
[33] Annex to Comm2021/2015, 21 April 2021
[34] Proposal for a Regulation of the European Parliament and Council on a Single Market For Digital Services (COM/2020/825 final).
[35] Communication (n 31).
[36] Paul Nemitz (Principal Adviser on Justice Policy – EU Commission) in Webinar on 'AI Regulation in Europe: What is the right mix?" (Giurispudenza Roma Tre, 1 June 2021, available at: <https://www.youtube.com/watch?v=pZu-WPplJ9E>.
[37] Article 3(1) of the proposed Regulation defines AI as "software that is developed with one or more of the techniques and approaches listed in Annex I and can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with." The techniques set out in Annex I are: a) machine learning approaches, logic and knowledge based approaches and statistical approaches.

other types of applications by means of delegated legislation[38] in order to 'future-proof' the legislation.

The proposal aims for targeted and proportionate regulatory intervention, by taking a risk based approach that distinguishes between AI applications and practices that entail unacceptable risk, high risk, limited risk or minimal risk.[39]

Practices that entail an unacceptable risk are to be prohibited.[40] This covers practices such as subliminal techniques that distort a person's behavior, practices that exploit children or vulnerable persons, social scoring technologies and the most categories of use of 'real-time' biometric identification (such as face-recognition) in public places.[41]

High risk systems are those that are considered to pose "significant risks to the health and safety or fundamental rights of persons".[42] They include AI used as part of safety components of products, AI systems used in critical infrastructure or in essential public services, systems used in education, recruitment, law-enforcement, immigration decisions or administration of justice.[43] Again, the legislation is 'future proofed' by empowering the Commission to add categories of systems to the high-risk list, by means of delegated legislation.[44]

The primary regulatory burden is borne by the 'providers' of the AI system.[45] Providers can only place high risk AI systems on the market if they:[46]

- Put in place an adequate risk management system,
- Use high quality data sets,
- Include technical documentation that shows how the system complies with the requirements of the Regulation,
- Provide for accurate record keeping that ensures traceability and monitoring of the system's functioning throughout its lifecycle,
- Design the system in such a way to ensure that its operation is sufficiently transparent to enable users to interpret the system's output and use it appropriately,
- Design the system in a way that allows for human oversight throughout its operation,
- Design and develop the system so to achieve an appropriate level of accuracy, robustness and cybersecurity in light of its intended purpose.

Systems that are not prohibited or classified as high-risk generally escape regulation, except in respect of some systems (use of chat-bots, production of deep-fake photos or videos) where there are some transparency requirements.

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[38] By adding to or amending the techniques set out in Annex I, as provided for by Article 4.
[39] Proposal (n 22), Explanatory Memorandum, p. 12.
[40] Proposal (n 22), Article 5.
[41] Thought there are exceptions that allow the use of real time biometric identification where this is strictly necessary for specified objectives.
[42] Proposal (n 22), Explanatory Memorandum, p. 13.
[43] Proposal (n 22), Article 6. The detailed list of systems is set out in Annex III to the proposal.
[44] Proposal (n 22), Article 7.
[45] According to Article 3(2) of the proposed Regulation, provider means a person, or other entity that develops an AI system or has it developed with a view to placing it on the market. There are also some duties imposed on users, importers and distributors.
[46] The following requirements are set out in Articles 9- 15 of the proposed Regulation.

Governance Structure

While some types of AI systems[47] will require conformity assessments carried out by third parties,[48] on the whole the burden on ensuring that the systems conform with the requirements above is placed mostly on the providers themselves. Providers of AI systems classified as 'high-risk' have to put in place a comprehensive system of ex-ante conformity assessment through internal checks.[49] This self-regulation mechanism is backed by national authorities, who are empowered to require providers to supply "all the information and documentation necessary to demonstrate … conformity".[50] National authorities are empowered to impose very significant penalties on undertakings who fail to comply with their obligations under the Regulation.[51] There is no requirement for member states to establish dedicated 'AI authorities' as member states can designate existing authorities, such as market surveillance authorities, as supervisory authorities.[52]

National authorities will be able to set up 'regulatory sandboxes': controlled environments intended to facilitate "the development, testing and validation of innovative AI systems for a limited time before their placement on the market".[53]

The operation of this governance structure will be overseen by the proposed European Artificial Intelligence Board. This Board will facilitate cooperation between national authorities and between these authorities and the Commission, and guide the development of standards for AI across the EU.[54]

Initial thoughts

The introduction of this proposal can be seen as the EU 'putting a marker in the sand' which will set the framework around which the debate on AI governance will revolve, not only in Europe, but internationally.

In introducing the proposal, the Commission appears to show a commitment to the position that AI should be regulated as a discrete and specific phenomenon. The idea, advanced by some, that ethical principles rather than hard law should guide the development of these technologies, has been rejected. However, as Lucilla Sioli, the Commission official that had a lead role in drafting the Regulation, put it, the proposal is not for the regulation of AI as such, but for the regulation of specific uses or applications of AI.[55]

Therefore, while there can be concern that the proposed regulation will add complexity to the European regulatory landscape, and so impose greater burdens on AI developers and

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[47] AI systems which are components of products, or which are themselves products, which require certification under existing EU product safety legislation, as well as AI systems for remote biometric identification.
[48] Proposal (n. 22), Article 43.
[49] ibid, Explanations, p 14. The detailed obligations are set out in Article 16.
[50] ibid, Article 23.
[51] ibid, Article 71. The administrative fines for non-compliance can be up to 30 million Euros, or 6% of global turnover.
[52] ibid, Article 59. However member states need to ensure that these authorities have the relevant expertise and resources to fulfil their supervisory tasks (Article 59(4)).
[53] ibid, Article 53.
[54] ibid, Articles 56 and 58.
[55] CEPS Webinar 'A European approach to the regulation of artificial intelligence' 23 April 2021, at <https://www.ceps.eu/ceps-events/a-european-approach-to-the-regulation-of-artificial-intelligence>.

manufactures,[56] the tenor of the proposal is that the development and use of AI in the European single market is to be encouraged and nurtured. The Commission's risk- based approach to regulation means that the majority of AI uses, which are not considered at the moment to present significant risks, are not subject to regulatory measures. The proposed Regulation will also prevent member states from imposing stricter rules on domestic developers, or to restrict the use, in their territory, of AI developed in other member states that complies with the provisions of the Regulation.[57] In addition, there are specific provisions, in particular the requirements to put in place regulatory sandboxes, that are specifically intended to foster innovation and experimentation.

The question will be whether the proposed 'European approach' to AI regulation will succeed in increasing the trustworthiness of the AI. There are uses of AI that have raised significant concerns, such as the algorithms used to track user preferences in social media or retail platforms, which appear to escape regulation. And while the proposal prohibits the use of "real-time remote biometric identification systems in publicly accessible spaces for the purpose of law enforcement" except in very limited circumstances.,[58] this prohibition turns out to be quite narrowly defined, and appears to permit the use of such systems for other purposes than law enforcement, or where the identification is not done in real-time. One striking example of the latitude afforded by the proposed regulation is that AI systems that use biometric data "for the purpose of assigning natural persons to specific categories, such as … ethnic origin or sexual or political orientation," are not prohibited, but are merely required to inform the persons exposed to this system that they are being categorized in this way by a machine.[59] In addition to these apparent gaps in the substantive regulatory standards, there are weaknesses in the procedures for enforcing these standards. Much of the work of assessing the risk level of the AI system, and of ensuring that the systems conform with the requirements of the regulation, is left for the developers of the AI systems themselves – the regulation relies to a great extent on self-assessment of conformity.

Of course, this proposal is just that - a proposal. The work of the legislator now is to address these potential weaknesses and to ensure that the final regulation has the best possible chance of achieving the Union's objective of fostering an innovative, human-centric and trustworthy AI industry. The task of all of us who consider that such an outcome is important is to engage with this proposal, and to participate in its design and improvement. It is likely that in the next few months and years crucial decisions about the governance over the development and use of AI systems will be made. Those decisions may have wide-ranging impacts on the future of humanity, and this proposed regulation is an important element in that process.

[56] Especially considering that many applications are likely require compliance with a range of instruments, including the GDPR or sector specific product safety or market regulation.
[57] The proposed regulation will be total harmonization measure.
[58] Proposal (n. 22), Article 5(1)(d).
[59] ibid, Article 52(2).

EQUAL PAY AND EU PUBLIC PROCUREMENT LAW – CASE STUDY OF MANDATORY ICELANDIC ÍST85 STANDARD

MARTA ANDHOV* & BERGÞÓR BERGSSON†

From 2018, it became mandatory to obtain the Icelandic Equal Pay Standard (ÍST85) for all companies with 25+ employees annually operating on the Icelandic market. It has been unclear to what extent – if any – the ÍST85 can be applied in public procurements. This article analyses whether the ÍST85 is compliant with the relevant European Union internal market law, particularly public procurement law. The growing intensity of nudges to include and verify social elements in public procurements can be observed throughout the EU. The analysis of the Islandic case study bears relevance as it can be applied to the EU Member States and other EEA/EFTA States, contemplating similar approaches in their procurements. Section 1 introduces ÍST85. Section 2 analyses the relationship between EEA and EU law, showcasing that this article's analytical outcomes provide lessons applicable beyond Iceland. Section 3 examines how equal pay is regulated under EU law. Section 4 conducts an internal market analysis of ÍST85 compliance by examining the Treaties provisions on free movement. Section 5 introduces the EU public procurement law and examines ÍST85 compliance with Directive 2014/24/EU. Section 6 tests the application of ÍST85 to the Posted Workers Directive. Section 7 concludes the article.

1 INTRODUCTION

The Icelandic Equal Pay Standard, also known as ÍST85,[1] was introduced in 2012 to close the gender pay gap in Iceland. It aims to ensure that women and men who work for the same employer are paid equal wages and enjoy equal terms of employment for the same jobs or jobs of equal value. The ÍST85 was voluntary until spring 2017, when the Icelandic government passed a law stipulating that from 1st January 2018, the ÍST85 is mandatory for all companies with 25+ employees operating on the Icelandic market.[2] The act has since been repealed and replaced, with the new version coming into force on 6th January 2021.[3]

The revised EU public procurement regime promotes sustainability in public procurement more broadly than ever before.[4] Sustainable public procurement (SPP) is a

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† Bergþór Bergsson LL.M. associate at DLA Piper. Our thanks to professors: Roberto Caranta, Catherine Bernard, Albert Sanchez-Graells, Martin Trybus and Xavier Groussot, as well as Dagmar Sigurðardóttir for commenting on an earlier drafts of this article.

[1] The official name of the standard is ÍST 85:2012 – Equal wage management system – Requirements and guidance.

[2] Act no. 10/2008 on Equal Status and Equal Rights of Women and Men, as amended by Amendment Act 56/2017 on Equal Pay Certification (Equal Rights Act).

[3] Act no. 150/2020 on the Equal Status and Gender Equality (Gender Equality Act) and Act no. 151/2020 on the Administration of Gender Equality (Administration of Equality Act).

[4] 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 (Directive 2014/24/EU) [2014] OJ L94/65; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by

'procurement that has the most positive environmental, social and economic impacts possible across the entire life cycle and that strives to minimise adverse impacts'.[5] As a policy tool for including considerations other than solely economic ones when acquiring goods, works or services, SPP may address social issues such as equal pay for men and women. This can be done while aiming to achieve the appropriate balance between the economic, social and environmental factors, which are the three pillars of sustainable development.[6] Recital 2 of Directive 2014/24/EU refers to the key role of public procurement in achieving the Europe 2020 strategy for smart, sustainable, and inclusive growth. This role is also evident in the Directive's ambition to enable 'procurers to make better use of public procurement in support of common societal goals'.[7]

Viewed through the lens of universal values and progress, introducing a mandatory law on equal pay certification in Iceland should certainly be applauded. Yet, the initiative also poses uncertainties and questions regarding Icelandic public procurements. The Icelandic contracting authorities have been unsure whether the ÍST85 can be applied in public procurements and particularly to what extent it can be required from the foreign bidders to obtain the standard to bid for governmental contracts. More specifically, whether the ÍST85 is compliant with the European Union (EU) law and particularly with public procurement law. As a member of the European internal market through the agreement on the European Economic Area (EEA), Iceland must ensure that no trade restrictions are impeding free movement provisions (goods, services, capital and persons). By extension, Iceland is bound to comply with EU public procurement law. This means that to apply ÍST85 in public tenders, it must comply with the EU public procurement directives for the covered contracts and the general EU Treaties provisions for all procurements, including those outside the directives.

As Iceland is a pioneer in its approach to ensure equal pay, ÍST85 is used here as a case study. The outcomes of this analysis provide broader applicability than just Iceland. Keeping in mind the growing intensity of nudges to include social elements in public procurements, this analysis can be applied to the EU Member States, contemplating similar approaches in their procurements.

This article aims to test whether Iceland's mandatory ÍST85 is compliant with relevant EU internal market law. It is structured sectionally. Section 2 introduces ÍST85. Section 3 analyses the relationship between EEA and EU law, showcasing that this article's analytical outcomes provide lessons applicable beyond Iceland. Section 4 examines how equal pay is regulated under EU law. Section 5 conducts an internal market analysis of ÍST85 compliance by examining the Treaties provisions on free movement. Section 6 introduces the EU public procurement law and examines ÍST85 compliance with Directive 2014/24/EU. Section 7

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entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L94/243, and Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts [2014] OJ L94/1. For an overview of the reform, see G Skovgaard Ølykke and A Sánchez Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules* (Edward Elgar 2016).

[5] International Organisation for Standarisation (ISO) ISO 20400:2017.

[6] See M Andhov, 'Contracting authorities and strategic goals of public procurement – a relationship defined by discretion?' in S Bogojevic, X Groussot, J Hettne (eds) *Discretion in EU Procurement Law* (Hart Publishing 2019). EU Commission, 'Strategic Public Procurement: Facilitating Green, Inclusive and Innovative Growth' (2017) 12 *European Procurement and Public-Private Partnership Law Review* 220.

[7] Recital 2 Directive 2014/24/EU.

tests the application of ÍST85 to the Posted Workers Directive. Section 8 concludes the article.

2 THE ICELANDIC EQUAL PAY STANDARD (ÍST85)

ÍST85 was introduced as a result of a collaboration between the Minister of Welfare, the Icelandic Confederation of Labour, and the Confederation of Icelandic Enterprises in 2012. ÍST85 is a mechanism assisting employers with developing and implementing an equality policy and implementing a system for monitoring employees' wages.[8] The aim is to ensure that all workers are receiving equal pay.[9] The cornerstone of ÍST85 is implementing an equal pay management system that should include all of a company's employees.[10] One aspect of implementing such a system involves defining and categorising all the positions within a company based on objective and appropriate criteria, thereby providing an effective and professional method for pay decisions.[11]

From 2018, ÍST85 became mandatory for all companies with 25+ employees annually operating on the Icelandic market.[12] The primary reasoning for making ÍST85 mandatory was to take a big step towards closing the gender gap in the Icelandic labour market. Although Iceland has occupied the top spot in the World Economic Forum's Global Gender Gap Report for ten years, the memorandum to the Equal Rights Act's legislative amendments suggests there is still a 5.6%–13.7% gender pay gap.[13] Such a situation is deemed unacceptable since Iceland is obliged to prevent discrimination – which includes pay inequality – by both Article 65 of the Icelandic Constitution and its international obligations.[14] For example, Article 69 of the EEA agreement explicitly states that men and women should receive equal pay for equal work.[15] Equally, this obligation follows from Article 4 of the Recast Directive[16] and International Labour Organization's Convention no. 100.[17]

Since ÍST85 became mandatory based on the Equal Rights Act, the act has since been repealed and replaced with the Gender Equality Act and the Administration of Equality Act.

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[8] Art. 2(11) of the Gender Equality Act defines the term Equal Pay Certification.
[9] Art. 1 ÍST 85:2012.
[10] Art. 4(1) ÍST 85:2012.
[11] Art. 4(3)(1) ÍST 85:2012.
[12] Art 19(4) Equal Status Act. The term 'company' is defined in Art 3 ÍST85:2012 as 'any entity, corporation, administrative authority or institution, or any other combination thereof, whatever its legal form, public or private, which has its own operations and senior management'.
[13] World Economic Forum, 'The Global Gender Gap Report 2018' (2018), 18 <www3.weforum.org/docs/WEF_GGGR_2018.pdf> accessed 1 February 2021 and the Memorandum accompanying the legislative draft, 4-5 <www.althingi.is/altext/pdf/146/s/0570.pdf> accessed 1 February 2021.
[14] Constitution of the Republic of Iceland Act no. 33 of 17 June 1944 with amendments.
[15] Art. 69 of the EEA agreement is identical to Art. 6 in the Agreement on Social Policy concluded between the Member States of the European Community with the exception of the United Kingdom and Northern Ireland, which is a protocol to the Treaty on European Union (TEU) [2016] OJ C202/13. The article is a predecessor to the more specific Art. 157 of the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/47.
[16] Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Recast Directive) [2006] OJ L 204/23.
[17] ILO Convention C100 - Equal Remuneration Convention, 1951 (No. 100).

The former addresses some of the initial shortcomings associated with the framework surrounding ÍST85.

The Gender Equality Act stipulates that a company covered by the law must attain a certification based on an audit attesting that the equal pay system it has implemented meets ÍST85 requirements.[18] The certification is valid for three years. However, small companies with 25-49 employees rather than receiving a certification via an audit may receive a confirmation from the Directorate of Equality in Iceland. Such a confirmation is based on an inspection of documents that a company must provide to the Directorate.[19] It should be noted that a parent company and its subsidiaries or a company group may receive a joint equal pay certification.[20]

Due to the burden created by ÍST85's obligations, the law from 2018 contained an interim provision addressing when companies must have acquired certification or confirmation concerning their ÍST85 implementation. The period depends on the company's size, with the largest companies implementing the system first.[21] If companies fail to obtain ÍST85 certification, they are subject to fines upwards of 50,000 ISK (~ 330 €) per day.[22] As of 16th April 2021, 299 companies and institutions have acquired an ÍST85 certification.[23]

No. of employees on an annual basis	**Type of company**	**Date**
25+	Government Ministries[24]	31st December 2018
250+	Companies and institutions	31st December 2019[25]
25+	Public institutions, funds or companies that are half-owned or more by the state	31st December 2019
150-249	Companies and institutions	31st December 2020
90-149	Companies and institutions	31st December 2021
25-89	Companies and institutions	31st December 2022

[18] Art. 7(1) Gender Equality Act.
[19] Art. 8(1) and Art. 8(2) Gender Equality Act. This exemption does not apply to public institutions, funds or companies that are half-owned or more by the state, cf. Art. 8(3) Gender Equality Act.
[20] Art. 7 Gender Equality Act and memorandum to the Act, 32-33.
[21] Interim provision I (1) Gender Equality Act.
[22] Art. 10(1) Gender Equality Act, cf. Arts. 6(1) and 6(2) Administration of Equality Act.
[23] See the list of companies and institutions available at: Directorate of Equality, 'Listi yfir aðila sem hlotið hafa vottun' (updated 22 June 2021) <www.jafnretti.is/is/vinnumarkadur/jofn-laun-og-jafnir-moguleikar/listi-yfir-adila-sem-hlotid-hafa-vottun> accessed 5 August 2021.
[24] Government Ministries operating under the Icelandic Government Ministries Act no. 115/2011.
[25] A regulation was passed on 9 November 2018, changing the deadline for the implementation of ÍST85 by the biggest companies and public institutions from 31 December 2018 to 31 December 2019, as it was foreseen that a number of companies and ministries would not manage to fulfil their obligations and receive a certification in time. A subsequent regulation was passed on 6 December 2019 changing the deadline for companies with 150-249 employees, 90-149 employees and 25-89 employees, where the original deadline for implementation was moved one year into the future. These deadlines are also found in Interim provision I (1) Gender Equality Act.

Table 1 Different times of implementation depending on the number of employees within a company. Source: Interim provision I of Gender Equality Act.

A newly established company with 25+ employees, or a company that previously fell outside the scope of the legislation but has grown to have 25+ employees, has three years from the date when a change of circumstances triggered the applicability of ÍST85 to implement it. The reason for the three year grace period is to account for any fluctuations in the number of employees (a company may have a single busy year) and account for the time it may take to fulfil the requirements in ÍST85.[26] Suppose a company fell within the scope of the legislation, but the employees' number has reduced to the extent that it no longer triggers the applicability of ÍST85. In that case, it is no longer mandatory to fulfil the requirements for obtaining the standard.

2.1 LEGISLATIVE PROCESS

During the legislative process of the Equal Rights Act establishing ÍST85 as mandatory, the Icelandic Parliament received comments from various stakeholders. Among these stakeholders was Icelandic Standards, a standards association that developed ÍST85. The association pointed out that standards should be optional, not mandatory. It cited the Regulation on European Standardisation and its explicit statement that standards are voluntary.[27]

At its inception, ÍST85 was written as a voluntary standard, and its set up was not designed in view of its application as a mandatory legal tool. Furthermore, ÍST85 has not been changed since 2012, and the Equal Rights Act did not take future amendments into account. As Icelandic Standards is the copyrighted owner of the ÍST85, the standard will be amended solely by Icelandic Standards, not by the parliament itself. The members of the association can exert influence on how ÍST85 standards are amended. One factor that warrants critique is that even though Icelandic Standards held copyright ownership of ÍST85, the Ministry of Welfare, which wrote the Equal Rights Act's legislative draft, never contacted the association or sought their assistance concerning the draft.[28] This issue has been addressed in the new Gender Equality Act, where all references are to ÍST85:2012 and not to ÍST85. This is to prevent any misunderstanding about which version of the standard is mandatory to implement if Icelandic Standards decides to revise ÍST85.[29]

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[26] Art. 7 Gender Equality Act and memorandum to the Act, 32-33.

[27] Recitals 1, 11 and Art. 2(1) Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European Standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council [2012] OJ L 316/12.

[28] See 'Icelandic Standards comments', (Islenskir Staðlar, 5 May 2017) <www.althingi.is/altext/erindi/146/146-1156.pdf> accessed 30 March 2021.

[29] 'Memorandum to Gender Equality Act', (2020), 32 <www.althingi.is/altext/pdf/151/s/0014.pdf> accessed 30 March 2021. The memorandum specifically mentions that the motivation was to prevent any amendments to the standard that would circumvent the parliament. Interestingly, this was pre-emptively addressed by Icelandic Standards in their comments to the Equal Status Act, where it argued that amending

Another criticism raised when introducing the mandatory ÍST85 focused on how inaccessible the standard was since companies had to purchase it despite its status as a legal requirement.[30] While making standard mandatory accords with Article 3(1) of the Act on Standards and Icelandic Standards, the legislation does not address how accessible the standard in question should be. In response to this criticism, which was also voiced in the parliament, the Icelandic Ministry of Welfare reached an agreement with Icelandic Standards. The ÍST85 would be accessible free to the public for the next four years, with a possible four-year extension.[31]

2.2 IMPLEMENTATION OF THE ÍST85

ÍST85 can only be accessed free of charge in Icelandic. The English version of the ÍST85 is available, but if a company wants to review the ÍST85, they will have to purchase it from the Icelandic Standard's website for 12.339ISK (approx. 81 €).[32] While the purchase of the ÍST85 is for free or for a marginal price, the implementation of ÍST85 can be very costly, especially for small and medium enterprises (SMEs).[33] According to one of the comments to the Equal Status Act, obtaining the formal review of an auditor and the certification can cost between 500,000 ISK and 700,000 ISK (3333 € - 4666 €) for a medium-sized company.[34] This does not include costs incurred by the company itself in implementing ÍST85. According to a survey conducted by the Icelandic Prime Minister's Office in 2019 among the companies that had obtained ÍST85 before 30th April 2019, the total cost of implementation incurred by the companies (including certification) varied from a few hundred thousand ISK to around 4.000.000 ISK (approx. 26.666 €). 68% of the companies and institutions that answered the survey stated that their costs were below 2.000.000 ISK (approx. 13.333 €).[35]

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the legislation by merely referring to the standard as ÍST85:2012 is insufficient. Icelandic Standards can revise the standard or repeal it and any attempts to restrict Icelandic Standards to do so would, in the associations view, impede the standard's development and counteract the its purpose. Icelandic Standards also point out, that it is common to revise standards every five years, meaning that a revision should have taken place in 2017. Icelandic Standards have yet not revised the standard. See Icelandic Standards comments available at: <www.althingi.is/altext/erindi/146/146-1156.pdf> accessed 30 March 2021. Icelandic Standards did not submit any comments to the new Equal Status Act.

[30] This was for example addressed by SA Confederation of Icelandic Enterprise, 'Comments to the Equal Status Act', (15 May 2017), 2 <https://www.althingi.is/altext/erindi/146/146-1359.pdf> accessed 30 March 2021.

[31] The Ministry of Welfare and Icelandic Standards entered into a four-year agreement on 10 November 2017, with a possible four-year extension. As of 12 April 2021, the contract has not been extended.

[32] It can be found at: <www.stadlar.is/stadlabudin/vara/?ProductName=IST-85-2012-e> accessed 13 April 2021.

[33] The Icelandic Confederation of University Graduates, the Icelandic Federation of Trade, the Confederation of Icelandic Enterprises, the Icelandic Chamber of Commerce, and one private comment all mentioned the high costs that implementing the Standard would entail. See: <www.althingi.is/pdf/erindi_mals/?lthing=146&malnr=437> accessed 13 March 2020. More generally on SMEs in public procurement see: M Trybus, M Andrecka, 'Favouring Small and Medium Sized Enterprises with Directive 2014/24/EU?' (2017) 3/2017 *European Procurement and Public-Private Partnership Law Review* 224.

[34] 'Comments made by the Confederation of Icelandic Enterprises' (15 May 2017) <www.althingi.is/altext/erindi/146/146-1359.pdf> accessed 13 March 2020.

[35] The Icelandic Prime Minister's Office, 'Survey of the implementation process of equal pay certification (Isk: Könnun á innleiðingarferli jafnlaunavottunar)', <www.stjornarradid.is/library/01--Frettatengt---myndir-og-skrar/FOR/Fylgiskjol-i-frett/Jafnlaunavottun%20k%c3%b6nnun%20ni%c3%b0urst%c3%b6%c3%b0ur%2005.19.pdf> accessed 30 March 2021. Given the different times of implementation listed in table 1, these companies and institutions

The implementation of the ÍST85 is also time-consuming. It takes between six months to two years, where 2/3 of the survey respondents stated that they finished implementation within eighteen months.[36] Given how time-consuming the implementation of the ÍST85 seems to be, the three years granted for a newly established company or a company that previously did not fall within the legislation's scope is reasonable and welcomed.

The laws making the ÍST85 mandatory have been introduced to impact the Icelandic market and Icelandic companies' behaviour. The legislator's intention has not been to provide Icelandic law with an extraterritorial character. While the focus and aim have been local, a point of criticism shall be given that neither the original Equal Rights Act nor the repealing act address how the law should apply to foreign companies having their presence on the Icelandic market. Whether they should be excluded from applicability ÍST85 or not, or it should be applicable in a limited or full form. The lack of express regulation introduces uncertainty and questions. This can be presented on an example of public procurement. Suppose ÍST85 is required in Icelandic public procurement terms. Such a requirement can be indirectly discriminatory to foreign companies, as it might place them at a competitive disadvantage compared to Icelandic companies that already operate in the market and have ÍST85. The potential restriction to the trade that ÍST85 can post is broader. That is why before turning more specifically to public procurement law, the authors investigate the relationship between EEA and EU law, how equal pay is regulated on the EU level and whether ÍST85 is a restriction to trade, and if so, is it justifiable.

3 THE RELATIONSHIP BETWEEN THE EEA AND EU LAW

The European Free Trade Association (EFTA) was founded in 1960, three years after the EU's predecessor, the European Economic Community (EEC). On 2nd May 1992, the EEA Agreement was signed.[37] The Agreement between the EFTA States was followed by the Establishment of a Surveillance Authority and a Court of Justice.[38] The agreement establishing the EEA is essentially an extension (with certain limitations) of the EU internal market to three of EFTA's Member States, namely Iceland, Norway, and Lichtenstein. Characterising the nature of the agreement, the EFTA court said in the *Sveinbjörnsdottir* case:

> The EEA Agreement is an international treaty sui generis which contains a distinct legal order of its own. The EEA Agreement does not establish a customs union but an enhanced free trade area... The depth of integration of the EEA Agreement is less far-reaching than under the EC Treaty, but the scope and the objective of the

are most probably not SME's. As the legislation is relatively new and research on the topic is scarce, there is little known about how effective the mandatory ÍST85 is. However, a recent article, discusses the experience of managers regarding the effect of the ÍST85 on wage environment. The article suggests that managers experienced increased bureaucracy and displacement of decision-making power. See G Björg Hafsteinsdóttir et al, 'Behind Every System are People: Managers Experiences of the Effect of Equal Pay Certification on Wage Environment' in *Icelandic Review of Politics and Administration* 2020, Vol. 16, Issue 2, 261–284. (The article is in Icelandic].

[36] ibid.

[37] S Norberg, M Johansson 'The History of the EEA agreement and the first twenty years of its existence' in C Baudenbacher (ed) *The Handbook of EEA Law* (Springer 2016), 4-5.

[38] Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice [1994] OJ L344/82.

> EEA Agreement goes beyond what is usual for an agreement under public international law.[39]

EEA law and EU law are two separate legal orders, but since EEA law originates from EU law, they are largely identical in substance.[40] The EEA Agreement aims to optimise the functioning of the EEA by creating homogeneity within EFTA and the EU.[41] Article 1 of the EEA Agreement states that the four freedoms of the internal market must be upheld and also stipulates that mechanisms should be put in place to prevent distortion of competition within the market.[42]

The core principles of the EEA resemble existing principles in the EU. Aside from the principle of homogeneity, which is often regarded as the 'cornerstone of the EEA agreement', the Agreement also includes other principles such as proportionality, state liability, sincere cooperation, and equality.[43] The principle of sincere cooperation (or the loyalty principle) is fundamental in practice. The principle emphasises that the members of the EEA Agreement: 'shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the agreement'.[44] There are also general EU principles that are not applicable for the EEA, namely the principle of direct effect and EU law supremacy. The EFTA court has repeatedly stated that the two principles are not part of the EEA Agreement.[45] This is also clearly established through Protocol 35 to the EEA Agreement, stating that homogeneity must be reached through national procedures.[46] However, under particular circumstances, EU legislation can have an effect that amounts to having a direct effect.[47]

To fulfil the EEA Agreement's objectives, a two-pillar system was created where EFTA mirrored various EU institutions. The creation of the system was necessary because the EU legal framework does not allow non-Member States to participate in its institutions. The EFTA institutions' purpose is to uphold the homogeneity principle from the EEA Agreement by interpreting and similarly applying the rules as the corresponding EU authorities do when monitoring and enforcing the rules.[48] Two central authorities within EFTA are the EFTA Surveillance Authority (ESA),[49] which mirrors the European Commission (Commission), and the EFTA court, which mirrors the Court of Justice of the EU (CJEU).[50] The EFTA court's primary competencies are threefold: a) to take action on

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[39] Case E-9/97 *Erla María Sveinbjornsdottir v Iceland* [1998] EFTA Ct. Rep. 95, para 59.
[40] Art 97(ff) EEA Agreement.
[41] ibid Art. 1(1).
[42] ibid Art. 1 (2).
[43] P Hreinsson 'General Principles' in C Baudenbacher (ed) *The Handbook of EEA Law* (Springer 2016), 350-356.
[44] Art. 3 EEA Agreement.
[45] Hreinsson (n 43) 383.
[46] Protocol 35 on the Implementation of EEA Rules.
[47] Case E-11/12 *Beatrix Koch* [2013] EFTA Ct. Rep. 272, paras 118-120.
[48] G Baur, 'Decision-Making Procedure and Implementation of New Law' in C Baudenbacher (ed) *The Handbook of EEA Law* (Springer 2016), 47-49.
[49] The competence for surveillance of alleged infringements lies with the Commission if the alleged infringement is committed by a contracting entity in the EU and with ESA if it is committed by a contracting entity in an EEA State.
[50] Art.108(1-2) EEA Agreement. The most important judgments of the EFTA Court are summarised in C Baudenbacher, *EFTA Court – Legal Framework and Case Law* (2006), available at www.eftacourt.lu/default.asp?layout=article&id=348 [Accessed 12 April 2021].

the surveillance procedure regarding the EFTA states; b) to handle appeals concerning decisions taken by ESA; c) to settle disputes between two or more EFTA states.[51]

On the matter of hierarchy within the EEA, the EEA agreement does not stipulate that CJEU rulings regarding the internal market prevail over the EFTA court rulings.[52] However, according to Article 6 of the EEA, the EFTA court is bound to interpret provisions of the EEA Agreement that are identical in substance to corresponding rules of the EU Treaties in conformity with the relevant CJEU rulings given prior to the date of signature of the EEA Agreement. When it comes to rulings given after that date, the EFTA court must pay due account to the principles laid down by the relevant rulings of the CJEU.[53] In practice, the EFTA court's case law is largely based on the CJEU's jurisprudence.[54] The EEA States' national courts will hardly refer questions to the EFTA court, which the CJEU has answered in the EU or EEA law context.[55] At the same time, the EFTA court has, in several cases, departed from the CJEU's *'precedents'* and created new ones within the EEA.[56]

4 EQUAL PAY AND GENERAL EU LAW

The EU/EEA internal market is a legal and economic system that is supported by a regulatory platform of social policy in areas where the Member States have chosen to act together to improve the quality of the working and social environment in the EU.[57] This is confirmed in Article 3(3) of the TEU, which embraces the 'social market economy'. Moreover, equal pay has been a clear objective of EU law since the very beginning of the EEC. What is now Article 157 TFEU originated in 1957 as Article 119 of the Treaty of Rome.[58] The French government strongly lobbied for the inclusion of Article 119 in the Treaty of Rome. Yet its reasons were not related to securing equal human rights for women but rather preserving fair competition.[59] Namely, France wanted to prevent other countries signing the Treaty of Rome from undermining the French economy by using women as a cheap source of labour. However, while the original goal of Article 157 was solely economic, the CJEU soon confirmed that the provision had both an economic and a social aspect. In the *Defrenne II* case, the CJEU stated: '[Article 157] … forms part of the social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the

[51] Art 110(2) EEA Agreement.
[52] O Valsson, 'EFTA Court is not bound to make use of ECJ rulings', (*Financial Times*, 2017) <www.ft.com/content/268fa1a2-ca2f-11e7-ab18-7a9fb7d6163e> accessed 12 April 2021.
[53] Art 3(2) of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (SCA) [1994] OJ L 344/82.
[54] C Baudenbacher, 'EFTA Court, the ECJ, and the Latter's Advocates General – a Tale of Judicial Dialogue' in A Arnull, P Eeckhout, and T Tridimas (eds) *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (Oxford Scholarship Online 2009), 91.
[55] ibid 90.
[56] Ch Timmermans, 'Creative Homogeneity' in M Johansson et al (eds) *Festschrift Sven Norberg* (Bruylant; Brussels 2006) 471–484.
[57] S Weatherill, *Law and Values in the European Union* (OUP 2016).
[58] Treaty Establishing the European Economic Community (Treaty of Rome) (1957).
[59] J Gregory 'Harmonisation or Deregulation - Implementing Equal Pay Law in the European Union and the United Kingdom' (1997) 27 Victoria University Wellington Law Rev. 555, 556-557; P Craig and G de Burca, *EU Law: Text, Cases and Materials* (5th edn, OUP 2011) 858.

living and working conditions of their peoples'.[60] Later jurisprudence also suggests that the economic aspect of Article 157 TFEU plays second fiddle to the societal aspect of the Article. In the case Deutsche Telekom v. Schröder, the CJEU points out that: '[the] right not to be discriminated against on the grounds of sex is one of the fundamental human rights whose observance the Court has a duty to ensure'. [61]

As presented in Article 157 TFEU, the principle of equal pay is laid out in greater detail in secondary law. Directive 75/117/EEC was the first legislation within the EEC on equal pay.[62] It played a significant role because the earlier incarnation of Article 119 of the Treaty of Rome only covered the right to 'equal pay for equal work'. Directive 75/117/EEC broadened the scope to 'work to which equal value is attributed'.[63] Article 157 TFEU now contains this broadened scope. The Recast Directive subsequently replaced directive 75/117/EEC.[64] The Recast Directive intended to systemise the existing EU legislation in the field of equality and update it in light of the jurisprudence of the CJEU.[65]

Following the previous sections, it is clear that primary and secondary EU law establishes the legal principle – which we refer to as an EU *equal pay standard* – that women and men are entitled to equal pay for equal work or work of equal value and that discrimination of pay based on sex is prohibited.

4.1 APPLICABILITY OF THE EU EQUAL PAY STANDARD IN ICELAND

Article 69 of the EEA agreement reflects Article 119 of the Treaty of Rome, thereby binding the EEA states to provide equal pay for equal work. As the wording of the Article is taken from the Treaty of Rome, Article 69 only states that men and women should receive equal pay for equal work but does not include the expansion of the provision included in Article 157 TFEU stating that equal pay should be applied for work to which equal value is attributed.[66] Annex XVIII to the EEA agreement includes a specific provision on how to implement Article 69. Per the Annex, through the EEA, Iceland was obliged to adopt various regulations and directives in the field of social policy, one of which was the Recast Directive.[67]

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[60] Case C-43/75 *Defrenne v Sabena* EU:C:1976:56, para 10. The Court also found Article 157 TFEU to have direct effect, regardless of whether it had been implemented into national law, see para 42.
[61] Case C-50/96 *Deutsche Telekom v. Schröder* EU:C:2000:72, para 56.
[62] Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [1975] OJ L 45/19, 19–20.
[63] ibid Art. 1. See I Heide, 'Supranational Action Against Sex Discrimination: Equal Pay and Equal Treatment in the European Union' (1999) International Labour Review 381, 391.
[64] Recast Directive (n 16).
[65] Craig and de Burca (n 59) 874. One of these developments concerned the burden of proof: Art. 19 Recast Directive 'Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment'. The principle of the shifting burden of proof stems from the Case 109/88 *Danfoss* EU:C:1989:383, para 14. In this case, the CJEU found that when an employer applies wage systems that are greatly lacking in transparency the burden of proof will shift from the employee to the employer.
[66] This is not surprising, though, since 'work to which equal value is attributed' was only added in the Treaty of Amsterdam in 1997, while the EEA Agreement is from 1992.
[67] See C Bernard, 'Social Policy Law' in C Baudenbacher (ed) *The Handbook of EEA Law* (Springer 2016) 816.

Equality of pay is also regulated in Article 23 of the EU Charter of Fundamental Rights.[68] Even though the EU Charter of Fundamental Rights is not legally binding for EEA countries, the EFTA court has pointed out that the EEA Agreement's provisions shall be interpreted in light of fundamental rights.[69] The three EFTA countries that are parties to the EEA agreement have adopted the European Convention of Human Rights (ECHR). The EFTA court has found that the ECHR and judgements from the European Court of Human Rights are 'important sources for determining the scope of these rights'.[70]

The EU *equal pay standard* is applicable in Iceland. Consequently, the Icelandic ÍST85 can be viewed as an enforcement mechanism of the EU equal pay law. While substantively, the EU equal pay law and the ÍST85 afford the same rights, the procedural mechanisms in ÍST85 provide a higher level of effectiveness for equal pay. This is primarily because, under ÍST85, the burden of proof is by default shifted from the employee to the employer. To attain certification, an employer must prove the respect of equality of pay throughout the entire company. Under EU law, the burden of proof may shift solely when the employee can demonstrate facts from which it may be presumed that there has been direct or indirect discrimination, meaning that it is more difficult for the employee.[71]

In 2017 the Commission acknowledged that the gender pay gap is an ongoing issue within Europe and published an action plan to tackle this problem.[72] Recently the Commission has also published the evaluation of the Recast Directive's principle of equal pay.[73] Amongst several points of the evaluation, the Commission emphasised 'The need to improve the practical application of the reversed burden of proof'.[74] This could be argued is already addressed under the ÍST85.

While from the perspective of equal pay law, the ÍST85 can be viewed as an enforcement mechanism of The EU *equal pay standard*. It is still necessary to analyse whether the application of ÍST85 to foreign companies constitutes a restriction to trade and, if so, if it is justifiable. The article further focuses on considerations arising from the provision of service by a foreign company (clear cross-border element) under a public contract in Iceland. We must, therefore, conduct a primary EU/EEA law analysis of ÍST85, viewed in the context of freedom to provide service.

5 PRIMARY EU/EEA LAW ANALYSIS OF ÍST85

The memorandum accompanying the establishment of ÍST85 as mandatory law states that Iceland is bound by Article 69 of the EEA agreement. It has also implemented the Recast Directive, where Article 4 lays out the right to equal pay.[75] However, no reference is made to free movement laws, specifically Articles 36 (the equivalent of Art. 56 TFEU) and 11 (the equivalent of Art. 34 TFEU) of the EEA agreement regarding freedom to provide services

[68] Charter of Fundamental Rights of the European Union [2012] OJC326/391.
[69] Case E-2/03 *Ásgeirsson* [2003] EFTA Ct. Rep. 18, para 23.
[70] ibid.
[71] Art. 19 Recast Directive (n 16).
[72] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee COM (2017) 678 final.
[73] Commission, 'Evaluation of the relevant provisions in the Directive 2006/54/EC implementing the Treaty principle on 'equal pay for equal work or work of equal value' SWD (2020) 50 final.
[74] ibid 68.
[75]Art. 69 of the EEA Agreement is reflected in Art. 157 of the TFEU.

and goods within the EEA. This shall be noted as a point of criticism. ÍST85 as mandatory Icelandic law may constitute a market access barrier, and it seems that the legislator did not consider the implications of the standard to the internal market.

The guarantee of non-discriminatory and unrestricted market access constitutes the core of the internal market law. It is primarily achieved by enforcing the fundamental freedoms laid down in the EU Treaties. Article 56 and 57 TFEU outline the principles behind the free movement of services within the EU. The two articles are almost identical to Articles 36(1) and 37 of the EEA. Article 57 TFEU defines services as activities not governed by other freedoms that are provided for remuneration. The Article also notes a few primary examples of services, one of them being 'activities of a commercial character'.[76] The concept of the freedom to provide services is closely linked to the freedom of establishment found in Article 49 TFEU. The defining character of service is its temporary character. In the *Gebard* case, the CJEU stated: '[…] the temporary nature of the activities in question has to be determined in the light, not only of the duration of the provision of the service, but also of its regularity, periodicity or continuity'.[77] Thus, work containing an economic element conducted temporarily within another Member State constitutes services. Such services will be restricted in light of Articles 56 and 57 if a country has implemented: '[…] national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within a Member State'.[78]

The CJEU has found that the temporary character of services can vary greatly on the basis of their nature and that services can be provided over an 'extended period, even over several years', especially when services are provided concerning the construction of infrastructure.[79] The concept underpinning the freedom to provide services seemed to arise amid efforts to grant a service provider the freedom to travel to another Member State to conduct services unrestricted.[80]

Given this broad notion of services, a foreign company sending workers or employing people in Iceland to implement a public contract for an extended period is conducting services and would have to comply with the mandatory requirements of the Gender Equality Act. It is crucial to underline that the ÍST85 must be adopted for all company employees in question.[81] This effectively means that if a company sends or employees 25+ workers in Iceland to provide particular services for a period that exceeds a year, it would be covered by the requirement to adopt an equal pay system (ÍST85) for the whole company.

Iceland shall recognise professional qualifications or other requirements (eg standards) from the country of origin to be *prima facie* equivalent – the principle of mutual recognition as the foreign company may have implemented an equal pay system in its country of origin. Alternatively, the foreign company may fulfil the ÍST85 requirements through different

[76] Art. 57(2)(c) TFEU.
[77] Case C-55/94 *Reinhard Gebhard* EU:C:1995:411, para 39.
[78] Case C-444/05 *Aikaterini Stamatelaki* EU:C:2007:231, para 25. On the effect of the national measure on the market in regard to free movement of goods, see Case 8/74 *Dassonville* EU:C:1974:82.
[79] Case C-215/01 *Schnitzer* EU:C:2003:662, para 30.
[80] See Case 33/74 *Binsbergen* EU:C:1974:131, para 10: 'The restrictions to be abolished pursuant to Articles 59 and 60 include all requirements imposed on the person providing the service by reason in particular of his nationality or of the fact that he does not habitually reside in the State where the service is provided, which do not apply to persons established within the national territory or which may prevent or otherwise obstruct the activities of the person providing the service'.
[81] Art 4(1) ÍST 85:2012.

means that Iceland shall recognise if those different means fulfil the same standard as ÍST85. Consequently, based on the EU mutual recognition principle, Iceland shall recognise supplier national certifications or mechanism of compliance with the equal pay law.[82] Under such circumstances, the ÍST85 would not constitute a restriction of services in light of Article 36 EEA (56 TFEU).

If Iceland is not providing mutual recognition for various reasons, it is necessary to assess whether ÍST85 is discriminatory towards foreign companies. ÍST85 applies in a non-discriminative manner to both Icelandic and foreign companies fulfilling the mandatory requirements of the Gender Equality Act. The act does not differentiate between services and establishment in this regard. Provided the criteria are fulfilled, the law applies.[83] However, the CJEU has constituted that Article 56:

> […] requires the abolition of all restrictions on the freedom to provide services, even if those restrictions apply without distinction to national providers of services and to those from other Member States, when they are liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State where it lawfully provides similar services.[84]

Consequently, ÍST85 might be indirectly discriminatory toward foreign companies which would need to obtain the standard if they would like to provide services on the Icelandic market. Nevertheless, the existence of restrictions is not uncommon. EU case law establishes a broad spectrum of allowed restrictions, eg national degrees or qualifications: laws that require domestic qualifications for the access to certain professions indirectly discriminate against graduates of foreign universities;[85] requirements for a service provider to have a permit, an approval, an assessment or to provide security to provide the service;[86] restriction on bringing personnel or using brought along personnel, eg the requirement of work permits or minimum wages.[87]

5.1 JUSTIFICATIONS

If to conclude that the ÍST85 constitute a restriction on the freedom to provide services, it can be justified under specific circumstances.[88] Namely, the EU law aids such indirect discriminatory restrictions by allowing them to be justified on overriding grounds of general

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[82] See Ch Janssens, *The Principle of Mutual Recognition in EU Law* (OUP 2013).
[83] It is specifically stated in Art. 4(1)(7) of Act 45/2007 on Posted Workers and Obligations of Foreign Service Providers that companies which post workers in Iceland cannot grant their workers lesser rights than are provided in Act 96/2000 on the Equal Rights of Men and Women. Act 96/2000 is the predecessor to the Equal Rights Act and the Gender Equality Act. Even though the Icelandic Posted Workers Act has not been updated in regard to that fact, its applicability is undisputed.
[84] Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa* EU:C:2009:519, para 51.
[85] Case 71/76 *Thieffry* EU:C:1977:65; Case 330/03 *Colegio* EU:C:2006:45; Case 345/08 *Pesla* EU:C:2009:771.
[86] Case 355/98 *Commission vs Belgium* EU:C:2000:113, para 35; Case 9/16 *Unibet International* EU:C:2017:491, para 34; Case 279/00 *Commission vs Italy* EU:C:2002:89, paras 31 f.
[87] Case 113/89 *Rush Portuguesa* EU:C:1990:142, para 12; Case 115/14 *RegioPost* EU:C:2015:760, para 69.
[88] Art. 62 TFEU and Art. 39 of EEA Agreement.

interest.[89] These justifications include public policy, public security, or public health, though this list is not exhaustive.[90] The CJEU has developed a justification test concerning services which greatly resembles the *Cassis de Dijon* test regarding the free movement of goods.[91] It is generally referred to as a 'mandatory requirements' test for goods, whereas regarding services, the term 'objective justification' test has been used.[92]

The three-step justification test was laid out in *Van Binsbergen* case.[93] The restriction must be: a) due to a legitimate interest, b) equally applicable to persons established within the state, non-discriminatory, and c) proportionate.[94] A fourth requirement not named in the *Van Binsbergen* case has been referred to in the following case law concerning justification, though it has received less attention from the CJEU. This requirement is that the restrictive measure should respect fundamental rights.[95] It was clearly stated in the *Carpenter* case that fundamental rights apply.[96] Overall, via this test process, the CJEU has found inter alia that the protection of workers may be an objective justification under the test.[97] This is to be understood positively as equal pay standard is perceived as ultimately protecting workers rights. In the following paragraphs, the authors will analyse whether ÍST85 passes the test of 'objective justification'.

Firstly, regarding pursuing a legitimate aim, establishing equal pay between men and women would be regarded as such within EU law. As noted in section 3, the concept of equal pay has been a part of EU law since its origin. Secondly, concerning the fact that the restriction should respect fundamental rights, it is clear that ÍST85 is applied to achieve equal pay between men and women, which is considered a fundamental right within Article 21 of the Charter of Fundamental Rights.[98] Thirdly, ÍST85 applies in a non-discriminatory manner to all (foreign and domestic) companies covered by the scope of the Gender Equality Act. While one might point out that ÍST85 is freely accessible in Icelandic, whereas the English version must be purchased, given the costs linked to the implementation of the ÍST85, the value of a service provision requiring a foreign company to hire or post at least 25 staff to Iceland, the price of purchasing the ÍST85 is regarded as marginal. Therefore, not having discriminatory character.

The 'objective justification' test also necessitates applying the proportionality principle. The premise is to review whether the rule in question is appropriate to reach the rule's aim and whether any less restrictive measures were available to reach the same goal.[99] Iceland adoption of progressive legislation that could be argued enforces the EU equal pay law shall not be deemed disproportionate compared to less progressive legislation of the same nature

[89] CJEU rarely makes a clear distinction between indirect discrimination and non-discriminatory hindrances, see Case 438/08 *Commission vs. Portugal* EU:C:2009:651.
[90] Art 62 TFEU. See also *Gebhard* (n 77) para 39. If present, the restrictions may be justified under four conditions. As listed in the *Gebhard* case: 'they must be applied in a non-discriminatory manner, they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it'.
[91] Case 120/78 *Cassis de Dijon* EU:C:1979:42.
[92] Craig and de Burca, (n 59) 800.
[93] See Case 33/74 *Van Binsberger* EU:C:1974:131.
[94] Craig and de Burca, (n 59) 801-802.
[95] ibid 802.
[96] Case C-60/00 *Mary Carpenter* EU:C:2002:434, paras 38-39.
[97] Case 341/05 *Laval* EU:C:2007:809, para 107.
[98] Charter of Fundamental Rights (n 68).
[99] Craig and de Burca (n 59) 801.

within the other Member States.[100] Particularly as the gender pay gap still exists (at least 5.6%) and Iceland's previous less restrictive measures have not been successful in closing this gap. However, the potential extraterritorial effect ÍST85 cannot be regarded as necessary to reach that goal. This can be seen if the Gender Equality Act's rules – making ÍST85 mandatory – are to be interpreted as requiring the foreign company to adopt ÍST85 on a company-wide basis (much of which falls outside Icelandic jurisdiction) simply to provide services in Iceland for a limited period. As ÍST85 is directed to the Icelandic market, the legislation will reach that goal regardless of whether a foreign company situated within the EEA adopts ÍST85 company-wide or only adopts it for its employees providing services in Iceland.

Applying the proportionality principle does not result automatically in a finding that ÍST85 is breaching Articles 36(1) and 37 of the EEA. Rather, it requires the contracting authorities and eventually Icelandic courts to interpret the law's scope of applicability, making ÍST85 mandatory to foreign companies employing 25+ workers in Iceland. As Advocate general Wathelet clearly indicated in a case concerning the procurement remedies directives,

> The principle that national law must be interpreted in conformity with EU law requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that Directive 89/665 is fully effective and achieving an outcome consistent with the objective pursued by it.[101]

Consequently, a better consistent interpretation of the Icelandic law is to interpret the rules as applicable solely to the part of the foreign company operating on the Icelandic market as if otherwise the ÍST85 would be deemed potentially unproportioned. Further, the Gender Equality Act's rules applicable to newly established companies shall be extended to foreign companies. Namely, a newly established company (or a company whose recent change of circumstances triggers the applicability of ÍST85) has three years to implement the ÍST85.[102] Therefore, it would be questionable and unproportioned to require a foreign company providing services for a shorter time to implement the ÍST85. The standard should be solely required from the companies operating on the Icelandic market for longer than the mentioned three-year period. If the standard is not implemented within the three years, the company can be subjected to fines. This concludes that the ÍST85 shall not be applied automatically to the foreign company entering the Icelandic market. It also would mean that ÍST85 shall not apply to a foreign company providing short-term services in Iceland– up to three years.

Conclusively, provided that the principles of mutual recognition and suggested consistent interpretation of ÍST85 law are complied with, ÍST85 can be read and applied in line with Articles 36(1) and 37 of the EEA.

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[100] Case C-384/93 *Alpine Investments BV v Minister van Financiën* EU:C:1995:126, para 51.
[101] Case C-689/13 *Puligienica Facility Esco SpA* EU:C:2015:263, para 59.
[102] The memorandum to Art. 7 the Gender Equality Act, 33-34.

6 EU PUBLIC PROCUREMENT LAW

Applying ÍST85 through public procurement could be beneficial for achieving the equal pay goal in Iceland due to the large scale of public procurement. In Iceland, it amounts to more than 202 billion ISK each year. Public procurement can incentivise the private market to speed up the uptake of ÍST85 if the standard is required in public tenders. To analyse whether public procurement in this case can be used as a policy tool, it is necessary to assess whether the ÍST85 can be applied under EU public procurement secondary law. As a member of the EEA, Iceland has implemented the EU Public Procurement regime from 2014 into its national law.[103] Therefore, Icelandic public procurement legislation is harmonised with the applicable EU legislation.[104]

Throughout the last decade, the EU procurement regime has increasingly recognised social considerations in public procurement.[105] However, earlier endeavours were not easy. Social considerations have been often – and still are – viewed through a negative lens. On the one hand, they are deemed as considerations contradictory to the economic objectives of the EU procurement system and providing a smokescreen for preferential treatment. On the other hand, they are considered too burdensome on contracting authorities, limiting their flexibility and requiring a disproportionate amount of resources to implement them. This tension is evident in the fact that out of 253 amendments tabled by the EU Parliament (mostly from a social protection angle), the Council and the Commission rejected most of these when modernising the EU procurement directives.[106]

In the Directive 2014/24/EU, social issues are clearly supported, and their importance is given greater emphasis, thereby lowering, to a certain extent, the regulatory risks attached to these issues under the previous directives.[107] Social considerations can be part of the procurement process as long as procurement rules and principles (transparency, non-discrimination, equality, and proportionality and open competition) are respected.

It follows from Article 42 Directive 2014/24/EU on the technical specification as well as from the case law, eg *Dutch coffee* case that social consideration, such as equal pay, shall not be considered as part of a technical specification as this focuses on *what* contracting authorities buy rather than from *whom* they buy or *how* the contract is performed.[108] However, the Directive 2014/24/EU introduces the so-called *sustainability principle* in Article 18(2). Member States are to ensure compliance with the mandatory EU, international and national

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[103] Act no. 120/2016 on Public Procurement.

[104] The remedies are provided through the possibility to complain to Public Procurement Complaints Commission. In 2019, the Complaints Commission issued 56 rulings on the basis of complaints and in 2018 it issued 40 such rulings.

[105] Cases 346/06 *Rüffert* EU:C:2008:189; Case 549/13 *Bundesdruckerei* EU:C:2014:2235; and *RegioPost* (n 87).

[106] See: M Andrecka and K Peterkova Mitkidis, 'Sustainability Requirements in EU Public and Private Procurement-A Right or an Obligation' (2017) 1 Nordic Journal of Commercial Law 55.

[107] Switzerland which is not an EU Member State also supports equal pay considerations in public procurement. Namely, it introduced controls in relation with public procurements to eliminate gender pay discrimination. Art. 8(1)(c) Federal Act on Public Procurement: 'The following principles shall be respected in awarding public contracts: […] (c) Contracts shall only be awarded to suppliers that guarantee equal treatment of men and women in respect of pay for workers performing services in Switzerland'. Art. 6, para 4, Ordinance on Public Procurement 'The awarding authority may call for checks in respect of equal treatment of women and men. The task of conducting such checks may be assigned to federal, cantonal or local authority gender equality offices'.

[108] Case C-368/10 *Commission v Netherlands (Dutch Coffee)* EU:C:2012:284.

laws – eg equal pay – under their tenders and public contracts.[109] This means that particularly during the selection stage of public procurement, a contracting authority has a right or even an obligation to excluded ÍST85 non-compliant bidder from the tender under specific circumstances.[110] Alternatively, ÍST85 may be analysed as a special condition for contract performance as a standard to be complied with when the contract is performed. These two phases will be further analysed below.

6.1 COMPLIANCE WITH MANDATORY LAWS AND SELECTING COMPLIANT BIDDER

The selection stage of a public procurement process is when contracting authorities focus on *who* the bidder is and if they comply with the applicable laws. For this reason, it seems most appropriate for a contracting authority to apply the requirement of equal pay standard (ÍST85) as a part of a qualification stage.[111] Specifically applicable for contracting authorities is Article 18(2) Directive 2014/24/EU, which reads:

> Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.[112]

Referring to Article 18(2), contracting authorities may apply ÍST85 at the exclusion phase of the qualification stage in the procurement proceedings. Contracting authorities also have a general right not to award a contract in case of non-compliance with Article 18(2), an obligation to reject an abnormally low tender in case of non-compliance with Article 18(2) and are to require subcontractors' compliance with Article 18(2).[113]

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[109] Case C-395/18 *Tim SpA* EU:C:2020:58, para 38: 'EU legislature sought to establish [Art.18.2] as a principle, like the other principles referred to in paragraph 1 of that article […]. It follows that such a requirement constitutes, in the general scheme of that Directive, a cardinal value with which the Member States must ensure compliance pursuant to the wording of Article 18(2) of that Directive'. Listen to: M Andhov, W Janssen, 'Episode #8: Art. 18(2) and the Tim case: a sustainability principle?' (*Bestek – the Public Procurement Podcast*) <www.bestekpodcast.com> accessed on 15 April 2021.

[110] The obligation will follow from interpretation of Art. 18(2) as a procurement principle. Whether this character can be given this Article is still unclear. See Case C-395/18 *Tim SpA* (n 109); Andhov (n 6); Andhov, Janssen (n 109); M Andhov, 'Commentary to Article 18(2)' in R Caranta, A Sanchez-Graells (eds) *Commentary of the Public Procurement Directive (2014/24/EU)* (Edward Elgar 2021).

[111] Art. 57(4)(a) Directive 2014/24/EU.

[112] Art. 18(2) as one of the pro sustainable provisions does not include the requirement of the considered laws to be 'link to the subject matter of the contract'. In this context Art.19(5) (a) Scottish Public Contract Regulation narrows down the application of Art 18(2) as it states it always shall be 'linked to the subject matter' which might pose challenges in application of equal pay standard similar too ÍST85 in the Scottish procurement.

[113] Arts. 56(1), 69(3), 71(1) Directive/2014/24/EU. On issues of abnormally low tender, see Case C-599/10 *SAG ELV Slovensko* EU:C:2012:191; Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani v ANAS* EU:C:2001:640; Joined Cases C-147/06 and C-148/06 *SECAP and Santorso v Comune di Torino* EU:C:2008:277.

The inclusion of Article 18(2) is perceived as an undeniable milestone in fighting social dumping in the public contracts market.[114] The provision is seen as an essential tool that can ensure compliance with social laws such as, eg equal pay in the context of public procurement.[115]

It follows from section 3 of this article that equal pay is an EU *equal pay standard* regulated by both primary and secondary EU law. Also, Article 18(2) refers to Annex X in which mentioned is international labour law, namely ILO Convention on Equal Remuneration no. 100, which in Article 2 states:

> '1. Each Member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.
> 2. This principle may be applied by means of
>
> a) national laws or regulations;
> b) legally established or recognised machinery for wage determination;
> c) collective agreements between employers and workers; or
> d) a combination of these various means'.[116]

Consequently, equality of pay is established on all three legal levels and is included in the scope of Article 18(2). ÍST85 does not on its own establish new law or higher standard of equal pay. Rather it represents an enforcement mechanism for European and international law. Consequently, ÍST85 constitutes proof for *trifecta compliance* with at the same time EU law, international law and national equal pay law.

6.1[a] Means of proof of equal pay law compliance

Based on Article 60 Directive 2014/24/EU, the Icelandic contracting authority is obliged to accept measures equivalent to the ÍST85 standard as proofs of foreign companies' compliance with equal pay requirement. This means that foreign companies will be able to demonstrate their compliance by providing similar standards obtained at their jurisdiction. In case a country in question does not issue such documents or certificates, they might be replaced by

> 'a declaration on oath or, in Member States or countries where there is no provision for declarations on oath, by a solemn declaration made by the person concerned

[114] Art. 18(2) is referred to as 'mandatory social considerations' see European Trade Union Confederation (ETUC), 'New EU framework on public procurement. ETUC key points for the transposition of Directive 2014/24/EU' (2015) 9 <www.etuc.org/sites/default/files/publication/files/ces-brochure_transpo_edited_03.pdf> accessed 15 April 2021; on 'mandatory social clause' see A Semple, 'Living Wages in Public Contracts: Impact of the RegioPost Judgment and the Proposed Revisions to the Posted Workers Directive' in A Sánchez Graells (ed), *Smart Public Procurement and Labour Standards* (Hart Publishing 2018) 83.

[115] Art. 18(2) could – with several important changes – be seen as a continuation of Art. 27 of Directive 2004/18/EC on obligations relating to taxes, environmental protection, employment protection provisions, and working conditions.

[116] Memorandum to Amendment Act no. 56/2017 introducing ÍST85 as a mandatory law reference the equal pay obligations from ILO Convention no. 100, 5 and 18.

> before a competent judicial or administrative authority, a notary or a competent professional or trade body, in the Member State or country of origin or in the Member State or country where the economic operator is established'.[117]

Theoretically, it is also possible to use a European standard as a means of proof.[118] However, currently, there is available no European standard on equal pay. Article 62 solely refers to quality assurance and environmental management standards. The only European standard which considers social aspects is the one on accessibility for disabled persons.[119]

6.1[b] The relationship between primary and secondary law

The application of EU secondary law alone would lend by itself to more permissive as to the sphere of application of ÍST85 than EU primary law, including by recognising its extraterritorial effect. This is hardly surprising since exclusion is about the reliability of a tenderer. An economic operator having paid bribes or being involved in collusion in its own jurisdiction does not become suddenly reliable only because it is tendering in another Member State. There is no reason why the breach of a mandatory social standard such as equal pay should be treated differently.

The fact remains that the TFEU has a higher standing in the hierarchy of EU law than (secondary) public procurement law. Therefore, the traditional rigid application of the proportionality principle developed in the context of restrictions to the freedom to provide services should, in principle, prevail. However, as highlighted, for instance, in *Arblade* case, the case law on those specific restrictions applies so far as 'there is no harmonisation in the field'.[120]

The case can be made that, read together, the Recast Directive and the Directive 2014/24/EU do indeed harmonise the field. They explicitly allow the Member States and their contracting authorities to exclude economic operators that are non-reliable because they do not comply with equal pay legislation. ÍST85 is a specific means of proof of such compliance devised by the Icelandic legislator. As discussed above, in circumstances where the country of the company' origin does not issue documents or certificates proving compliance with equal pay laws, they might be replaced by a declaration or oath. Hardly something to lament the breach of internal market principles. It might be even very little. The value and reliability of such declarations compared to the extensive requirements that must be met to obtain the ÍST85 standard is questionable. Therefore, an outstanding question is whether an Icelandic contracting authority could not accept proof in the form of, eg an equivalence declaration but require that the bidder have the ÍST85 standard. Three scenarios must be recognised:

1) The foreign company that employs 25+ employees enters the Icelandic market for the first time. The public contract for which it bids is short term – under three years. Alternatively, the foreign company has been on the Icelandic market providing services

[117] Art. 60(2)(b) Directive 2014/24/EU.
[118] ibid Art. 62.
[119] European Committee for Standardisation available at:
<www.standards.cen.eu/dyn/www/f?p=CENWEB:105> accessed 3 March 2021.
[120] Joined cases C-369/96 and C-376/96 *Arblade* EU:C:1999:575, para 34.

for less than three years. Under such circumstances, the contracting authority shall accept the self-declaration and cannot insist on obtaining the ÍST85 standard that would violate the proportionality principle.

2) The foreign company that employs 25+ employees has been on the Icelandic market for more than three years. Under such circumstances, it is justifiable in our opinion for the contracting authority to require ÍST85 standard as mandatory law in Iceland. The three-year grace period applicable to new Icelandic companies and companies whose recent change of circumstances triggers the applicability of ÍST85 is over.
3) The foreign company that employs 25+ employees enters the Icelandic market for the first time. The public contract for which it bids is a long term contract – over three years. Under such circumstances, the contracting authority shall accept the self-declaration and cannot insist on obtaining the ÍST85 standard that would violate the proportionality principle. However, the contracting authority might potentially oblige the bidder within the contract performance clause to obtain the ÍST85 within three years.

6.2 SPECIAL CONTRACT PERFORMANCE CONDITIONS

As remarked above, compliance with ÍST85 could – alternatively – be required as a special contract performance condition. Contracting authorities may establish special conditions relating to the performance of a public contract. Such conditions can be 'social or employment-related considerations'.[121] Recital 97 expressly refer to the contract performance condition as potential means for the introduction of measures ensuring equality of man and woman: 'Contract performance conditions might also be intended to favour the implementation of measures for the promotion of equality of women and men at work, the increased participation of women in the labour market and the reconciliation of work and private life'.

Any special contract conditions must be indicated in the call for competition or the procurement documents. Also, it must be 'link to the subject-matter of the contract' (LtSMoC). The latter requirement is a new addition to the provision on contract performance conditions, which was not present under the old version of the provision.[122] Consequently, to assess the possibility of applying the ÍST85 standard as a special contract condition in the procurement procedure, it is necessary to examine whether ÍST85 can be 'linked to the subject matter' of the public contract.

6.2[a] Link to the subject-matter – Limitation for ÍST85 application

The CJEU developed the LtSMoC concept in its case law regarding award criteria for public contracts. Starting with the *Concordia* case, the court allowed a public entity to use environmental considerations, namely the emissions of nitrogen oxide and noise, amongst the criteria for the contract award. The CJEU established that: '[W]here the contracting authority decides to award a contract … it may take criteria relating to the preservation of the environment into consideration, provided that they are linked to the subject matter of

[121] Art. 70 Directive 2014/24/EU.
[122] Art. 26 Directive 2004/18/EC.

the contract'.[123] These criteria cannot confer an unrestricted freedom of choice on the contracting authority. They must be explicitly mentioned in the contract notice or tender documents and must comply with the fundamental EU Treaties principles, particularly non-discrimination.

During the last decade, the LtSMoC concept progressed. Particularly in the *Dutch Coffee* case, the LtSMoC is expanded by underlining that there is no requirement for award criteria to relate to a core characteristic of a product or something which alters its material substance.[124] Specific processes of production, and the provision of trade or a specific process for another stage of their life-cycle, even where such factors do not form part of their material substance, are considered LtSMoC.[125]

Currently, the concept is applied at the public procurement award stage and contract performance conditions where the social concerns might be considered.[126] Still, they must be connected to the contract that is to be awarded – meaning that the contract performance condition must be directly linked to the activities carried out under the contract and nothing beyond that. This line of argumentation is supported by the Recital 97 of the Directive 2014/24/EU, which states:

> However, the condition of a link with the subject-matter of the contract excludes criteria and conditions relating to general corporate policy, which cannot be considered as a factor characterising the specific process of production or provision of the purchased works, supplies or services. Contracting authorities should hence not be allowed to require tenderers to have a certain corporate social or environmental responsibility policy in place.

Thus, the social requirements must relate to the goods, services, or works that are being purchased. They cannot concern matters which fall outside the scope of the procurement relationship and the public contract itself. With the principles of non-discrimination and proportionality, the LtSMoC creates limitations when applying social considerations such as those underpinning ÍST85 in public procurement.

The concept of LtSMoC makes it impossible to include ÍST85 standards to the extent that it addresses matters beyond the specific subject matter of a public contract. It could be argued that a contracting authority may require ÍST85 solely regarding the scope of its application to the tendered public contract. However, this is problematic since ÍST85 states explicitly that for a company to implement the standard, it would have to implement an equal wage management system, where *all* (emphasis added) positions within a company are defined.[127] Consequently, the contracting authority shall define the performance conditions by reference to the relevant (ie LtSMoC) specifications of the ÍST85, highlighting that after the three year grace period required will be ÍST85 as a means of proof of compliance.[128] This way, the contract performance clause will provide an additional layer of contractual

123 Case C-513/99 *Concordia Bus Finland* EU:C:2002:495, para 64.
124 Case *Dutch Coffee* (n 108).
125 Art. 67 Directive 2014/24/EU.
126 Case *Dutch Coffee* (n 108).
127 Art. 4(1) IST85:2012.
128 See related information on application of labels in public procurement: Andhov, 'Commentary to Article 43' in Caranta and Sanchez-Graells (n 110).

enforcement of mandatory legal provisions after a period of three years.[129] Alternatively, to make it possible to apply ÍST85 within public procurement contract performance conditions, the ÍST85 standard issuing body would have to be more flexible and predict options of issuing the standard for a specific scope that would cover the public contract.

7 THE APPLICATION OF ÍST85 TO THE POSTED WORKERS DIRECTIVE

In a situation where an Icelandic contracting authority procures service delivery in Iceland, the EU's Posted Workers Directive may become applicable.[130] We might envisage a scenario where a foreign company from the EU is awarded the contract and sends its employees to Iceland to perform the public service contract. The Posted Workers Directive would protect these workers.

Based on the EEA Agreement, Iceland had to implement the Posted Workers Directive into Icelandic law. According to the Icelandic Posted Workers Act, the terms of the Act on Equal Status and Equal Rights of Women and Men shall apply to posted workers in Iceland. Therefore, implementing the ÍST85 becomes mandatory for a company which, has been present on the Icelandic market for over three years and posts its workers to Iceland if there are 25+ workers annually working in Iceland.

In recent years, public and academic attention has been brought to bear on issues of labour law and social protection of workers as a special condition in public procurement contracts due to CJEU rulings in three cases: *Rüffert*,[131] *Bundersdruckerei*,[132] and *RegioPost.*[133] Though materially different, all three cases address a situation in which a minimum wage requirement was included as a special requirement in a public contract where the bidders would not be awarded the contract without fulfilling the minimum wage criteria.

It is clear from the principles laid out in the three judgements that for contract performance conditions, such as a minimum wage, to fulfil the standards of Article 56 TFEU on the freedom of services, it would have to be a part of universally applicable law or collective agreement.[134] Two of the cases, *Rüffert* and *Bundesdruckerei*, also clarify that the requirement in question must apply to both public and private contacts. In the context of ÍST85, this is not an issue since the scope of the legislation covers both public and private companies. The law following from the mandatory ÍST85 standard is universally applicable. There is also a clear objective justification for the legislation, as outlined earlier.

It is also worth considering a scenario in which a foreign company is awarded a public contract for service provision from a distance, such as online services. This undertaking would not by law have to comply with Icelandic legislation, and consequently, the mandatory scope of ÍST85 would not be applicable in such a case. It follows from the *Bundesdruckerei* case, where CJEU found it disproportionate to require a Polish subcontractor to pay its employees in Poland a minimum wage as defined in Germany. The fixed minimum wage

[129] Andhov, 'Commentary to Article 70' (n 110).
[130] Directive 97/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1996] OJ L 18/1.
[131] *Rüffert* (n 105).
[132] *Bundesdruckerei* (n 105).
[133] *RegioPost* (n 87).
[134] ibid. Article 3(1) of the Posted Workers Directive.

imposed on the Polish subcontractor had no relation to the cost of living in Poland and went further than what was needed to ensure the original objective of employee protection. The court assessed that the requirement would also deprive the Polish companies of their competitive advantage.[135] Therefore, it is highly likely that similar argumentation would apply in a case where ÍST85 is required in a tender where the services would be fulfilled from a distance.

8 CONCLUSIONS

While Iceland is a small market, the country is undoubtedly a pioneer in addressing the pay gap between women and men through a law requiring companies to obtain ÍST85 – equality of pay standard. The preceding analysis may prove valuable to any Member State considering the introduction of similar legislation and approach. This will, after all, require detailed scrutiny of the critical issues and red flags that must be addressed. Our analysis is a useful contribution to understanding this type of legislation and public procurement processes.

The ÍST85 has been developed to apply locally. However, it has its effects on foreign companies wishing to provide services in Iceland. The article concludes that ÍST85 will not constitute a restriction to inter-state trade when the principle of mutual recognition is applied, and the equivalent measure (certifications, labels) from foreign companies' national jurisdiction would be accepted. If not, ÍST85 may constitute a barrier to the inter-State provision of services, but it is potentially justifiable based on the CJEU's test. This stems from the fact that ÍST85 is pursuing a legitimate interest, namely the equality of pay between women and men, which is a fundamental right and one of the EU values most closely connected to the EU's aim of pursuing a 'social market economy'. At the same time, ÍST85 applies in an equal and non-discriminatory manner to all.

The uncertainty is whether the ÍST85 is proportionate, particularly due to its potential extraterritorial effect, which is not necessary for reaching the goal of closing the gender pay gap in Iceland. In the authors' opinion, the proportionality of the measure is ensured through consistent interpretation of the ÍST85. It would require extending the provisions granting a grace period of three years to newly established companies (or companies whose recent change of circumstances triggers the applicability of ÍST85) to foreign companies.

ÍST85 has not been designed with the purpose to apply to public procurements. Therefore, its application post certain challenges. EU public procurement directives allow the inclusion of social considerations in public tenders. Though, their application is limited by specific procurement objectives and provisions. Mainly because aspects such as equal pay relate to *who* the bidder is, while the procurement provisions mainly focus on *what* it is that contracting authorities are buying. However, the Directive 2014/24/EU introduces a new procurement principle in Article 18(2). The latter in its scope includes the requirement of compliance with mandatory, amongst others, equal pay laws.

It is concluded that ÍST85 does not introduce a new law on equal pay but rather enforces ILO convention no. 100, EU Treaties and Recast Directive, and Icelandic national law on equal pay. It constitutes a mean of proof of equal pay compliance. Contracting authorities shall allow equivalent proofs in the form of similar standard or certification

[135] *Rüffert* (n 105) para 32.

obtained in a different jurisdiction. A declaration of an economic operator shall suffice in special circumstances – particularly within the first three years of operating on the Icelandic market. In the authors' opinion, the mandatory law of the land that is a requirement of obtaining ÍST85 as means of proof rather than accepting, eg solemn declaration, shall apply after the foreign company which employs 25+ employees is present on the Icelandic market for more than three years.

The application of ÍST85 through other provisions of public procurement pose some challenges. This stems primarily from the scope of the ÍST85 requiring company-wide applicability. EU public procurement law is solely interested in regulating the procurement relationship (the part of the company that will deliver the public contract). Anything beyond this risks categorisation as not *LtSMoC*. This would render the inclusion of ÍST85 as a special contract condition within the three-year grace period non-compliant with EU public procurement rules. Unless the certification body interpreted its rules flexibly and it would be possible to obtain the ÍST85 for specific scope covering the public contract solely.

The practical solution to the above challenge is for a large foreign company to establish a special purpose vehicle (SPV) to deliver the public contract. The SPV potentially would not trigger the applicability of ÍST85 (too few employees), or its scope would reflect what is necessary to deliver a public contract.

Finally, addressing this issue through public procurement law alone will not suffice. In practice, it can play a solely supportive role. ÍST85 must be reinforced through as many instruments as possible. Labour law, contract law, anti-discrimination law, corporate governance, and public opinion must work in concert with public procurement law if equal pay enforcement is to be actualised.

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THE LONG-AWAITED TRADE DEAL BETWEEN THE EU AND THE UK – EXPECTATIONS AND REALITIES

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At long last, the EU and the UK have struck an agreement on their new relationship defining future trade and cooperation across the Channel. However, expectations and realities do not always meet and so it is in the particular case here. The TCA is not an ordinary international trade agreement, as it contains distinct features which may disappoint those expecting a CETA-style deal. In addition, Brexit has the potential of developing into a never-ending story as the TCA by no means puts an end to the debate. Many questions remain unanswered which will have to be dealt with in the following years or otherwise run the risk of creating further divergence in the longer term, ultimately undermining the entire agreement and keeping the threat of a 'no deal' scenario alive.

1 INTRODUCTION

With its referendum in June 2016, the UK decided to leave the European Union after more than four decades of membership.[1] The withdrawal process according to Article 50 TEU was officially initiated by formal notification in March 2017 and should have lasted only two years,[2] however was extended several times before Brexit was eventually completed with a Withdrawal Agreement on 31 January 2020.[3] A transitional period of 11 months provided the necessary time frame to negotiate the conditions of the future relationship between the two parties.

Signed on 30 December 2020 by both the EU and the UK, the Trade and Cooperation Agreement (TCA) constitutes the official conclusion of the Brexit negotiations.[4] It applies provisionally from 1 January 2021.[5] According to Article COMPROV.1 of the TCA, the purpose of the Agreement is to establish a 'basis for a broad relationship between the Parties, within an area of prosperity and good neighbourliness characterised by close and peaceful relations based on cooperation'. The main parts of the TCA include arrangements for trade, transport, and fisheries (Part Two), law enforcement and judicial cooperation (Part Three),

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[1] The possibility of withdrawal was only introduced in the latest treaty reform, the Treaty of Lisbon, in the form of Article 50 TEU. Prior to that, EU Member States were not able to reverse the process of accession once this was completed.

[2] In an earlier publication, I have commented on the various constitutional and institutional hurdles in the Brexit process on the side of both the UK and the EU: Annegret Engel, 'The European Union and the Brexit Dilemma – A very British Problem?' [2019] 2(1) NJEL 24.

[3] Agreement 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) [2019] OJ C384I/01.

[4] Trade and Cooperation Agreement Between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (TCA) [2020] OJ L 444/14.

[5] Article FINPROV.11 of the TCA.

and dispute settlement and horizontal provisions (Part Six). These are embedded into common and institutional provisions under Part One and final provisions in Part Seven.[6]

This paper does not aim to provide a thorough analysis of the individual parts and provisions of the TCA as this is already done by other commentators.[7] Instead, I will focus on the on two main questions in my elaborations. The first question relates to the TCA's distinct features and its overall characteristics as an international trade deal. Without going into too much detail on the substantive provisions, evidence will demonstrate the Agreement's *sui generis* nature. The second question will then focus on the potential for new disputes arising and old conflicts re-emerging under the TCA. The reality of a continued threat of a 'no deal' scenario even after the TCA's enforcement does not meet the expectation of a resolution to Brexit. A final part will provide some recommendations for improvement of the withdrawal process.

2 JUST AN ORDINARY INTERNATIONAL TRADE DEAL?

At first glance, the TCA resembles other international trade agreements the EU has concluded in recent years; the Comprehensive Economic and Trade Agreement (CETA)[8] with Canada is often used as a reference point with what concerns extensive facilitation of trade and cooperation with a third country. Indeed, there are some similarities as to its content on the areas covered (trade in goods, dispute settlement, etc.) and the sheer complexity of the agreement.

And yet, the deal with the UK is of a *sui generis* nature. Obviously, every agreement between the EU and each third country is different, as it depends on the specificities of trade between the parties and their individual interest from such cooperation. In short, there is no blueprint for an international trade deal. However, there are a few common features that apply to most if not all of them – except the TCA. As such, I will be focusing on the main aspects which distinguish the TCA from other international trade agreements as for example CETA.

A first distinguishing factor is the timeframe under which the agreement was concluded. In a remarkable velocity of less than a year this trade deal was negotiated with the UK.[9] By comparison, the negotiations for CETA took over five years. Admittedly, the starting point of the UK as a former EU Member State, thus fulfilling current EU standards, as well as the rapidly approaching end of the transitional period[10] may have helped to speed up the process.

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[6] The remaining parts include provisions on health and cyber security under the thematic cooperation in Part Four and participation in Union programmes, sound financial management and financial provisions in Part Five

[7] See eg the in-depth analysis edited by Issam Hallak 'EU-UK Trade and Cooperation Agreement: An analytical overview' (2021) European Parliamentary Research Service (EPRS) <https://www.europarl.europa.eu/RegData/etudes/IDAN/2021/679071/EPRS_IDA(2021)679071_EN.pdf> accessed 29 July 2021

[8] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [2017] OJ L 11/23

[9] Negotiations only started after the conclusion of the Withdrawal Agreement and the UK's exit from EU membership - see Council Decision (EU, Euratom) 2020/266 of 25 February 2020 authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for a new partnership agreement [2020] OJ L 58/53

[10] The UK refused to extend the transitional period for political reasons

As a former EU Member State, the UK does not benefit from facilitation or improved cooperation of any kind by removal of tariffs or the like. Rather, it is a significant step down from its previously held position under EU membership and could effectively be described as mere 'damage control' to prevent a much steeper fall onto WTO rules without this agreement. These 'opposing directions of travel'[11] between the EU and the UK may create problems in the long term and hence differentiate this agreement from others, such as CETA, where the third country in question is aiming for further alignment with EU standards.

2.1 BRUSSELS EFFECT AND THE LEVEL PLAYING FIELD

Unlike any other ordinary trade deal between the EU and third countries, the TCA does not improve previous trade relations or increase cooperation.[12] Instead, it reduces the UK's rights *vis-à-vis* the EU to a fraction of what its previous status under EU membership entailed.[13] Paradoxically, this runs counter the UK's efforts to actively shape certain policy areas, such as cooperation in criminal matters, where not only the UK has become a 'rule taker' after Brexit but is also being excluded from its own initiatives, such as the European Arrest Warrant, as well as from privileged cooperation with European agencies.[14]

Having said that, the UK will be still be subject to the so-called 'Brussels' effect',[15] even if under slightly different circumstances. Instead of a process of alignment through incentivising increased and facilitated trade, the mechanism under the TCA aims to prevent the UK from derogating from current EU standards in order to maintain the agreed privileges. This is called the 'level playing field' under the TCA, requiring 'open and fair competition between the Parties […] conducive to sustainable development'.[16] The Parties acknowledge, however, that this does not mean harmonisation of standards between them.[17]

The agreed level playing field in the TCA aims to provide the possibility for autonomous regulatory determination desired by the UK in order to attract international trading partners, while at the same time ensuring that the high EU standards are not being undermined with cheaper products deriving from the UK. Essentially, this is flexibility with limits, a Brussels' effect *de minimis*. The latter the UK was hoping to avoid, but would have

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[11] I have previously made this observation with regards to the very crucial cooperation in criminal matters between the EU and the UK: Annegret Engel 'The Impact of Brexit on EU Criminal Procedural Law – A new dawn?' [2021] 6(1) European Papers 513

[12] Senior European Experts, 'The UK-EU Trade and Co-operation Agreement 2020' (2021) <https://senioreuropeanexperts.org/paper/uk-eu-trade-co-operation-agreement-2020/> accessed 29 July 2021.

[13] See also André Sapir, 'The double irony of the new UK-EU trade relationship' (2021) <https://www.bruegel.org/2021/01/the-double-irony-of-the-new-uk-eu-trade-relationship/> accessed 29 July 2021.

[14] See eg Valsamis Mitsilegas, 'After Brexit: Reframing EU-UK Cooperation in Criminal Matters', in Ricardo Pereira, Annegret Engel, Samuli Miettinen (eds), *The Governance of Criminal Justice in the European Union: Transnationalism, Localism and Public Participation in an Evolving Constitutional Order*, (Edward Elgar Publishing 2020); Thomas Wahl, 'Brexit: EU-UK Trade and Cooperation Agreement – Impacts on PIF and JHA in a Nutshell' (2021) <https://eucrim.eu/news/brexit-eu-uk-trade-and-cooperation-agreement-impacts-on-pif-and-jha-in-nutshell/> accessed 29 July 2021.

[15] See Anu Bradford, 'The Brussels Effect' [2012] 107(1) Northwestern University Law Review 1.

[16] Art. 1.1(1), Title XI, Part Two of the TCA.

[17] Art. 1.1(4), Title XI, Part Two of the TCA.

been barred from access to the EU internal market otherwise. The result is evidence of the EU's market power through the concept of extraterritoriality.[18]

2.2 THE UNION'S EXCLUSIVITY VERSUS MEMBER STATES' FLEXIBILITY

The urgency of the negotiations due to the time constraints imposed by the transitional period may have also contributed to another very crucial distinction of the TCA from the likes of CETA: the choice of legal basis – Article 217 rather than Article 216 TFEU.[19] The TCA thus constitutes an Association Agreement the EU typically concludes under its own competence with neighbouring countries, such as the Ukraine. The policy areas concerned fall under the Union's exclusive or pre-empted shared competence categories.[20]

By contrast, CETA was concluded as an international trade agreement of a mixed nature which required the joint ratification of all EU Member States according to their own constitutional procedures. In general, the Court of Justice has held that the complexity of international trade agreements and the resulting variety of different types of competences involved would normally prescribe a joint approach between the EU and Member States.[21]

Such a joint ratification process, however, bears certain risks, as is evident from the ratification process under CETA. Here, opposition was formed in several Member States against the agreement, most notably in the Belgian region of Wallonia, which resulted *inter alia* in a preliminary ruling questioning the compatibility of the agreement with EU law.[22] As could be argued, the involvement of Member States not only prolongs the process of negotiations and ratification, but also risks failure of the entire agreement.[23] Up to this date, CETA is not yet fully ratified in all Member States.

Such a scenario was to be avoided for the TCA with the UK and the lessons learned from CETA led to a different approach here. In view of its 'exceptional and unique character',[24] the TCA was adopted by the EU speaking with one voice under its own competence,[25] while leaving ample scope for Member States to regulate what falls within their competence individually and bilaterally as they see fit.

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[18] Anu Bradford, 'Exporting Standards: The Externalization of the EU's Regulatory Power Via Markets' [2014] 42 International Review of Law and Economics 158.

[19] Council Decision (EU) 2020/2252 of 29 December 2020 on the signing, on behalf of the Union, and on provisional application of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, and of the Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information [2020] OJ L 444/2.

[20] For an extensive discussion of the different types of competences and the potential conflicts arising therefrom, see Annegret Engel (2018) *The Choice of Legal Basis for Acts of the European Union: Competence Overlaps, Institutional Preferences, and Legal Basis Litigation* (Springer International Publishing 2018).

[21] Opinion 2/15 *EUSFTA* EU:C:2017:376. See also case comment by Marise Cremona, 'Shaping EU Trade Policy post-Lisbon: opinion 2/15 of 16 May 2017' [2018] 14(1) European Constitutional Law Review 231.

[22] Opinion 1/17 *Opinion pursuant to Article 218(11) TFEU (CETA)* EU:C:2019:341.

[23] As for example was the case with the failed TTIP agreement between the EU and the U.S.

[24] Council Decision (EU) 2020/2252 (n 19).

[25] Such an EU-only approach was previously taken in the Marrakesh Treaty to facilitate access to published works for persons who are blind, visually impaired or otherwise print disabled from 2013 [2018] OJ L 48/3 . Judicial review by the court found sufficient competence stemming from the EU alone to conclude the contested treaty without the need for further joint ratification by Member States, Opinion 3/15 *Marrakesh Treaty* EU:C:2017:114.

According to Article COMPROV.2 of the TCA, the conclusion of bilateral agreements between the EU, its Member States, and the UK shall supplement the TCA as 'an integral part of the overall bilateral relations [and] form part of the overall framework'. Indeed, several provisions under the various policy areas throughout the agreement explicitly provide an option of further bilateral agreements to be concluded.

This is in line with Advocate General Sharpston's opinion delivered in the EUFSTA case, suggesting the splitting of a mixed agreement which would otherwise fall under different types of competences, thus ensuring a swift ratification procedure for those parts within Union competence, while at the same time allowing for the necessary flexibility at intergovernmental level in due course without risking failure of the agreement as a whole.[26]

As such, the above statement quoted from Article COMPROV.1 which reads that the Agreement 'establishes *the basis* for a broad relationship between the Parties'[27] indeed has to be taken literally: the TCA constitutes a mere starting point which will only take proper shape in the years to come when Member States and the UK will have added to it and filled in the gaps – if they wish to do so as this is not obligatory.

The inherent flexibility this approach provides is quite remarkable as it inevitably creates uncertainty over the final scope of the relationship between the EU and the UK.[28] In addition, it also creates a patchwork in the long term with different bilateral agreements in place and thus different rules applying for different Member States. Not only does this generate discrepancies within the EU, but it also remains open-ended for the foreseeable future.[29]

2.3 THE CREATION OF A NEW INSTITUTIONAL FRAMEWORK

Another distinct feature of the TCA is the creation of a new institutional framework in order to solve disputes between the Parties at an early stage. According to Article INST.1, the TCA provides for the establishment of a Partnership Council, set up by representatives at ministerial level of the EU and the UK. The new Partnership Council shall meet at least once a year and has the power to *inter alia* amend the TCA or any supplementing agreements.

In addition to the Partnership Council, a range of Specialised Committees[30] and Working Groups[31] are established by the TCA, which have monitoring powers over their respective areas. Further institutional cooperation may be established in the form of a Parliamentary Partnership Assembly according to Article INST.5 and the adequate participation of civil society is facilitated within the Civil Society Forum according to Article INST.8.

In particular the Partnership Council and the Specialised Committees are the first contact point in case of dispute between the Parties of the TCA. According to Article INST.13, 'the Parties shall endeavour to resolve the matter by entering into consultations in good faith, with the aim of reaching a mutually agreed solution'. In a second step and only if

[26] Opinion 2/15 EU:C:2017:376, Opinion of AG Sharpston, para 567.
[27] Emphasis added.
[28] This situation is rather comparable to the relationship between the EU and Switzerland.
[29] 'The UK-EU agreement did prevent the potentially disastrous consequences of a no deal but it won't end the Brexit debate or division, it may just prolong them' - Senior European Experts (n 12).
[30] Art. INST.2 of the TCA.
[31] Art. INST.3 of the TCA.

such consultations have ended unsuccessfully an arbitration procedure may be initiated by establishment of an arbitration tribunal according to Article INST.14.

It is rather obvious from this new setup that consultation is the preferred mechanism as opposed to arbitration. The TCA thus provides quite a unique institutional framework with the aim of solution-oriented de-escalation. Admittedly, it could also be a sign of an actual anticipation of conflict arising between the Parties considering the often bumpy negotiations for the Withdrawal Agreement and the TCA itself.[32] In any case, this institutional framework differs from what tends to be the rule under other international trade agreements, where dispute settlement via arbitration is the only option.

With this new setup, the EU has additionally managed to institutionalise its own unity since Member States are not Parties to the TCA and therefore are not represented in the Partnership Council or the Specialised Committees. This is also a result of the Agreement being concluded under the Union's own competences as discussed above. As was observed by Konstantinidis, this constitutes a 'dramatic departure from the days of the UK's membership' which thus 'solidifies the weakening of its position vis-à-vis the EU'.[33] As could be argued, this is also part of the reality of the UK finding itself outside of the EU after withdrawal where the EU has learned to speak more united and with one voice, while the actual debate amongst the EU-27 takes place prior to that and behind closed doors.

3 ALL'S WELL THAT ENDS WELL?

The mere existence of the TCA has to be called a success in itself. Apart from that, those who hoped for finality of the Brexit saga may be disappointed. Undeniably, the discussed flexibility for further supplements and amendments could be considered pragmatic and may be explained with the limited time available for its conclusion. Ultimately, flexibility is a virtue cultivated by the EU over time and gaps are meant to be filled.

What manifests, however, the inherent fragility of the Agreement is the potential for new disputes within it, the re-opening of Pandora's box, which imposes a continuous threat to the newly established relationship of being torn to pieces again. The following will provide an analysis of the ratification and review procedures provided under the TCA as well as the infringement proceedings against the UK for breach of its obligations under international law.

3.1 RATIFICATION AND REVIEWS

One concern is the pending ratification of the TCA by the EU. Due to the last-minute conclusion of the TCA's negotiations just before the end of the transitional period which did not allow sufficient time for ratification, the Parties agreed on a provisional application from 1 January 2021.[34] While the UK has already ratified the TCA by means of the European

[32] See discussion below on the pending infringement proceedings against the UK.
[33] See eg Vasiliki Poula 'From Brexit to Eternity: The institutional landscape under the EU-UK Trade and Cooperation Agreement' (*European Law Blog*, 14 January 2021) <https://europeanlawblog.eu/2021/01/14/from-brexit-to-eternity-the-institutional-landscape-under-the-eu-uk-trade-and-cooperation-agreement/> accessed 29 July 2021.
[34] Art. FINPROV.11 (2) of the TCA.

Union (Future Relationship) Act 2020 which received royal assent on 31 December 2020,[35] the side of the EU has yet to ratify the agreement by consent in the European Parliament and decision by the Council according to Article 218 TFEU.

Originally, ratification by the EU was envisaged to be completed by 28 February 2021,[36] however, this was extended until 30 April 2021.[37] At the time of writing,[38] ratification by the European Parliament seems uncertain following the second-time infringement proceedings initiated by the European Commission.[39] In a previous statement, the European Parliament stressed the importance of the UK's compliance with its obligations under the Withdrawal Agreement; otherwise it would refrain from ratification of any trade deal with the UK.[40]

Even if the current Northern Ireland dispute is eventually reconciled and the Parliament ratifies the TCA in due course,[41] the agreement itself requires continued negotiations between the parties. According to Article FINPROV.3, regular reviews are to be conducted at five-year intervals and jointly by the Parties of the entire agreement and supplementing agreements. In other words, every five years the debate will re-emerge with the potential that the lights could just be turned off if one party deviates from its previous position.

Other parts, such as the trade and investment provisions under Part Two of the TCA may be subject to rebalancing measures according to Article 9.4, relating to common standards upon which the Agreement is founded, such as labour and social, environmental and climate protection. Divergences between the Parties which may very well occur in the longer term are thus placed under regulatory scrutiny upon request by either Party 'no sooner than four years after the entry into force' of the TCA,[42] and in subsequent four-year intervals.[43]

In addition, either party may terminate or suspend – in whole or in parts – the operation of the TCA or any supplementing agreement if it 'considers that there has been a serious and substantial failure by the other Party to fulfil any of the obligations that are described as essential elements'.[44] According to Article COMPROV.12, essential elements include democracy, the rule of law, and human rights,[45] the fight against climate change,[46]

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35 European Union (Future Relationship) Act 2020.
36 Art. FINPROV.11 (2)(a) of the TCA.
37 Decision No 1/2021 of the Partnership Council established by the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, of 23 February 2021, as regards the date on which provisional application pursuant to the Trade and Cooperation Agreement is to cease (2021/356) [2021] OJ L 68/227.
38 Before 25 April 2021.
39 See further below.
40 European Parliament, News (11 September 2020) 'Statement of the UK Coordination Group and the leaders of the political groups of the EP', https://www.europarl.europa.eu/news/en/press-room/20200907IPR86513/statement-of-the-uk-coordination-group-and-ep-political-group-leaders.
41 Guillaume Van Der Loo and Merijn Chamon (2021) 'The European Parliament flexes its muscles on the EU-UK trade deal' (European Policy Centre, 5 March 2021) <https://www.epc.eu/en/Publications/The-European-Parliament-flexes-its-muscles-on-the-EUUK-trade-deal~3c43bc> accessed 29 July 2021.
42 Art. 9.4(4).
43 Art. 9.4(7).
44 Art. INST.35(1) of the TCA.
45 Art. COMPROV.4(1) of the TCA.
46 Art. COMPROV.5(1) of the TCA.

and the countering proliferation of weapons of mass destruction.[47] A serious and substantial failure exists if 'its gravity and nature [is] of an exceptional sort that threatens peace and security or […] has international repercussions',[48] subject to proportionality and the respect for international law.[49]

According to Article FINPROV.8, termination of the agreement can be done unilaterally by either party – the EU or the UK – by written notification. After a transitional period of eleven months, the agreement and any supplementing agreement then ceases to be in force. Part Three on law enforcement and judicial cooperation in criminal matters can even be terminated with immediate effect if the UK or any EU Member State denounces the European Convention on Human Rights.[50] Again, this is another example of how easy it would be for the entire TCA or parts thereof to be abolished even at a later stage after ratification, irrespective of the five-year review intervals. This, in effect, constitutes another source of legal uncertainty and the potential for a 'no deal' scenario much further down the line.

3.2 INFRINGEMENT PROCEEDINGS AGAINST THE UK

The TCA's fragility can also be demonstrated by the willingness – or lack thereof – of both parties to be bound by and comply with their obligations arising from the agreement. According to Article COMPROV.13, the provisions of the TCA 'shall be interpreted in good faith […] in accordance with customary rules of interpretation of public international law'. As one would expect, both the EU and the UK would consider it self-evident to oblige.

However, the UK is on the verge of breaking international laws in relation to Brexit for the second time within less than a year. Also for the second time, the European Commission has thus initiated infringement proceedings against the UK, a situation which could potentially jeopardise the TCA's ratification process as discussed above and thus the entire agreement itself.

The first part of the dispute began in September 2020, with the UK tabling the Internal Market Bill 2020 which envisaged disapplication of certain aspects of the Northern Ireland Protocol annexed to the EU-UK Withdrawal Agreement.[51] While Article 16 of the Protocol provides for the possibility of unilateral safeguard measures, these have to be appropriate and only in case of '*serious* economic, societal or environmental difficulties'.[52] The EU however, considered the UK's actions in breach of the good faith provision in Article 5 of the Withdrawal Agreement and thus of its obligations under international law.

The controversial passages in the Internal Market Bill were only deleted after the EU initiated infringement proceedings in October 2020 if the UK were to maintain its position.[53] Despite the UK's withdrawal from EU membership on 31 January 2020, the Commission's

[47] Art. COMPROV.6(1) of the TCA.
[48] Art. INST.35(4) of the TCA.
[49] Art. INST.35(3) of the TCA.
[50] Art. LAW.OTHER.136 of the TCA.
[51] Withdrawal Agreement (n 3).
[52] Emphasis added.
[53] European Commission, 'Withdrawal Agreement: European Commission sends letter of formal notice to the United Kingdom for breach of its obligations', Press release (1 October 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1798> accessed 29 July 2021.

powers under Article 258 TFEU continued to apply throughout the transitional period until 31 December 2020 on the basis of Article 131 of the Withdrawal Agreement in conjunction with Article 12 of the Northern Ireland Protocol. The infringement proceedings were paused after the final iteration of the UK Internal Market Act 2020[54] which was then in conformity with previously agreed international law.[55]

Nevertheless, on 15 March 2021 and for the second time, the European Commission sent another letter of formal notice for breach of its obligations under the Northern Ireland Protocol as well as the good faith obligation according to Article 5 of the Withdrawal Agreement.[56] This comes after the UK's threat to unilaterally extend the so-called 'grace period', a transitional period allowing for staggered and initially much lighter controls on certain goods crossing the Irish Sea,[57] which was originally granted until 1 April.

Alongside the infringement procedure according to Article 258 TFEU, the Commission's proceedings have also triggered the consultations in the Joint Committee according to Article 169 of the Withdrawal Agreement in order to find a feasible solution. If unsuccessful, the dispute mechanism under the Withdrawal Agreement could take effect, resulting in the establishment of an arbitration panel according to Article 171, with consequences also for the ratification of the TCA as well as the Good Friday Agreement of 1998 and potentially the entire peace process in the region of Northern Ireland.

As could be argued, the UK's rather confrontational behaviour can be traced throughout the Brexit negotiations and there are no signs at the moment for a mending of tensions between the parties. Taking into account the continued riots in Belfast as a reaction to current developments, a more cooperative approach would be apt.[58] However, as can be argued, the UK's reputation as an internationally reliable partner has received scratch marks from its readiness to break obligations under international law.

4 A LESSON TO BE LEARNED?

As mentioned above, at the time of writing of this article, ratification of the European Parliament is still pending. However, it is expected that the EU will ratify the agreed TCA even if the current conflict continues for two main reasons. First of all, the TCA serves as an additional legal base, a ground to bring legal action according to the respective procedures therein once it is fully enforced. Second, the two agreements – the Withdrawal Agreement and the TCA – although they are two sides of the same coin, they are nevertheless separate

[54] United Kingdom Internal Market Act 2020.
[55] European Commission, 'Brexit: Withdrawal Agreement to be fully operational on 1 January 2021' (17 December 2020) <https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2478> accessed 29 July 2021.
[56] European Commission, 'Withdrawal Agreement: Commission sends letter of formal notice to the United Kingdom for breach of its obligations under the Protocol on Ireland and Northern Ireland' (15 March 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1132> accessed 29 July 2021.
[57] As part of the Agreement, Northern Ireland remains part of the Customs Union in order to avoid a hard border on the island of Ireland.
[58] See also Jess Sargeant, 'Cooperation not confrontation should be at the heart of UK-EU discussion on the protocol' (*Institute for Government*, 5 March 2021) <https://www.instituteforgovernment.org.uk/blog/cooperation-northern-ireland-protocol> accessed 29 July 2021.

legal documents which should not be conflated, neither in their ratification nor in their enforcement.

It goes without saying that the EU is not only allowed to, but also well advised to press legal charges and to utilise all possible means if the UK further diverts from its agreed commitments. The institutional framework (Partnership Council and Committees) set up in the TCA provides adequate control mechanisms to observe proper implementation and compliance with the agreement.[59] At the same time, further concessions should be avoided at all cost unless the UK is able to provide legally enforceable reassurances.

In addition, unity of the EU-27 is evidently the road to success. Since the UK's referendum in 2016, the EU has stood firm and united – almost unprecedented in its most recent history after enlargement – and must continue to do so. The UK's attempts to negotiate separately with some Member States[60] or its uncooperative behaviour during the COVID-19 pandemic[61] are evidence of the UK's efforts to undermine this unity of the EU-27. Its loss would significantly weaken the Union's position in this regard *vis-à-vis* the UK as well as other international partners.

For the EU, one lesson has to be learned from the entire withdrawal process. While the expected 'domino effect' – of other EU Member States to follow suit the UK's exit – has clearly been stifled, not least because of the entire Brexit shambles and resulting uncertainties which thus worked as deterrence for similar ambitions in the short term,[62] the EU should avoid repeating such a scenario in the longer term.

That is not to say that withdrawal should be made impossible. Rather, Article 50 TEU should be revised to provide for default fall-back options for transition unless and until an agreement is concluded. While a withdrawing Member State should clearly be able to completely cut all ties with the EU if it so wishes, this would then have to be explicitly stated in the agreement. The transitional period should not include a set end date for the purpose of evading the to and fro of extensions to be granted and the constantly lingering threat of an uncontrolled 'no deal'.

Ultimately, a default transitional period would be beneficial for businesses and citizens alike in the respective Member States, creating legal certainty for cross-border trade. Instead of merely acting as a deterrence from withdrawal, a revised procedure would build further trust in the EU and thus increase the benefits of EU membership itself.

5 CONCLUDING REMARKS

The conclusion of a trade deal regulating the future relationship between the EU and the UK has long been anticipated on both sides. The result is the lowest common denominator

[59] See discussion above.
[60] See eg Francesco Guarascio, 'Exclusive: EU says UK seeks to undermine its unity at trade talks: document', (Reuters, 5 March 2020) <https://www.reuters.com/article/us-britain-eu-exclusive-idUSKBN20S1IV> accessed 29 July 2021.
[61] Xinhua, 'World Insights: Britain-EU row over coronavirus vaccine likely to continue amid supply shortages' (*Xinhua*, 1 April 2021) <http://www.xinhuanet.com/english/europe/2021-04/01/c_139851977.htm> accessed 29 July 2021.
[62] Simone Esposito, EU Parliamentary Projection: No Domino-Effect Caused by Brexit in Sight' (*Europe elects*, 31 August 2020) <https://europeelects.eu/2020/08/31/august2020/> accessed 29 July 2021.

without much margin for deviation. Any minor dispute in the future could have severe consequences and ultimately jeopardise the entire agreement.

As has been shown above, the TCA is unlike other international trade agreements as its starting point is a different one considering the UK's recent EU membership status. Thus, the aim is to prevent further divergence rather than encourage alignment with EU standards. In addition, the newly established institutional framework and the exclusivity of the EU's competences over the substantive provisions of the agreement are quite unique.

However, the discussion above has also highlighted the many questions which remain unsolved under the TCA. At best, this can be considered pragmatic flexibility, at worst it exposes the inherent fragility of the entire agreement – similar to a castle built in sand. Whether this castle will withstand the test of time will largely depend on the willingness of both sides to work with and not against each other. The already smouldering conflicts in the form of international law breaches and infringement proceedings constitute, however, not the most favourable omen.

For future reference, the EU should revise the procedure under Article 50 TEU in order to avoid a *déjà vu*. As has been suggested, this could include a default and open-ended transitional period until an agreement has been reached which would be less detrimental to the overall relationship between the parties after withdrawal and would guarantee more legal certainty in the process.

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FAREWELL TO THE EU CHARTER: BREXIT AND FUNDAMENTAL RIGHTS PROTECTION

MARCO GALIMBERTI*

Twenty years after its drafting and more than one decade after its entry into force, the Charter of Fundamental Rights of the European Union has ceased to be part of British law as a consequence of Brexit. Looking into this issue raised by the UK withdrawal from the European Union, the essay sheds some light on the legal status and impact of the EU Bill of Rights in the British legal order. Against this background, the article detects a connection between the UK Supreme Court's case law and the jurisprudence of the Court of Justice of the European Union on the direct effect of the Charter. From this perspective, the analysis highlights the implications of the UK departure from the Charter and disentanglement from the Luxembourg case law, thus arguing that they may weaken the standards of fundamental rights protection.

1 INTRODUCTION

Borrowing the words of British Prime Minister Boris Johnson, the EU-UK Trade and Cooperation Agreement concluded at the end of last year and approved by the European Parliament in April 2021 marks a 'final step in a long journey' which began nearly five years ago.[1] With the addition of this latest piece of the puzzle, it can be argued that the UK Government and the European Union eventually managed to lead the Brexit negotiations to a safe harbour, notwithstanding the severe storms that the parties had to navigate through since the very beginning of their journey. Among the variety of legal and constitutional issues that the Brexit process raises and requires to unravel – and on which a great deal of ink has already been spilled so far –, it is hard to deny that one the most intricate matters is the one concerning the future of fundamental rights protection in the UK.

Taking a step backwards, the relevance of this open question has its roots in the European Union (Withdrawal) Act 2018 that the Parliament introduced in order to repeal the European Communities Act 1972 and facilitate legal transition when the UK parts ways with the EU.[2] Indeed, the Withdrawal Act is predicated on the general assumption that existing EU legislation is converted into UK law as it stands at the moment of Brexit, with the possibility for the UK Parliament and courts to decide thereafter whether to retain,

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[1] The so-called 'Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part' was signed on 30 December 2020. It was applied provisionally as of 1 January 2021 and entered into force on 1 May 2021 - Trade and Cooperation Agreement Between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part [2020] OJ L 444/14.

[2] Subsequently, amendments to the European Union (Withdrawal) Act 2018 were made by the European Union (Withdrawal Agreement) Act 2020 and related provisions concerning the UK-EU Withdrawal Agreement.

amend or repeal it. To be more precise, such logic is reflected in Clauses 2 to 4 of the Bill, which provide that different sources of EU law – such as EU-derived national legislation, direct EU legislation and rights forming part of UK law by virtue of the European Communities Act 1972 – will continue to exist within the British legal order.[3]

Nevertheless, this rationale of legal continuity underlying the Withdrawal Act finds a major exception in Clause 5(4), which expressly excludes the EU Charter of Fundamental Rights (hereinafter, 'the Charter') from being incorporated into domestic law on or after exit day.[4] At the same time, there is a certain degree of ambiguity surrounding the reading of Clause 5(5) of the Bill, as it affirms in a somewhat cryptic way that such preclusion of the Charter transplant into national legislation 'does not affect the retention in domestic law […] of any fundamental rights or principles which exist irrespective of the Charter' itself.[5]

Neither it is clear whether those principles being referred to therein do actually correspond with the principles laid down by the Court of Justice of the European Union (hereinafter, 'CJEU'), which will no longer be binding on UK courts and tribunals according to Clause 6(1) of the Withdrawal Act.[6] In a similar vein, a further interpretative knot to untie lies in the fact that the Bill provides for incorporation of general principles of EU law (including EU fundamental rights) recognised by the CJEU into UK law,[7] whilst disallowing, however, any right of action relying on them as such.[8]

On top of that, it can also be noticed that the Withdrawal Act sets the survival of the principle of EU law primacy – and the ensuing disapplication of any inconsistent UK law –

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[3] More specifically, Clause 2 of the Withdrawal Act retains domestic statutes and statutory instruments that implement EU law; Clause 3 refers to direct EU legislation, ie directly applicable EU regulations and decisions, which have legal effect within the national legal framework without the need for any implementing domestic statute; and Clause 4 covers directly effective rights that have hitherto been part of British law under section 2(1) of the European Communities Act 1972. In particular, this latter section states that 'all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly'.

[4] For a critical analysis of the decision to exclude the Charter from the general logic underpinning the European Union (Withdrawal) Act, see Nicholas Bamforth, Meghan Campbell, Paul Craig, Sandra Fredman, Stephen Weatherhill and Alison Young, 'The EU Charter After Brexit' (2017) Oxford Human Rights Hub, Submission to Joint Committee on Human Rights <https://ohrh.law.ox.ac.uk/the-eu-charter-after-brexit-2017-submission-to-joint-committee-on-human-rights/> accessed 25 May 2021; Arabella Lang, Vaughne Miller, Simson Caird, 'EU (Withdrawal) Bill: the Charter, general principles of EU law, and "Francovich" damages' (2017) House of Commons Library, Research Briefing Paper Number 8140 <https://commonslibrary.parliament.uk/research-briefings/cbp-8140/> accessed 25 May 2021.

[5] Accordingly, Clause 5(5) of the Withdrawal Act underlines that 'references to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles'.

[6] As regards this specific point, Clause 6(1) of the Bill provides that a court or tribunal '(a) is not bound by any principles laid down, or any decisions made, on or after exit day by the European Court, and (b) cannot refer any matter to the European Court on or after exit day'.

[7] See especially Clause 6(3) of the Withdrawal Act, according to which 'any question as to the validity, meaning or effect of any retained EU law is to be decided […] in accordance with any retained case law and any retained general principles of EU law […]'.

[8] In this respect, reference should be made to Schedule 1 of the Withdrawal Act, which lays down further provision about exceptions to savings and incorporation. Particularly, Schedule 1 paragraph 2 explains that for a general principle of EU law to be part of domestic law, it has to have been recognised by the CJEU in a case decided before exit day. At the same time, Schedule 1 paragraph 3 makes clear that 'there is no right of action in domestic law on or after exit day based on a failure to comply with any of the general principles of EU law'.

on a slippery slope: on the one hand, Clause 5(1) removes it in relation to statutes adopted post-exit day;[9] on the other hand, Clause 5(2) preserves it as regards legislation enacted prior to exit day;[10] and, to make matters even more difficult, Clause 5(3) maintains it for laws existing before Brexit and modified afterwards, as long as the purpose of such amendment is consistent with the *primauté*.[11]

Against this backdrop, one might well wonder what kind of legal implications can be ultimately inferred in terms of fundamental rights protection from the above interlocking elements of complexity set out in the Withdrawal Act. And, in particular, the question arises as to which detrimental effects may stem, in this respect, from the Government's choice to rid itself of the Charter. In order to address this contentious issue, the next pages give firstly a brief overview of the status that the Charter has enjoyed in the UK legal system since its incorporation into the Treaty up to exit day (section 2). Taking the cue from this theoretical framework, the following section of the paper delves into the UK Supreme Court's *Benkharbouche* decision as a case study which provides a tangible example of the effectiveness of the Charter in domestic jurisprudence (section 3). Broadening the scope of our analysis to the Luxembourg Court, the *Benkharbouche* judgment offers then the opportunity to envisage the initial seeds of a substantial – and to some extent unpredicted – convergence between the UK case law and the CJEU's jurisprudence on the direct effect of the Charter (section 4). Lastly, the essay will seek to draw some – though still inevitably tentative – conclusions on the basis of the analysis carried out throughout the previous sections (section 5).

2 THE EU CHARTER OF FUNDAMENTAL RIGHTS IN THE UK

With a view to framing correctly the present topic and be able to enter into the merits thereof, it is useful to provide, first of all, some basic coordinates relating to the status and incidence of the 'EU Bill of Rights'[12] in the British legal system. As is well-known, the Charter was solemnly proclaimed by the EU Parliament, the Council of Ministers and the EU Commission at Nice in December 2000 and acquired binding legal status with the Lisbon

[9] According to Clause 5(1) of the Bill, 'The principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after exit day'.
[10] In this regard, Clause 5(2) of the Withdrawal Act states that '[…] the principle of the supremacy of EU law continues to apply on or after exit day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day'.
[11] In particular, Clause 5(3) affirms that 'Subsection (1) does not prevent the principle of the supremacy of EU law from applying to a modification made on or after exit day of any enactment or rule of law passed or made before exit day if the application of the principle is consistent with the intention of the modification'.
[12] This expression is inspired by Eddy De Smijter and Koen Lenaerts, 'A "Bill of Rights" for the European Union' (2001) 38 CML Rev 273.

Treaty entry into force on 1 December 2009.[13] From then on, the Charter forms part of EU primary law and has 'the same legal value as the Treaties' pursuant to Article 6(1) TEU.[14]

Even before the Treaty of Lisbon entered into force, the British Government chaired by the then Prime Minister Tony Blair had bluntly made clear its reluctance to acknowledge the legally binding nature of the Charter in the UK and described it as a mere statement of policy.[15] Such misgivings about the application of Charter rights seem however to be quite unsurprising in view, more generally, of the traditional dualism characterising the British constitutional approach to international and EU law.[16] This unfriendly attitude toward the legal enforceability of the EU human rights catalogue took the form of a written document, namely Protocol No 30 on the application of the Charter to the UK (and Poland), which was annexed to the EU Treaties.[17] The equivocal wording of Protocol No 30 gave rise to a common misunderstanding that the Protocol itself amounts to a sort of opt-out regime from the Charter,[18] inasmuch as Article 1(1) thereof states that 'the Charter does not extend the

[13] With regard to the main goal for EU fundamental rights' codification into a written text, the Presidency Conclusions at the occasion of the European Council of Cologne in 1999 clarified that '[…] at the present stage of development of the European Union, the fundamental rights applicable at Union level should be consolidated in a Charter and thereby made more evident'. Accordingly, the European Council decision on the drawing up of a Charter of Fundamental Rights of the European Union (annex IV) declared that '[…] there appears to be a need, at the present stage of the Union's development, to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union's citizens'.

[14] As regards the debate on the legal effects of the Charter and its impact on the EU system of fundamental rights protection, which falls beyond the scope and purposes of the present analysis, see *ex multis* Joseph Weiler, 'Does the European Union Truly Need a Charter of Rights?' (2000) 6 European Law Journal 95; Bruno De Witte, 'The legal status of the Charter: Vital question or non-issue?' (2001) 8 Maastricht Journal of European and Comparative Law 81; Gráinne De Burca, 'The drafting of the European Union Charter of fundamental rights' (2001) 26 European Law Review 126; Piet Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) 39 Common Market Law Review 945, 951; Xavier Groussot and Laurent Pech, 'Fundamental Rights Protection in the European Union Post Lisbon Treaty' Foundation Robert Schuman Policy Paper 173/2010 <https://www.robert-schuman.eu/en/doc/questions-d-europe/qe-173-en.pdf> accessed 25 May 2021; Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 European Constitutional Law Review 375.

[15] To name but a few examples, in October 2000 the then UK Minister for Europe Keith Vaz claimed that 'this is not a litigator's Charter. Nobody can sue on it. Nobody will be able to litigate on it'; similarly, on 22 November 2000 he declared to the House of Commons that the Charter 'will not be legally enforceable'; on 14 November 2000, the Prime Minister Tony Blair stated that the Charter is 'simply a statement of policy and the UK is not the only member state to oppose something of a binding legal nature'; and, in a speech to the House of Common on 11 December 2000, he maintained that 'our case is that [the Charter] should not have legal status and we do not intend it to. We will have to fight that case'.

[16] On the UK's dualist approach see, among many others, Margot Horspool, Matthew Humphreys, Michael Wells-Greco, *European Union Law* (OUP 2018) 199 and Shaheed Fatima, 'The Domestic Application of International Law in British Courts' in Curtis A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (OUP 2019).

[17] Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom [2008] OJ C 115/313. For a thorough analysis of the Protocol and its contested legal implications see, among others, Anthony Arnull, 'Protocol (No 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom' in Steve Peers, Tamara Hervey, Jeff Kenner, Angela Ward (eds), *The EU Charter of Fundamental Rights. A Commentary* (Hart 2014); Catherine Barnard, 'The 'Opt-Out' for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?' in Stefan Griller, Jacques Ziller (eds), *The Lisbon Treaty: EU Constitutionalism Without a Constitutional Treaty?* (Springer 2008).

[18] By way of example, in a statement to the House of Commons on 25 June 2007 Tony Blair affirmed that 'it is absolutely clear that we have an opt-out from […] the Charter […]'. The misconception that the UK had an 'opt-out' from the Charter is also highlighted in Menelaos Markakis, 'Brexit and the EU Charter of Fundamental Rights' (2019) Public Law 82.

ability of the Court of Justice of the European Union, or any court or tribunal […] of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action […] of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms'.

Yet, in 2011 the CJEU's ruling in the *N.S.* case took the chance to explain that Protocol No 30 does not intend to grant any genuine opt-out from the application of the Charter[19] but it merely accords to the UK (and Poland) a kind of 'comfort clause'.[20] One year later, it was a decision of the UK Supreme Court to confirm that the Charter – binding the Member States only when they are implementing EU law under Article 51(1) of the Charter – takes effect in the national legal order[21] and, therefore, to tame the debate that the UK High Court had meanwhile contributed to revive as to the alleged opt-out nature of Protocol No 30.[22] At a closer look, further evidence of the Charter's binding effects may also be implicitly derived from the two other provisions forming part of the Protocol, which deal with the way that certain rules of the Charter have to be applied in the UK: first, Article 1(2), declaring in rather vague terms that nothing in Title IV of the Charter ('Solidarity') creates justiciable rights applicable to the UK except in so far as such rights are provided for in national law; and, second, Article 2, stressing that where a Charter provision refers to national laws and practices, it shall only apply to the UK to the extent that the rights or principles that it contains are recognised in domestic law or practices.[23]

That being said, although both the CJEU and the UK Supreme Court had already held that Protocol No 30 did not secure any opt-out from the Charter, there appear to persist some concerns as to the exact status of the EU Bill of Rights in the UK. In this context, a 2014 report published by the European Scrutiny Committee of the House of Commons identified confusion about a number of aspects of the Charter's application in UK law and

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[19] Joined Cases C-411/10 and C-493/10 *N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* EU:C:2011:865, paras 119-120: '[…] Protocol (No 30) does not call into question the applicability of the Charter in the United Kingdom or in Poland […]. In those circumstances, Article 1(1) of Protocol (No 30) explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions'. In this regard, the Grand Chamber expressly upheld the *N.S.*, Opinion of AG Trstenjak, paras 169-170.

[20] This expression is borrowed from Bryn Harris, 'The Charter of Fundamental Rights in UK law after Brexit: Why the Charter should not be transposed' (*Lawyers for Britain*, 20 November 2017) <https://lawyersforbritain.org/why-the-eus-charter-of-fundamental-rights-must-not-be-transposed-into-uk-law> accessed 25 May 2021.

[21] *The Rugby Football Union v Consolidated Information Services Limited (Formerly Viagogo Limited)* [2012] UKSC 55, paras 26-28: 'Although the Charter […] has direct effect in national law, it only binds member states when they are implementing EU law - article 51(1). But the rubric, 'implementing EU law' is to be interpreted broadly and, in effect, means whenever a member state is acting 'within the material scope of EU law' […]'.

[22] See, in particular, *R(on the application of AB) v Secretary of State for the Home Department* [2013] EWHC 3453, when Mr Justice Mostyn stated as follows: 'I was sure that the British government […] had secured at the negotiations of the Lisbon Treaty an opt-out from the incorporation of the Charter into EU law and thereby via operation of the European Communities Act 1972 directly into our domestic law. […] it is absolutely clear that the contracting parties agreed that the Charter did not create one single further justiciable right in our domestic courts'. Nevertheless, he specified that, as a consequence of the recalled CJEU's *N.S.* judgment, 'Notwithstanding the endeavours of our political representatives at Lisbon it would seem that the much wider Charter of Rights is now part of our domestic law'.

[23] In the abovementioned *N.S.* judgment (n 19), the CJEU did not rule on the meaning of such provisions, since they were not necessary for deciding the case. By contrast, they were mentioned in the Opinion of AG Trstenjak (n 19), paras 171-176.

invoked, thus, 'an urgent need for clarification, and for action'.[24] Notably, the report did stress that several legal effects of the Charter were still unclear, including its field of application, the distinction between rights and principles, the relationship with the European Convention on Human Rights (hereinafter, 'ECHR'), and the capacity of the Charter to have horizontal effect between private parties.[25] On the basis of such remarks, the 2014 study by the European Scrutiny Committee recommended, by way of conclusion, that the Government should intervene in proceedings before the CJEU to limit the scope of the Charter[26] and also that an Act of Parliament should be passed in order to disapply the Charter in the UK[27].

Shortly thereafter, a response of the Government to such report underlined the domestic courts' power to strike down a national statute inconsistent with a directly enforceable right in the Charter; it reiterated that the Charter, as it also states in its preamble, is not intended to establish any new rights but to simply reaffirm rights (and principles) already recognised in EU law; and it clarified that the CJEU had hitherto respected the limits on the application of the Charter.[28] Among other things, the Government essentially agreed with the Committee's conclusion as to two important differences – which we will come back to in the next section – between the Charter and the ECHR, this latter being given effect in British law through the enactment of the Human Rights Act 1998 ('HRA'). At the outset, it observed that some rights codified in the Charter have a wider scope than the corresponding

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[24] European Scrutiny Committee – Forty-Third Report, 'The application of the EU Charter of Fundamental Rights in the UK: a state of confusion' (2013-2014) HC979, para 13. Such concerns arose even though the European Scrutiny Committee, in its Third Report of Session, 'EU Intergovernmental Conference: Follow-up Report' (2007-2008), para 38, had argued that 'It is clear that the Government accepts that the Charter will be legally binding, and it has stated that the Protocol is not an opt-out. Since the Protocol is to operate subject to the UK's obligations under the Treaties, it still seems doubtful to us that the Protocol has the effect that the courts of this country will not be bound by interpretations of measures of Union law given by the ECJ and based on the Charter'.

[25] For a critical analysis of the main issues highlighted in the report see Sionaidh Douglas-Scott, 'Fundamental Rights Not Euroscepticism: Why the UK Should Embrace the EU Charter' (2014) Oxford Legal Studies Research Paper 82/2014 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2528768> accessed 25 May 2021.

[26] European Scrutiny Committee – Forty-Third Report, 'The application of the EU Charter of Fundamental Rights in the UK: a state of confusion' (2013-2014) HC979, para 169: '[…] We urge the Government to think again, and to intervene in future ECJ cases on the Charter in support of a higher threshold—a determinative link—for the test for when Member State action comes within the scope of EU law, as a consequence of which any human rights aspects fall under the Charter, as interpreted by the ECJ rather than national courts'. Interestingly, the report observed that the UK Government had not intervened before the CJEU in Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* EU:C:2013:105, namely the leading authority on the interpretation of Article 51(1) of the Charter.

[27] Forty-Third Report, 'The application of the EU Charter of Fundamental Rights in the UK: a state of confusion' (n 26) para 172: '[…] in particular in relation to the field of application, and the certainty that the jurisdiction of the ECJ will range across an even wider field with increasingly unintended consequences, we recommend that primary legislation is introduced by way of amendment to the European Communities Act 1972 to exclude, at the least, the applicability of the Charter in the UK. This is what most people thought was the effect of Protocol 30. They were wrong. It is not an opt-out, but for the sake of clarity and for the avoidance of doubt we urge the Government to amend the European Communities Act 1972 […]'.

[28] Government response to the House of Commons European Scrutiny Committee – Forty-Third Report, 'The application of the EU Charter of Fundamental Rights in the UK: a state of confusion' (n 26). A similar stance was also taken by the House of Lords European Union Committee 12th Report, 'The UK, the EU and a British Bill of Rights' (2015-2016) HL Paper 139, 3, stating that 'We also heard a range of views on whether the Court of Justice of the European Union could be accused of extending the scope of EU law over national law through its judgments on the EU Charter. The weight of expert evidence was clear, and did not support such a conclusion'.

ones guaranteed under the ECHR, such as in the case of Article 47 of the Charter (right to an effective remedy and fair trial) compared to Article 6 of the Convention. From the point of view of remedial measures, the Government then recalled that UK judges must disapply a piece of national legislation being at variance with a Charter's directly applicable right, in accordance with the principle of EU law primacy. By contrast, a domestic court can only make a declaration of incompatibility whenever an Act of Parliament is inconsistent with a Convention's right (and therefore with the HRA), without affecting the validity of the Act in question until and unless Parliament amends it.

Last but not least, among the Charter-related studies prior to the European Union (Withdrawal) Act, it is also worth mentioning a 'right by right analysis' the UK Government published in December 2017.[29] Interestingly enough, the report argued that the substantive rights enshrined in the Charter would not be weakened after exit day: they will find protection in a range of other sources, such as retained EU law, general principles of EU law, common law, other international human rights instruments and domestic statutes, which would fill the gap left by the removal of the Charter in the UK's human rights system. However, relying upon the mere assumption that the Charter's rights will be eventually converted into national law, the Government's assessment appears in fact unable to grasp all the nuances of the matter. Neither the study took into account, for instance, the issue of post-exit enforcement of rights that for the time being have no direct equivalent at all either in the ECHR or in any other relevant sources;[30] nor it examined the potential implications of the UK courts' loss of competence to disapply laws that contravene an EU directly enforceable right as a natural consequence of the Charter exclusion.[31]

3 TAKING THE CHARTER SERIOUSLY: THE FLOOR TO THE COURTS

In the light of the framework depicted so far, it is now possible to focus in more detail on the judicial impact of the Charter and, particularly, on an exemplary case involving the direct applicability of EU rights in the UK.

According to the EU Fundamental Rights Agency (FRA) database, which collects the case law of the CJEU and the European Court of Human Rights (hereinafter 'ECtHR') with direct references to the Charter, as well as a selection of national jurisprudence from the EU Member States, the CJEU has referred to the EU catalogue of rights in as many as 979 cases

[29] 'Charter of Fundamental Rights of the EU: Right by Right Analysis' (5 December 2017) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/664891/05122017_Charter_Analysis_FINAL_VERSION.pdf> accessed 25 May 2021.

[30] For example, the report merely observed that Article 8 of the Charter (protection of personal data) has no direct equivalent in the Convention, or that the scope of the right under Article 47 of the Charter 'is not however identical to that of Article 6 ECHR because it is not limited to the determination of civil rights and obligations or a criminal charge'. With specific regard to Articles 21 (non-discrimination) and 28 (collective bargaining and action), it noted that courts will be required to interpret retained EU law consistently with the Charter 'so far as it reflects a general principle of EU law' as well as that domestic legislation 'covers some of the same ground' as relevant the Charter rights.

[31] In this regard, the study simply stated that '[…] where the court is currently able to disapply legislation because of incompatibility with that right, it will continue to be able to do so where that retained EU law was passed or made before exit day' (para 22).

(including judgments, orders and opinions).[32] Among these, 24 case law references are identified as concerning directly the UK.[33] Even though this overall number may be considered as a quite limited one, especially in comparison to the relevant figures for other Member States such as Germany and Italy,[34] it is also true that, from a "qualitative" viewpoint, some UK cases have left a strong mark in the Luxembourg jurisprudence since the Charter became legally binding.

Suffice it to remind, first of all, the 2011 *N.S.* judgment we have already come across, in which the CJEU ruled that Article 4 of the Charter must be interpreted as meaning that national authorities may not transfer an asylum seeker to another Member State if there are substantial grounds for believing that he or she would face a real risk of being subjected to inhuman or degrading treatment due to the systemic deficiencies in that country's asylum procedure and reception conditions.[35] Another prominent example from the UK can be found in the well-known 2013 *Kadi* decision, where the CJEU was called to strike a balance between security reasons and restrictive measures to the rights to defence and effective judicial protection guaranteed under the Charter.[36] And again, touching upon the field of new generation rights, in *Tele2 Sverige and Watson* the Grand Chamber concluded that Articles 7 (respect for family and private life), 8 (personal data protection) and 11 (freedom of expression and information) of the Charter preclude a national legislation which, for the purpose of fighting crime, provides for general and indiscriminate retention of all traffic and location data.[37] More recently, reference should also be made to the 2018 *RO* ruling, which took a step forward on the ongoing rapprochement between Charter and ECHR, and therefore between their respective systems of rights protection.[38] In that circumstance, where the UK had issued a European arrest warrant after the notification of its intention to withdraw from the Union, the legal reasoning of the CJEU went as far as to say that Brexit does not affect the obligation to have due regard to Article 3 ECHR – corresponding to Article 4 of the Charter –, since the continuing participation in the Convention is in no way linked to EU membership.[39]

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[32] However, this number is to be partially brought down because the database includes also a series of judgments that, despite being prior to the Charter and not referring to it, are still relevant for the applicability thereof.

[33] Additionally, the database includes eighteen cases referring to Ireland. Among these, it is worth mentioning the judgment in Case C-327/18 *Minister for Justice and Equality v RO* EU:C:2018:733 *Minister for Justice and Equality v RO* and the relating AG Szpunar's opinion, which deal with the Brexit dynamics.

[34] According to the FRA database, there have been sixty cases involving Germany and forty-one cases from Italy with direct references to the Charter. Thirty-eight case law references can also be found with regard to Spain, whilst only sixteen cases originated from France.

[35] *N.S.* (n 19).

[36] Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *European Commission and Others v Yassin Abdullah Kadi*, EU:C:2013:518.

[37] Joined Cases C-203/15 and C-698/15 *Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others* EU:C:2016:970.

[38] As to the relationship between the Charter and the ECHR, we should also recall Article 52(3) of the Charter, which stipulates that 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection'.

[39] *Minister for Justice and Equality v RO* (n 33) para 52. According to the CJEU, the decision of a Member State to withdraw from the Union cannot consequently 'justify the refusal to execute a European arrest warrant on the ground that the person surrendered would run the risk of suffering inhuman or degrading treatment within the meaning of those provisions'.

Shifting then the lens of our current analysis from the Luxembourg jurisdiction to the domestic case law, a recent research illustrates that, after the Lisbon Treaty entry into force, UK courts have made 526 references to the Charter.[40] It goes without saying that this number inevitably takes into consideration a multitude of cases in which the Charter has a limited impact or plays a mostly ornamental role, as it is cited in passing or is just referred to by the legislation mentioned therein. This being so, one of the most relevant findings for present purposes is that the case search suggests an increasing frequency of references to the Charter in post-Lisbon litigation both at Court of Appeal and Supreme Court level.[41] While the Charter has carved out ever greater visibility as a reference point in the fundamental rights domain, the UK Supreme Court has in some cases continued to place reliance primarily on national law (including the ECHR as incorporated into the HRA) when both domestic and EU fundamental rights apply.[42] Nonetheless, when it comes to assessing the effectiveness of the remedies available in case of a breach of such rights, we cannot overlook the fairly different kind of protection that the Charter offers as compared to the one provided under domestic sources of law. To give a concrete example of such inconsistency, the enhanced remedial value of the Charter has distinctly come to the fore in *Benkharbouche*.

The joined cases of *Benkharbouche v Embassy of the Republic of Sudan* and *Janah v Libya* originated from the complaints raised by two non-UK nationals formerly working as domestic staff in the Sudanese and Libyan embassies in London. The applicants claimed the alleged infringement of their employment rights and the Working Time Regulations 1998, which had implemented the EU Working Time Directive in the UK.[43] By contrast, both foreign embassies opposed these claims by invoking State immunity in national courts under sections 4(2)(b) and 16(1)(a) of the State Immunity Act 1978 (hereinafter, 'SIA').[44]

At the outset, two separate Employment Tribunals dismissed the complaints on the ground that the employers were entitled to State immunity pursuant to the SIA. In 2014, appeals from the first instance decisions were heard together by the Employment Appeal Tribunal ('EAT'),[45] which held that there had been a violation of right to a fair trial under Article 6 ECHR.[46] In addition, the EAT found the contested provisions to be in conflict with

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[40] Lady Arden and Takis Tridimas, 'Limited But Not Inconsequential: The Application of the Charter by the Courts of England and Wales' in Michal Bobek and Jeremias Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart 2020) 331-332.

[41] ibid 332.

[42] See, in an exemplary way, *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51.

[43] Ms Benkharbouche brought claims against the Sudanese embassy for wrongful dismissal, failure to pay the minimum wage and breach of the Working Time Regulations 1998. Ms Janah brought claims against the Libyan embassy for wrongful dismissal, unpaid wages, racial discrimination, harassment and infringement of the Working Time Regulations 1998.

[44] In particular, section 4(1) SIA removes immunity in proceedings relating to a contract of employment made or due to be performed wholly or partly in the UK. However, section 4(2)(b) SIA reinstates immunity if at the time when the contract was entered into the employee was neither a national of the UK nor habitually resident there. Section 16(1)(a) SIA provides that the exception to immunity under section 4 SIA does not apply to proceedings concerning the employment of members of a mission within the meaning of the Vienna Convention on Diplomatic Relations (1961) or of members of a consular post within the meaning of the Vienna Convention on Consular Relations (1963).

[45] *Benkharbouche and Janah v Embassy of the Republic of Sudan and Libya* UKEAT/0401/12/GE and UKEAT/0020/13/GE [2014] ICR 169. For an analysis of the case, Andrew Sanger, 'The State Immunity Act and the Right of Access to a Court' (2014) 73 CLJ 1.

[46] However, the EAT is not entitled to make a declaration of incompatibility pursuant to section 4(2) of the Human Rights Act 1998. As a matter of fact, the HRA empowers only higher courts to issue a declaration of incompatibility between an Act of Parliament and the ECHR.

the right to an effective remedy as protected by Article 47 of the Charter. One year later, the UK Court of Appeal reached the same conclusions, thereby paving the way for a double remedial track.[47] On the one side, it issued a declaration of incompatibility for the challenged sections of the SIA insofar as they infringed the Convention.[48] On the other side, in relation to those parts of the claims falling within the scope of EU law, it found the domestic provisions at stake to be contrary to the Charter and hence to be subject to disapplication. In this regard, it recognised the right to an effective remedy as a general principle of EU law and Article 47 as falling into the category of the Charter's provisions endowed with horizontal direct effect (ie direct applicability against private parties).[49]

In 2017, the UK Supreme Court affirmed the order of the Court of Appeal.[50] After reviewing the relevant international law – and especially the ECtHR's case law –, it upheld that the contested sections of the SIA were at variance with Article 6 ECHR.[51] No separate issue was needed as to the claims grounded on EU law: if the Convention is infringed, so will be the Charter as well, by reason of the similar (albeit not identical) scope of Article 6 ECHR and Article 47 of the Charter.[52] It follows, therefore, that national statutes are disapplied due to their inconsistency with a directly enforceable right and that both cases shall be remitted to the Employment Tribunal in order to determine on the merits the EU law-based claims.

Although, at a first glance, the legal reasoning of the UK Supreme Court appears mostly centred around Article 6 ECHR, it is worth dwelling in more depth on its comparison with the judicial remedy available from the perspective of EU law. The decision confirmed that, in a case of conflict between a directly applicable right of the Charter and a piece of domestic legislation, the former necessarily prevails over the latter, which shall be disapplied.

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[47] *Benkharbouche and Janah v Embassy of the Republic of Sudan and Libya* [2015] EWCA Civ 33. For an analysis of the judgment delivered by the UK Court of Appeal see *ex multis* Andrew Sanger, 'State Immunity and the Right of Access to a Court under the EU Charter of Fundamental Rights' (2016) 65 ICLQ 213; Katja S. Ziegler, 'Immunity versus Human Rights: The Right to a Remedy after Benkharbouche' (2017) 17 Human Rights Law Review 127; Richard Garnett, 'State and Diplomatic Immunity and Employment Rights: European Law to the Rescue?', (2015) 64 ICLQ 783; Philippa Webb, 'The Immunity of States, Diplomats and International Organizations in Employment Disputes: The New Human Rights Dilemma?' (2016) 27 European Journal of International Law 753; Steven Peers, 'Rights, remedies and state immunity: the Court of Appeal judgment in Benkharbouche and Janah' (*European Law Blog*, 6 February 2015), <www.eulawanalysis.blogspot.com/2015/02/rights-remedies-and-state-immunity.html> accessed 25 May 2021.

[48] The Court of Appeal found a violation of Article 6 ECHR, in partial conjunction with prohibition of discrimination under Article 14 ECHR. The ruling held that the relevant provisions of the SIA could not be read down and be given effect in a way which is compatible with the ECHR, in accordance to the interpretative obligation imposed by section 3(1) HRA.

[49] *Benkharbouche and Janah v Embassy of the Republic of Sudan and Libya* [2015] EWCA Civ 33, paras 76-81. Notably, in *Benkharbouche* the UK courts treated the respondents as private parties for the purpose of the employment claims, since non-EU States are not bound by EU law as States.

[50] *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs: Secretary of State for Foreign and Commonwealth Affairs and Libya v Janah* [2017] UKSC 62. For a comment on this decision, Andrew Sanger, 'The limits of state and diplomatic immunity in employment disputes' (2018) 77 CLJ 1; Aidan O'Neill, 'The UK Supreme Court and EU law in the Legal Year 2016–2017 – Part 2' (*EUtopia law*, 27 October 2017) <www.eutopialaw.com/2017/10/27/the-uk-supreme-court-and-eu-law-in-the-legal-year-2016-2017-part-2/> accessed 25 May 2021; Alison Young, 'Benkharbouche and the future of disapplication' (*UK Constitutional Law Association*, 24 October 2017) <www.ukconstitutionallaw.org/2017/10/24/alison-young-benkharbouche-and-the-future-of-disapplication/> accessed 25 May 2021.

[51] *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs: Secretary of State for Foreign and Commonwealth Affairs and Libya v Janah* [2017] UKSC 62, para 76.

[52] ibid para 78.

Conversely, when an Act of Parliament is found to breach the ECHR (that is to say, the HRA), such statute shall just be declared incompatible with the Convention: it will then be up to the legislator to intervene, at a later stage, in order to set it aside.[53]

Having said that, it seems that the Supreme Court could easily confine its legal reasoning within the boundaries of the sole infringement of Article 6 ECHR. In so doing, once the challenged provisions are found to be in conflict with the Convention, it would eventually give the ball back to the Parliament, namely the only authority entitled to amend, replace or repeal national legislation.[54] However, in the present case, the Supreme Court did not hesitate to rely upon the primacy of EU law and the direct effect of the Charter,[55] so as to empower domestic courts and tribunals to promptly disapply an Act of Parliament.

In view of the example set by *Benkharbouche*, it is all the more clear that the Charter provides a stronger and more straightforward remedy than the one being available, in the meanwhile, under national law.[56] Admittedly, a declaration of incompatibility stemming from a breach of the HRA would amount, as such, to no more than a mere 'Pyrrhic victory'.[57] As a matter of fact, the applicants would still have to bring their claims before the ECtHR in order to obtain compensation after all internal remedies are exhausted. Moreover, as we have noticed, a subsequent decision by the Parliament would anyway be needed for the purposes of adjusting or striking down the contested provisions.

With this in mind, in the decision of the Withdrawal Bill to sever ties with the Charter we can ultimately grasp the signs of the well-known objective of 'bringing rights back home' which has long nourished, more in general, a disenchantment with and an internal front of resistance to the multilevel system of fundamental rights protection.[58] Still, as we have seen, this choice may be considered as a highly risky move, given that it will henceforth deprive the UK legal order of a legal tool through which each and every judge is in the position to safeguard rights more rapidly and secure more immediate relief to the individual than the national sources of law.

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[53] *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs: Secretary of State for Foreign and Commonwealth Affairs and Libya v Janah* [2017] UKSC 62, para 78: 'a conflict between EU law and English domestic law must be resolved in favour of the former, and the latter must be disapplied; whereas the remedy in the case of inconsistency with article 6 of the ECHR is a declaration of incompatibility'.

[54] As regards the declaration of incompatibility, *Benkharbouche and Janah v Embassy of the Republic of Sudan and Libya* [2015] EWCA Civ 33, para 72 made clear that such remedy 'does not affect the operation or validity of the SIA. The declaration acts primarily as a signal to Parliament that it needs to consider amending that legislation'.

[55] In this respect, Young (n 50) underlined that the Supreme Court's judgment *R (Miller) v The Secretary of State for Exiting the European Union* [2017] UKSC 5, confirming the primacy of EU law over domestic legislation, affected not only the timing but also the importance of the *Benkharbouche* decision.

[56] On this remedial added value of the Charter see, among others, Arden and Tridimas (n 40); Sanger 'State Immunity' (n 47) 218; Mark Elliott, Stephen Tierney and Alison Young, 'Human Rights Post-Brexit: The Need for Legislation?' (*Public Law for Everyone*, 8 February 2018) <www.publiclawforeveryone.com/2018/02/08/human-rights-post-brexit-the-need-for-legislation/> accessed 25 May 2021.

[57] Concurring with this view, among others, Ziegler (n 47) 150 and Garnett (n 47) 812.

[58] See, *ex multis*, Stephanie Palmer, '7 The Human Rights Act 1998: Bringing Rights Home' (1998) 1 Cambridge Yearbook of European Legal Studies 125; Sarah Lambrecht, 'Bringing Rights More Home: Can a Home-grown UK Bill of Rights Lessen the Influence of the European Court of Human Rights?' (2014) 15 German Law Journal 407; Graham Gee, 'Leaving Strasbourg? Reforming the Human Rights Act', (2015) 3 Quaderni costituzionali 808. More recently, Conor Gearty, 'States of denial. What the search for a UK Bill of Rights tells us about human rights protection today' (2018) 5 European Human Rights Law Review 415.

4 THE DIRECT EFFECT OF THE CHARTER: AN UNEXPECTED EU-FRIENDLINESS?

The above statement made in *Benkharbouche* that Article 47 of the Charter has horizontal direct effect in UK law unveils an element of interest not only in terms of hierarchy of norms and relating remedial measures, but also from the point of view of judicial relationships within the multilevel fundamental rights realm. As a matter of fact, it can be highlighted that this stance taken by the UK Court of Appeal – as it also did, in the same year, in its *Vidal-Hall* ruling[59] – and later confirmed by the UK Supreme Court aligns in full with the ever-evolving case law of the CJEU on the matter.

In this respect, shortly after *Benkharbouche* and in parallel with the British divorce from the Union, the issue of horizontal direct effect of the Charter came to the fore in the CJEU's *Egenberger* decision.[60] This 2018 judgment represents indeed one of the most recent (and groundbreaking) bricks the Luxembourg Court has added to a well-rooted string of cases – starting from the seminal *Van Gend and Loos*[61] and passing, just to name a few, through *Defrenne*[62], *Mangold*,[63] *Kücükdeveci*[64] and *Association de médiation sociale*[65] – dealing with the direct effect of EU law.[66] In a nutshell, the step up that *Egenberger* witnessed from the previous CJEU's case law consists of the acknowledgment of horizontal direct effects for Article 21 (prohibition of discrimination) and Article 47 of the Charter.[67] More precisely, the CJEU made clear that both provisions are sufficient in themselves and do not need to be specified

[59] *Vidal-Hall v Google Inc* [2015] EWCA Civ 311. In this judgment, concerning the matter of data protection, the UK Court of Appeal found that Articles 7, 8 and 47 of the Charter enjoy horizontal direct effect. See also *Secretary of State for the Home Department v Davis MP & Ors* [2015] EWCA Civ 1185, when the Court of Appeal referred questions to the Luxembourg Court on the interpretation of the CJEU's *Digital Rights Ireland* regarding the retention of communications data.

[60] Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V* EU:C:2018:257.

[61] Case 26/62 *Van Gend and Loos* EU:C:1963:1.

[62] Case C-43/75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* EU:C:1976:56.

[63] Case C-144/04 *Werner Mangold v Rüdiger Helm* EU:C:2005:709.

[64] Case C-555/07 *Seda Kücükdeveci v Swedex GmbH & Co. KG* EU:C:2010:21.

[65] Case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT and Others* EU:C:2014:2.

[66] On the horizontal direct effect of EU fundamental rights see, among others, Eleni Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union: A Constitutional Analysis* (OUP 2019); Sonya Walkila, *Horizontal Effect of Fundamental Rights in EU Law* (Europa Law Publishing 2016); Eleni Frantziou, 'The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality' (2015) 21 European Law Journal 657; Eleanor Spaventa, 'The Horizontal Application of Fundamental Rights as General Principles of Union Law' in Anthony Arnull and others (eds), *A Constitutional Order of States – Essays in Honour of Alan Dashwood* (Hart 2011) 199; Dorota Leczykiewicz, 'Horizontal Application of the Charter of Fundamental Rights' (2013) 38 European Law Review 479; Xavier Groussot, 'Direct Horizontal Effect in EU Law after Lisbon – The Impact of the EU Charter of Fundamental Rights on Private Parties' in Patrik Lindskoug and others (eds), *Essays in Honour of Michael Bogdan* (Juristförlaget 2013). On this topic, see also the in-depth analysis provided in this Journal by Graham Butler, Marius Meling, 'Horizontal Direct Effect of the Charter in EU Law: Ramifications for the European Economic Area' (2020) 2 Nordic Journal of European Law 1.

[67] For a comment on this case, Ronan McCrea, 'Salvation outside the church? The CJEU rules on religious discrimination in employment' (*European Law Blog*, 18 April 2018) <http://eulawanalysis.blogspot.com/2018/04/salvation-outside-church-ecj-rules-on.html> accessed 25 May 2021; Eleni Frantziou, 'Mangold Recast? The CJEU's Flirtation with Drittwirkung in Egenberger' (*European Law Blog*, 24 April 2018) <www.europeanlawblog.eu/2018/04/24/mangold-recast-the-CJEUs-flirtation-with-drittwirkung-in-egenberger/> accessed 25 May 2021; Aurelia Colombi Ciacchi, 'Egenberger and Comparative Law: A Victory of the Direct Horizontal Effect of Fundamental Rights' (2018) 5 European Journal of Comparative Law and Governance 207; Ciarán O'Mara, 'Horizontal enforcement of general principles of EU employment equality law - Mangold revisited' (2018) 15 Irish Employment Law Journal 91.

either by EU or national law in order to confer on individuals 'a right they may rely on as such' in disputes arising in a field covered by EU law.[68] On this basis, it drew the conclusion that domestic courts have to ensure judicial protection deriving from the Charter and guarantee its full effectiveness 'by disapplying if need be any contrary provision of national law'.[69]

Going beyond the milestone it set in *Egenberger*, the CJEU has also recognised horizontal direct applicability to other provisions of the Charter, such as Article 31(2) in the *Max-Planck-Gesellschaft*[70] and *Bauer and Broßonn*[71] cases.[72] One year later, this ongoing trend has known a further step forward in *Cresco Investigation*,[73] where the CJEU inferred from the horizontal direct effect of the Charter not only an obligation for lower courts to disapply a conflicting national provision but even a duty to apply, instead of it, any domestic statute granting a higher level of protection.[74]

Whereas there is no doubt that such ever-expanding jurisprudence on the direct effect of the Charter has gained momentum over the past few years, the question arises as to whether it will still be possible for UK courts to keep following in the CJEU's footsteps after Brexit and the consequent departure from the EU Bill of Rights. According to the Withdrawal Act, as we have pointed out earlier, an option to fill the void left by the removal of the Charter – and the disentanglement from the CJEU's case law – is that such rights may continue to apply to the UK in the form of unwritten general principles of EU law.[75]

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[68] *Egenberger* (n 60) paras 76-78.

[69] ibid para 79. After *Egenberger*, in *IR v JQ* the CJEU held that 'the prohibition of all discrimination on grounds of religion or belief, now enshrined in Article 21 of the Charter, is therefore a mandatory general principle of EU law and is sufficient in itself to confer on individuals a right that they may actually rely on in disputes between them in a field covered by EU law […] Accordingly, in the main proceedings, if it considers that it is impossible for it to interpret the national provision at issue in a manner that is consistent with EU law, the referring court must disapply that provision'. See Case C-68/17 *IR v JQ*, EU:C:2018:696, paras 69-70. For a comment on this case, Ronan McCrea, 'Religious discrimination at work: Can employees be fired for getting divorced?' (*European Law Blog*, 12 September 2018) <www.eulawanalysis.blogspot.com/2018/09/religious-discrimination-at-work-can.html> accessed 25 May 2021.

[70] Case C-684/16 *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Tetsuji Shimizu* EU:C:2018:874.

[71] Joined Cases C-569/16 and C-570/16 *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn* EU:C:2018:871. For a comment see Eleni Frantziou, '(Most of) The Charter of Fundamental Rights Is Horizontally Applicable: Joined cases C-569/16 and C-570/16 Bauer et al' (*European Law Blog*, 19 November 2018), <www.europeanlawblog.eu/2018/11/19/joined-cases-c-569-16-and-c-570-16-bauer-et-al-most-of-the-charter-of-fundamental-rights-is-horizontally-applicable/> accessed 25 May 2021; Daniel Sarmiento, 'Sharpening the Teeth of EU Social Fundamental Rights: A Comment on Bauer' (*Despite Our Differences Blog*, 8 November 2018), <https://despiteourdifferencesblog.wordpress.com/2018/11/08/sharpening-the-teeth-of-eu-social-fundamental-rights-a-comment-on-bauer/> accessed 25 May 2021.

[72] In *Bauer and Broßonn* (n 71) para 85, the CJEU argued that 'The right to a period of paid annual leave, affirmed for every worker by Article 31(2) of the Charter […] is sufficient in itself to confer on workers a right that they may actually rely on in disputes between them and their employer in a field covered by EU law and therefore falling within the scope of the Charter'.

[73] Case C-193/17 *Cresco Investigation GmbH v Markus Achatzi* EU:C:2019:43.

[74] ibid para 80. In that case concerning discrimination on grounds of religion under Article 21 of the Charter the CJEU held that 'a national court must set aside any discriminatory provision of national law, without having to request or await its prior removal by the legislature, and must apply to members of the disadvantaged group the same arrangements as those enjoyed by the persons in the other category'.

[75] Interestingly, Takis Tridimas noticed that such general principles 'are unwritten principles of law extrapolated by the [EU] Court from the laws of the Member States by a process similar to that of the development of the common law by the English courts'. See Takis Tridimas, *The General Principles of EU Law* (Oxford EC Law Library 1999) 4.

However, the viability of this solution envisaged in the Withdrawal Bill has yet to be proven, considering that it will largely depend on the courts' degree of judicial activism, and insofar as general principles with the same content as the rights embedded in the Charter could be said to exist. Apart from the notable exception of the right to an effective remedy and to a fair trial under Article 47 of the Charter, hailed in *Benkharbouche* as a general (and horizontally enforceable) principle forming an integral part of UK law, it is not easy to foresee now whether and to what extent the same rationale may also encompass other Charter rights and the acknowledgment of their horizontal direct effects. What is more, we should also bear in mind that only those general principles recognised as such by the CJEU before exit day would be retained;[76] and, on top of that, even the retained general principles could be used only for interpreting retained EU law rather than for challenging and disapplying domestic legislation.[77]

In addition to this (still somewhat blurred) overlap between EU fundamental rights and general principles of EU law, the enhanced centrality of the Charter discourse in the UK jurisprudence finally allows to hint at a further cause for reflection. Broadening the scope of our analysis in a comparative perspective, the position taken by the UK Court of Appeal and Supreme Court can be framed within the context of a growing tendency to use the Charter as a standard of judicial review of laws which has been under way in several foreign jurisdictions. Over the last decade, a series of national Constitutional Courts in Europe have in fact started placing much emphasis on the inherent constitutional nature of the Charter in so-called cases of 'dual preliminarity', that is to say when the same piece of legislation raises questions of constitutionality and, in the meantime, doubts of compatibility with EU law.[78]

Among the rationales underpinning this fine-tuning there is also the perception that, in such circumstances, an extensive reliance by lower courts on the direct effects of the Charter and the preliminary reference mechanism under Article 267 TFEU could jeopardise the precedence that the interlocutory review of constitutionality has usually enjoyed over the preliminary ruling procedure itself in domestic case law.[79] In order to avert the risk that an ever closer 'partnership' between common judges and the CJEU through the avenue of preliminary ruling, along with the remedy of disapplication, could place constitutional justice at the margins of the multilevel system of fundamental rights protection in the European legal space, the Austrian *Verfassungsgerichtshof*[80] as well as, more recently, the Italian *Corte costituzionale*[81] and the German *Bundesverfassungsgericht*[82] have begun to claim a 'right to speak

[76] European Union (Withdrawal) Act 2018, Clause 6(7) and Schedule 1 para 2.
[77] ibid Schedule 1 paras 2 and 3.
[78] On the matter of dual preliminarity in multilevel contexts, Giuseppe Martinico, 'Multiple loyalties and dual preliminarity: The pains of being a judge in a multilevel legal order' (2012) 10 International Journal of Constitutional Law 871.
[79] For a more detailed analysis of this Charter-centred case law, Marco Galimberti, 'From Good Neighbours to Brothers in Arms? The EU Charter as Avenue for Horizontal Constitutional Interaction' (2021) 1 Europarättslig tidskrift 29.
[80] Austrian Constitutional Court, Joined Cases U 466/11-18 and U 1836/11-13, Judgment of 14 March 2012.
[81] Italian Constitutional Court, Judgment no. 269 of 2017, followed by Judgments no. 20 of 2019 and no. 63 of 2019.
[82] German Federal Constitutional Court, Order of the First Senate of 6 November 2019, 1 BvR 16/13 (Right to be forgotten I) and Order of the First Senate of 6 November 2019, 1 BvR 276/17 (Right to be forgotten II).

first' (ie prior to the CJEU) and, in certain cases, even to make their own preliminary reference to Luxembourg.[83]

A joint reading of the direction undertaken by such Constitutional Courts with longstanding traditions and the UK case law to which we have previously referred leads us to draw a twofold set of considerations. The first finding to be derived therefrom lies in the fact that the use of the Charter as a benchmark of judicial review of laws may be deemed as a common thread running through an array of national constitutional jurisdictions. As we have noted, the direct enforceability of EU fundamental rights has smoothly penetrated and found fertile ground by now also in the UK legal order, where the binding nature of the Charter has long been under discussion, and even in the midst of the Brexit process.

Yet, at the same time, it is possible to distinguish from such element of commonality a countertrend factor: unlike the foreign case law, the alignment between the British judges and the CJEU is at odds with the efforts to curb the spill-over effect of the Charter that is feared to take over, at the expense of Constitutional Courts, in other national legal frameworks.[84] In this sense, the voice of the UK Supreme Court can be said to rise in antithesis to the one of its brethren within the European choir, of which it has ceased however to be part shortly thereafter with the advent of Brexit. The incorporation of the Charter in constitutional adjudication seems, thus, to branch off into two different tracks which coexist within the EU judicial architecture: for centralized systems of constitutional justice such as the Austrian, Italian and German ones, it has moved towards a strengthening of the Constitutional Courts' status in the fundamental rights domain; whereas for the UK constitutional design it has been liable to reinforce, before exit day, the authority of lower courts as fundamental rights gatekeepers.

5 CONCLUSION

Curiously enough, it is precisely in a time of Brexit that the Charter has given concrete evidence to be quite an effective tool for rights protection in the hands of domestic courts and tribunals. Even though it still remains to be seen what path the UK case law will be taking in the fundamental rights realm in the aftermath of the recently completed divorce from the Union – and, in particular, from the Charter –, we may already seek to add some concluding remarks on the basis of the analysis conducted so far. In this regard, the first firm point that can be set is of a "substantial" nature.

In fact, there is no question that the Withdrawal Act's decision not to retain the Charter in the UK legal system expunges from it a contemporary catalogue of rights which, despite its narrower scope of application if compared to the ECHR, contains a far-reaching series of rights that cannot be found either in the text of the Convention or in its Protocols. This is especially true, for instance, when it comes to new rights having no counterpart in the Convention and in the HRA, such as a right to dignity, a right to protection of personal data and a broader right to a fair trial, as well as social and equality rights. In addition to this

[83] See, in particular, Orders no. 117 of 2019 and no. 182 of 2020 by the Italian Constitutional Court.

[84] As regards the possibility that the failure to abide by the material limits laid down in Article 51 of the Charter could ultimately result in a spill-over effect thereof, see Augusto Barbera, 'La Carta dei diritti: per un dialogo fra la Corte italiana e la Corte di giustizia' (*AIC*, 6 November 2017) <https://www.rivistaaic.it/images/rivista/pdf/4_2017_Barbera.pdf> accessed 25 May 2021.

capacity to transcend the contents of the ECHR on account of rights not enumerated in the Convention, it should not be forgotten that, pursuant to Article 52(3) of the Charter, even when the rights of the Charter are similar in content to those of the ECHR, the former may set a higher standard of protection than the latter.[85] And besides, the farewell to the EU Bill of Rights means, as we have seen, that UK judges are also prevented from relying on the CJEU's ever-evolving interpretation of the Charter and the acknowledgment of its direct effects after exit day.

Along with the substantial standpoint, a second key element to be given due attention pertains then to a more 'procedural' dimension. As the *Benkharbouche* case has shown in a paradigmatic way, the removal of the Charter from the UK legal order entails the loss of a stronger remedy available to the litigants (the disapplication of a domestic statute) in comparison to the weaker one being enforceable under the HRA (the declaration of incompatibility).[86] As to the crucial diversity in terms of efficacy between the two measures at issue, some legal experts have perceptively summarised that

> […] declarations of incompatibility do not quash legislation, or render it unlawful. Legislation declared incompatible with Convention rights continues to apply and have legal effect. However, the declaration sends a political signal to the Government and the legislature that an Act of Parliament is incompatible with Convention rights, providing an opportunity for Parliament to consider whether the legislation should be changed. In EU law, a stronger remedy is available. Both the Charter and general principles of EU law can […] be used to disapply legislation. This means that the legislative provision which harms human rights does not have legal effect. The rights of the individual before the court can be protected as the legislation harming those rights is not applied to them.[87]

In view of the above, what can thus be argued from both a substantial and procedural perspective is that the choice of the Withdrawal Bill to do without the Charter – and to fill such gap exclusively through national legislation and the aleatory category of general principles of EU law – raises more than one doubt in terms of legal certainty;[88] and, as such, it is likely to ultimately bring about a certain degree of deficit for the protection of individuals' rights.[89] Moreover, as we have observed, it goes without saying that the removal of the Charter will end up precluding the ongoing discovery of its 'yet unfulfilled potential',[90] suffice

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[85] (n 38).
[86] For a dissenting view, arguing in support of the Withdrawal Bill's choice to exclude the Charter, see Harris (n 20).
[87] Elliott, Tierney and Young (n 56).
[88] On the legal uncertainty in which the exclusion of the Charter will result see also, more specifically, Tobias Lock, 'What Future for the Charter of Fundamental Rights in the UK?' (*European Futures*, 6 October 2017) <https://www.europeanfutures.ed.ac.uk/what-future-for-the-charter-of-fundamental-rights-in-the-uk/> accessed 25 May 2021 and Bamforth, Campbell, Craig, Fredman, Weatherhill and Young (n 4) 1.
[89] In line with this view, Merris Amos, 'Red Herrings and Reductions: Human Rights and the EU (Withdrawal) Bill' (*UK Constitutional Law Association*, 4 October 2017) <https://ukconstitutionallaw.org/2017/10/04/merris-amos-red-herrings-and-reductions-human-rights-and-the-eu-withdrawal-bill/> accessed 25 May 2021; Tobias Lock, 'Human Rights Law in the UK after Brexit' Edinburgh School of Law Research Paper 17/2017 1; Adrienne Yong, 'Forgetting Human Rights - The Brexit Debate' (2017) 5 European Human Rights Law Review 469; Markakis (n 18) 82; Douglas-Scott (n 25) 3.
[90] This expression is borrowed from Tobias Lock, 'Human Rights Law in the UK after Brexit' (n 89) 10.

it to think of the CJEU's constantly expanding case law on the horizontal direct effects of its provisions.

Last but not least, a further interpretation which could be drawn from the foregoing goes against a today's widespread tendency, that is the one to place the (national and supranational) courts at the forefront of the fundamental rights guarantee circuit at the expense of legislators. By contrast, the exclusion of the Charter and the disappearance of the remedy of disapplication go in the direction of rolling the ball back to the political arena: this contributes to a re-establishment of parliamentary sovereignty and reminds that rights protection is not only a task for judges. Also, in the light of this revived responsibility upon the legislature, the next chapters that will follow this latest stage of the narrative of 'bringing rights back home' are a story still to be written. And apparently, it is not possible to write these news pages without accepting to loosen, at least in part, the grip of the courts, even at the cost of political and legal hurdles such as the ones that the UK has encountered so far.

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THE *RANDSTAD* CASE: *MELKI* RELOADED? THE FUNDAMENTAL RIGHT TO EFFECTIVE JUDICIAL PROTECTION AS BATTLEGROUND FOR JUDICIAL SUPREMACY IN EUROPEAN LAW

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This paper will examine the recent preliminary reference to the European Court of Justice issued by the Italian Court of Cassation in the Randstad case, aimed at rearranging the internal constitutional separation between ordinary and administrative courts (article 111(8) of the Constitution). I will first provide some context on both the relations between Italian and EU courts (2.1) and on the confrontation between the Court of Cassation and the Constitutional Court in interpreting article 111 (2.2). I will then specifically examine the referring order to the Court of Justice of the EU (3), focusing on the role of general clauses of EU law as articles 4(3) and 19 TEU and 47 of the Charter in it. Finally, I will consider the instrumental use of EU law made by the Cassation to overcome an unpleasant constitutional arrangement. This aligns Randstad with previous cases such as Melki or A v. B and may foster constitutional conflict in the future.

1 INTRODUCTION

In this paper I will consider how in the European Union (EU) ordinary judges use supranational law strategically and instrumentally to overturn established domestic provisions, even at the constitutional level. To show how this strategic use might happen, I will consider the *Randstad* case,[1] involving the Italian Court of Cassation, the European Court of Justice (ECJ), and the Italian Constitutional Court (the latter indirectly, as a sort of 'stone guest'). This case will show that EU norms safeguarding fundamental rights, in particular the right to effective judicial protection as in articles 19 of the Treaty on European Union (TEU) and 47 of the Charter of Fundamental Rights of the EU (CFREU), can de facto be used strategically by domestic courts to overcome domestic constitutional norms (in *Randstad* the division of competences between ordinary and administrative courts) independently from the opinion of constitutional courts on the matter. The paper is structured as follows.

First, I will introduce the broader context, stressing how the enlargement of protection of fundamental rights in EU law has fostered an even growing overlap between supranational and domestic guarantees and, therefore, interpretive competition. The wide scope of application of the Charter plays a special role in this inter-legal scenario. I will also situate the judgments within the larger confrontation between the Cassation and the Italian Constitutional Court on the interpretation of article 111(8) of the national Constitution

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[1] Request for a preliminary ruling from the Corte suprema di Cassazione (Italy) lodged on 30 September 2020 (order 19598/20), Case C-497/20 *Randstad Italia SpA v Umana SpA and Others*, to be decided.

regarding the division of competences ('jurisdiction' in the domestic legal vocabulary) between ordinary and administrative judges.

I will then consider the *Randstad* preliminary reference *ex* article 267 of the Treaty on the Functioning of the European Union (TFEU) by the Court of Cassation to show a paradigmatic instance of the role of supranational law in judicial politics.

Finally, it will try to underline that *Randstad* amounts to a strategic, instrumental, perhaps even abusive use of EU law to overcome domestic internal arrangements. I argue that *Randstad* follows the path originally shaped by precedents such as *Melki* in France and *A v. B* in Austria. Being a preliminary reference issued by a peak court, which are nowadays more and more influential in Luxemburg, and using the now crucial right to effective judicial protection as a pivot to overcome a constitutional provision, it exemplifies a particularly threatening case for the relations between EU and Member State law.

2 SITUATING *RANDSTAD*: SUPRANATIONAL AND NATIONAL CONTEXT

In this paragraph I will situate *Randstad* within the broader context, examining both the supranational and the national context (2.1). Considering the former, I will mainly focus on the progressive expansion in the scope of application of the Charter of Fundamental Rights and on the subsequent reaction of constitutional courts. The national context, presenting the disagreement between the Cassation and the Constitutional Court on article 111(8) of the Constitution, will be introduced in 2.2.

2.1 THE SUPRANATIONAL CONTEXT: SUBSTANTIVE OVERLAP OF FUNDAMENTAL RIGHTS IN EUROPE

The EU and its predecessors, the Communities, were not born endowed with a catalogue of fundamental rights: cases like *Stork* are famous vestiges of that past.[2] It is equally known that the lacuna was filled up by the ECJ itself by means of the so called general principles of European law, in turn drawn from the 'common constitutional traditions' of the Member States and from the European Convention on Human Rights.[3] Despite always rejecting the direct application of domestic norms on rights,[4] through the general principles, also endowed with horizontal effects,[5] the Court granted review of rights and appeased disappointed constitutional courts.[6]

Decades later came the Charter of Fundamental Rights: initially aimed at clarifying the rights and making them more visible and certain, with the Lisbon Treaty it added a new tool for judicial review of rights to the arsenal of the ECJ.[7] It has been object of incremental

[2] Case C-1/58 *Friedrich Stork & Cie v High Authority of the European Coal and Steel Community* EU:C:1959:4.
[3] Case C-4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* EU:C:1974:51; Case C-36/75 *Roland Rutili v Ministre de l'intérieur* EU:C:1975:137.
[4] Case C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* EU:C:1970:114.
[5] Case C-144/04 *Werner Mangold v Rüdiger Helm* EU:C:2005:709.
[6] Bundesverfassungsgericht (BVerfG) Solange I 37, 271 1971; Solange II 73, 339 1983; Italian Constitutional Court (ICC) judgment 183/1973; judgment 170/1984.
[7] Grainne De Búrca, 'The Drafting of the EU Charter of Fundamental Rights' (2001) 26(2) EL Rev 126.

interpretive extension in several directions: the horizontal applicability of some rights[8] or the discussion on the possible extraterritorial application are cases in point of this tendency.[9]

Most notably, the internal scope of application certifies the ever-growing extension of the Charter. Article 51(1), specifying that the Charter is binding on the institutions and bodies of the Union and on the Member States only when implementing EU law, was initially a source of uncertainty, mainly regarding the meaning of the 'implementation'. For instance, whether it regarded only actions or omissions too was unclear; so was whether Member States derogating from EU law were bound by the Charter.[10] In 2013 the pivotal *Åkerberg Fransson* and *Melloni* judgments clarified several points under discussion.[11] *Fransson* specified that every time Member State actions fell within the scope of EU law, that action did count as implementation of EU norms by Member States, even when unintended.[12] Therefore, what did count was not the subjective will of national authorities to implement EU law, but the objective functionality of the enacted provisions to do so, even accidentally.[13] Later cases mostly confirmed the objective and functional approach of *Fransson*: although recalled among the various criteria to determine the applicability of the Charter, the aim pursued by domestic authorities was in fact enlisted as one of the criteria to take into account, not as a necessary condition.[14] In *Siragusa* and *Iida* the ECJ enlisted four criteria to establish the applicability of the Charter to Member States action: the intent to implement EU law, the convergence of the aims pursued by States with an objective covered by EU law, the objective impact on EU law, and the existence of specific rules of EU law on the matter.[15] The *Ledra* judgment, regarding the ESM treaty, granted the applicability of the Charter to EU institutions and bodies even outside the EU legal framework, provided that the ESM was instrumental to supplement the objectives of the EU.[16] The *Fransson* doctrine was to some extent limited in later cases, such as *TSN*, which allowed Member States to ensure higher standards of rights' protection outside the scope of application of the Charter when adopting opt-outs on the basis of minimum harmonization standards.[17] Anyhow, the general result of these cases was

[8] See the up-to-date analysis by Eleni Frantizou, 'The Horizontal Effect of the Charter: Towards an Understanding of Horizontality as a Structural Constitutional Principle' (2020) 22 Cambridge Yearbook of European Legal Studies 208, 216-220.

[9] Eva Kossoti, 'The Extraterritorial Applicability of the EU Charter of Fundamental Rights: Some Reflections in the Aftermath of the Front Polisario Saga' (2020) 12(2) European Journal of Legal Studies 117; Chiara Macchi, 'With trade comes responsibility: the external reach of the EU's fundamental rights obligations' (2020) 11(4) Transnational Legal Theory (2020) 409, 413-425.

[10] Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 European Constitutional Law Review 375.

[11] Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* EU:C:2013:105; Case C-399/11 *Stefano Melloni v Ministerio Fiscal* EU:C:2013:107.

[12] Filippo Fontanelli, '*Hic Sunt Nationes*: The Elusive Limits of the EU Charter and the German Constitutional Watchdog' (2013) 9 European Constitutional Law Review 315, 322-325.

[13] ibid 325-327.

[14] Case C-206/13 *Cruciano Siragusa v Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo* EU:C:2014:126, para 25.

[15] ibid. See also Case C-40/11 *Yoshikazu Iida v Stadt Ulm* EU:C:2012:691, para 79. The criterion of EU law's specificity is the most used by the Court. See Benedikt Pirker, 'Mapping the Scope of Application of EU Fundamental Rights: A Typology' (2018) 3(1) European Papers 133, 139-150.

[16] Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising Ltd and Others v European Commission and European Central Bank (ECB)* EU:C:2016:701, para 67.

[17] Joined Cases C-609 and 610/2017 *Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry v Hyvinvointialan liitto ry and Auto- ja Kuljetusalan Työntekijäliitto AKT ry v Satamaoperaattorit ry* EU:C:2019:981. See the commentary by Maxime Tecqmenne 'Minimum Harmonisation and Fundamental Rights: A Test-Case for the Identification

an extension in the scope of application of the Charter, encompassing *prima facie* doubtful cases too.[18]

Fransson must be read together with the twin *Melloni* judgment:[19] under the *Melloni* doctrine, Member States can apply domestic standard on fundamental rights only when these would not undermine the level of protection provided by the Charter and when primacy, direct effect, and uniformity of EU law would be left uncompromised.[20] As a result, diverging measures at the national level, even when aiming at a higher level of protection, face strict limits.

Read together, *Fransson* and *Melloni* entail a strong 'federalizing force': the combination of a widely applicable Charter (*Fransson*) and of limited room for national constitutional standards (*Melloni*) is such that the Charter becomes a wide-ranging standard of judicial review of rights.[21] As a result, the Charter must be applied frequently and trump national (constitutional) standards of review. Moreover, domestic judges are famously the first guardians of EU law and apply it directly, sometimes after referring a preliminary question to the ECJ (the so called *Simmenthal* mandate).

Partly as a reaction to *Fransson-Melloni*, constitutional courts started using the Charter themselves as a yardstick of constitutionality. The broad interpretation of article 51(1) meant that the attempt to functionally separate the Charter and national catalogues of rights (usually at the constitutional level) had failed. Consequently, in a variety of cases two regimes of rights were destined to overlap ('parallel' or 'tandem' applicability).[22] Although with some differences one another, the list of constitutional courts explicitly relying on the Charter has grown:[23] after the pioneering experience of Austria,[24] the cases of Italy[25] and Germany[26] aroused particular attention.

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of the Scope of EU Law in Situations Involving National Discretion?' (2020) 16 European Constitutional Law Review 493, 500-506 and 510-513.

[18] Eg Joined Cases C-411/10 and C-493/10 *N.S. v United Kingdom and M.E. v Ireland* EU:C:2011:865, paras 64-69, in which the Charter was considered applicable even to cases in which a certain degree of discretion is left to the Member State in implementing EU law.

[19] See Nikos Lavranos, 'The ECJ's Judgments in Melloni and Akerberg Fransson: Une ménage à trois difficulté' (2013) 4 European Law Reporter 133; Dorota Leczykiewicz, 'The Charter of Fundamental Rights and the EU's Shallow Constitutionalism' in Nicholas W Barber, Maria Cahill and Richard Ekins (eds), *The Rise and Fall of the European Constitution* (Hart Publishing 2019), 142-143.

[20] *Melloni* (n 11) paras 55-60. For an exhaustive commentary on *Melloni* see Aida Torres Pérez, 'Melloni in Three Acts: From Dialogue to Monologue' (2014) 10 European Constitutional Law Review 308.

[21] Aida Torres Pérez, 'The federalizing force of the EU Charter of Fundamental Rights' (2017) 15 International Journal of Constitutional Law 1080, 1081-1090.

[22] Sara Iglesias Sanchez, 'Article 51: The Scope of Application of the Charter' in Michal Bobek and Jeremias Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart Publishing 2020), 410-412.

[23] European Union Agency for Fundamental Rights, 'Ten Years On: Unlocking the Charter's Full Potential', (2020), 8-9 <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-fundamental-rights-report-2020-focus_en.pdf> accessed 3 August 2021.

[24] Verfassungsgerichtshof (VfGH), U 466/11-18, U 1836/11-13. See Andreas Orator, 'The Decision of the Austrian Verfassungsgerichtshof on the EU Charter of Fundamental Rights: An Instrument of Leverage or Rearguard Action?' (2015) 16 German Law Journal 1429.

[25] ICC, judgment 269/17; judgment 20/19; judgment 63/19. See Giuseppe Martinico and 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.

[26] BVerfG Right to Be Forgotten I 1 BvR 16/13; Right to Be Forgotten II 1 BvR 267/17. See Daniel Thym, 'Friendly Takeover, or: the Power of the "First Word". The German Constitutional Court Embraces the Charter of Fundamental Rights as a Standard of Domestic Judicial Review' (2020) 16 European Constitutional Law Review 187.

On the one hand, the 'appropriation' of the Charter by constitutional courts might be viewed favorably, as constitutional courts would finally be 'taking the Charter seriously'. On the other hand, there is another aim beyond the process of constitutional appropriation: avoiding the risk of being marginalized by the creation of a decentralized system of judicial review of rights performed by ordinary judges.[27] The widely applicable Charter, directly used by national judges, risks cutting off constitutional courts. Mechanisms like the (rebuttable) presumption of prior application of the German Constitution are explainable as attempts by constitutional courts, the *Bundesverfassungsgericht* in this case, to resist the process of rights' decentralization.[28] Comparative analysis shows that in the case of the Italian Constitutional Court, absent a mechanism of individual direct action for constitutional review, the danger of marginalization is even higher.[29]

As a result, the scope of application of EU rights is widening, while constitutional courts in centralized systems of review seem concerned by the risk of de facto decentralization and take steps to avoid that.

In this context of EU rights' expansion, a special role belongs to the right to effective judicial protection, which in the last few years has been at the center of intense judicial elaboration.[30] A series of cases starting from *Associação Sindical dos Juízes Portugueses* (*ASJP*) in 2018[31] has clarified that article 47 CFREU must be used to interpret article 19(1) TEU and incorporates in article 19 the requirement of judicial independency.[32] This allows article 47 to be applied beyond the (already widened) scope of application of the Charter, although only as an interpretive parameter. This line of cases has been summarized and recalled in *Repubblika*, decided on 20 April 2021, which confirmed article 47 CFREU as a necessary provision to interpret article 19 TEU and judicial independence as in articles 19 TEU and 47 CFREU as an instantiation of the rule of law value as in article 2 TEU.[33]

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[27] On the centralized/de-centralized divide in constitutional review, see Cheryl Saunders, 'Courts with Constitutional Jurisdiction' in Roger Mastermann and Robert Schütze (eds), *The Cambridge Companion to Comparative Constitutional Law* (CUP 2019), 417-437.

[28] Dana Burchardt, 'Backlash against the Court of Justice of the EU? The Recent Jurisprudence of the German Constitutional Court on EU Fundamental Rights as a Standard of Review' (2020) 21 German Law Journal 1, 6-8; MW/JHR/MC 'Editorial - Better in Than Out: When Constitutional Courts Rely on the Charter' (2020) 16 European Constitutional Law Review 1, 1-3. For the milder limiting strategy of the VfGH, see Orator (n 24) 1436-1438 and 1442-1444.

[29] Clara Rauchegger, 'National Constitutional Courts as Guardians of the Charter: A Comparative Appraisal of the German Federal Constitutional Court's Right to Be Forgotten Judgments' (2020) 1 Cambridge Yearbook of European Legal Studies 258, 272-275; Clara Rauchegger, 'The Charter as a Standard of Constitutional Review in the Member States' in Michal Bobek and Jeremias Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart Publishing 2020), 489-493.

[30] On the evolution of effective judicial protection from a merely procedural to a properly constitutional principle of EU law, see Matteo Bonelli, 'Effective Judicial Protection in EU Law: an Evolving Principle of a Constitutional Nature' (2019) 12 Review of European Administrative Law 35, 37-61.

[31] See Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas (ASJP)* EU:C:2018:117, paras 29-37; Case C-284/16 *Slowakische Republik v Achmea BV* EU:C:2018:158, paras 32-33; Case C-216/18 PPU *LM* EU:C:2018:586, para 53; Case C-619/18 *European Commission v Republic of Poland* EU:C:2019:531, paras 54 and 57; Case C-824/18 *A.B. and Others v Krajowa Rada Sądownictwa and Others (A.B.)* EU:C:2021:153, paras 115 and 143-146.

[32] Matteo Bonelli and Monica Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary' (2018) 14 European Constitutional Law Review 622, 633-635; Aida Torres Pérez, 'From Portugal to Poland: The Court of Justice of the European Union as watchdog of judicial independence' (2020) 27(1) Maastricht Journal of European and Comparative Law 105, 109-112.

[33] Case C-896/19 *Repubblika v Il-Prim Ministru (Repubblika)* EU:C:2021:311, paras 47-65.

In its form under article 47 of the Charter, effective judicial protection scores by far as the most mentioned right in preliminary references and amounts under EU law to a sort of 'right to have rights'.[34] As a matter of fact, when applying EU law domestic judges also are European judges: the norms regarding the organization of the judiciary allow the existence and functioning of institutions that directly connect EU and domestic law. Besides, judges' ability to apply the law independently and freely is a basic requirement of the rule of law in Europe.[35] Effective judicial protection therefore enjoys a special position among EU rights.

Moreover, as Torres Pérez has noticed, if article 47 is read together with the broad interpretation of the scope of application of the Charter given in *Fransson* and following cases, it is even possible that 'once a situation is deemed within the fields covered by EU law according to Article 19(1) TEU, for that same reason, it could be argued that the Member States are 'implementing' EU law and thus the Charter applies'.[36] Therefore, any difference in the scope of application of articles 19 TEU and 47 CFREU might disappear. In the recent *Repubblika* judgment,[37] the Court persisted in using article 47 as a criterion to interpret article 19(1) TEU (indirect application), while the larger direct application advocated by Torres Pérez has remained theoretical. However, this further expansion is an option for the future, also since, at least in *Repubblika*, the distinction between articles 19 TEU and 47 CFREU has been grounded not on the requirement of implementation of EU law (typical of the Charter), but on the line dividing cases in which individual rights are at stake (article 47 CFREU) and cases in which the more general independency of the judiciary is at stake (article 19 TEU). This might further unhook article 47 CFREU from the limits of article 51 CFREU. Finally, and in a similar vein, it has been also argued that article 47 may serve as a specification of one of the values of the EU under article 2 TEU and as such be applied even beyond the scope of EU law, according to the so-called *Reverse Solange* doctrine.[38]

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[34] David Reichel and Gabriel N. Toggenburg, 'References for a Preliminary Ruling and the Charter of Fundamental Rights: Experiences and Data from 2010 to 2018' in Michal Bobek and Jeremias Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart Publishing 2020) 467, 471-472 and 475-478.

[35] *ASJP* (n 31) para 36; *LM* (n 31) paras 50-51.

[36] Aida Torres Pérez, 'Rights and Powers in the European Union: Towards a Charter that is Fully Applicable to the Member States?' (2020) 1 Cambridge Yearbook of European Legal Studies 279, 297-298; Torres Pérez 'From Portugal to Poland:' (n 32) 115-118. In a similar vein, Advocate General Tanchev even spoke about a 'constitutional passerelle' between article 19 TEU and 47 of the Charter. See Joined Cases C-585/18, C-624/18 and C-625/18 *A. K. v Krajowa Rada Sądownictwa* EU:C:2019:551, Opinion of AG Tanchev, para 85. The possible extension of Charter rights beyond article 51 of the Charter *ex* art. 19 TEU recalls similar theoretical possibilities grounded in article 20 TEU (some Charter rights would be applicable beyond art. 51 TEU to avoid limitations to EU citizenship). See Martijn van den Brink, 'The Origins and the Potential Federalising Effects of the Substance of Rights Test' in Dimitry Kochenov (ed), *EU Citizenship and Federalism - The Role of Rights* (CUP 2017), 85, 102-105; José Luís da Cruz Vilaça and Alessandra Silveira 'The European Federalisation Process and the Dynamics of Fundamental Rights' in Kochenov (ed), *EU Citizenship and Federalism - The Role of Rights* (CUP 2017)125, 138-142.

[37] *Repubblika* (n 33) paras 35-46 and 52. See also *A.B.* (n 31) paras 85-89.

[38] Armin von Bogdandy and Luke Dimitrios Spieke, 'Protecting Fundamental Rights Beyond the Charter: Repositioning the Reverse Solange Doctrine in Light of the CJEU's Article 2 TEU Case-Law' in Michal Bobek and Jeremias Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart Publishing 2020), 537-538. The concept of 'horizontal Solange' has been proposed to describe the mutual trust between Member States in the EU too. Such trust entails a presumption of conformity of other States' behaviors to EU values. This presumption would be anyway rebuttable and in case of systematic violation of fundamental rights, Member States may suspend horizontal cooperation, especially in the sensitive area of the European Arrest Warrant. See Iris Canor, 'My brother's keeper? Horizontal solange: "An ever closer distrust among the peoples of Europe"' (2013) 2 CML Rev 383; Iris Canor, 'Suspending Horizontal Solange: A

As a result, *Randstad* must be understood in a context in which the possibility for ordinary judges to affirm their own interpretation of fundamental rights is higher thanks to the existence of an independent and broad system of EU review of rights, even in jurisdictions characterized by a centralized system of review. This risk is particularly high for the right to effective legal protection, which enjoys a special status in quantity (the most used provision in the Charter) and quality (a 'right to have right'). Constitutional courts, on the other hand, progressively internalize the Charter with the goal of avoiding marginalization. Although in limited cases constitutional courts are used to directly apply EU law more in general,[39] the Charter enjoys the special status of an intrinsically constitutional section of EU law,[40] to be used simultaneously with national constitutional catalogues.

2.2 THE NATIONAL CONTEXT: OVERCOMING THE DUAL SYSTEM OF JUDICIAL REVIEW?

To properly understand *Randstad*, the national context, namely the domestic dual system of judicial review, must be examined too. The Italian organization of the judiciary follows the French doctrine of a special and separate system of courts to obtain redress against government actors.[41] The *droit administratif*, in other words, is mostly adjudicated in a separate system of courts, with regional tribunals as courts of first instance and the Council of State (*Consiglio di Stato*) as the supreme administrative court.

There are, however, two main differences when comparing the Italian model to the French. First comes the (in)famous concept of 'legitimate interest' describing the legal interest of the individual against the administration to have acts or omissions of the latter reviewed in court. This concept, hardly distinguishable from a special form of legal right, identifies the specific interest that can be preserved by administrative courts, while individual rights *stricto sensu* shall be brought to ordinary judges. The distinction between legitimate interests (sued in special courts) and individual rights *tout court* (sued in ordinary courts) is often hard. Thus, the Constitution itself identifies a legal authority to solve possible conflicts between the two jurisdictions (ordinary and special). Here comes the second difference from the classic French model: there is no mixed body in which judges from the two peak courts mingle (as in the *Tribunal des Conflits*, made of members of the *Conseil d'État* and of the *Cour de Cassation*). According to article 111(8) of the Constitution, all conflicts between ordinary and administrative tribunals (conflicts on 'jurisdiction') are solved by the supreme court (*Corte di Cassazione*) alone.[42] As a result, the mechanism of judicial review is dual, but not symmetrical. One of the two peak courts, the Court of Cassation, enjoys a certain primacy

Decentralized Instrument for Protecting Mutual Trust and the European Rule of Law' in Armin von Bogdandy et al (eds), *Defending Checks and Balances in EU Member States* (Springer 2021), 183.

[39] David Paris, 'Constitutional courts as European Union courts: the current and potential use of EU law as a yardstick for constitutional review' (2017) 24(6) Maastricht Journal of European and Comparative Law 792, 799-811.

[40] See VfGH U 466/11-18, U 1836/11-13 (n 24) para 5; ICC, 269/2017 (n 25) para 5.2

[41] Francesca Bignami, 'Regulation and the courts: judicial review in comparative perspective' in Francesca Bignami and David Zaring (eds), *Comparative Law and Regulation* (Edward Elgar 2018), 277-283.

[42] Constitution of the Italian Republic, Article 111(8): 'Appeals to the Court of Cassation against decisions of the Council of State and the Court of Accounts are permitted only for reasons of jurisdiction'. Official English translation available at <https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf> accessed 3 August 2021.

over the Council of State, for it has the power to decide over reasons of jurisdiction. However, clarifying what a reason of jurisdiction is turns out to be rather hard. Moreover, since article 111(8) is a constitutional provision, the appropriate interpreter is not the Cassation, but the Constitutional Court. The result of this complex institutional arrangement is a certain degree of interpretive competition between the Cassation and the Constitutional Court on article 111 of the Constitution.

To the extent that this issue of domestic law is relevant here, suffice it to say that in the last years the Court of Cassation has occasionally favored an expansive interpretation of article 111(8).[43] According to the Cassation, 'jurisdiction' had to be interpreted broadly as referring not only to the norms regarding the establishment and functioning of the judiciary, but also to misguided interpretation of procedural or substantive norms which could de facto deprive plaintiffs and defendants of their rights.[44] In 2018, the Constitutional Court issued a pivotal decision, judgment 6/2018, which severely restricted this expansive interpretation of article 111(8). According to the Constitutional Court, article 111(8) of the Constitution merely allows the Cassation to censor cases in which administrative tribunals (a.) invade the prerogatives of ordinary courts (or the other way around); (b.) intrude into competences reserved to the legislator or the executive; or (c.) refuse to decide over questions reserved to their competence. Any other case does not belong to the notion of 'jurisdiction': if norms are wrongly interpreted or applied by a court outside the scope of cases enlisted in judgment 6/2018, that must be considered as mere infringement of law (*violation de loi*).[45]

As a result, the domestic context must be understood considering this confrontation on the notion of jurisdiction and on the interpretation of article 111(8), which entails heavy consequences regarding the possible expansion or restriction of the powers of the Court of Cassation over administrative courts.

The domestic confrontation between the Cassation and the Constitutional Court must be understood by also focusing on the specific attitude of Italian judges towards EU law in general and the Charter in particular. In preliminary rulings between 2010 and 2018, Italian judges have mentioned the Charter more than their peers in other Member States in absolute numbers and score above the European average with respect to the proportion of references that mention it,[46] but they also collected the highest percentage of dismissals for lack of jurisdiction by the ECJ in the EU (one out of four *circa*).[47] Thus, Italian judges seem particularly ready to use the preliminary reference mechanism and the Charter in particular, but are often dismissed by the ECJ. This might reinforce the idea that the Charter is used in a rather nonchalant manner by ordinary judges and confirm the ICC's worry of possible instrumental use of the Charter to overcome unappreciated internal legal arrangements, such

[43] The 'dynamic' interpretation of article 111(8) of the Constitution is far from being dominant in the Court of Cassation itself. See Pier Luigi Tomaiuoli 'Il rinvio pregiudiziale per la pretesa, ma incostituzionale, giurisdizione unica' (2020) III Consulta Online, 698, 702-704 <https://www.giurcost.org/studi/tomaiuoli2.pdf> accessed 03 August 2021.

[44] Giuseppe Tesauro, 'L'interpretazione della Corte costituzionale dell'art. 111, ult. comma: una preclusione impropria al rinvio pregiudiziale obbligatorio' (2020) 34 Federalismi 237, 247-249.

[45] ICC judgment 6/2018, paras 11-15.

[46] See David Reichel and Gabriel N. Toggenburg (n 34). Italian judges fare quite bad in general in preliminary references and are often dismissed by reasoned order, see Arthur Dyevre, Monika Glavina and Michal Ovádek, 'Case selection in the preliminary ruling procedure' (*ssrn.com*, 9 December 2019), 1, 13-17 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3489741> accessed 3 August 2021.

[47] David Reichel and Gabriel N. Toggenburg (n 34) 473.

as the interpretation of article 111(8) of the Constitution. As mentioned in the previous section, a certain centralization of review based on the Charter is happening in other jurisdictions too. In Italy this specifically took the form of a direct message to ordinary judges. While already in previous cases the Constitutional Court referred to the Charter,[48] in 2017 it started using it directly as a parameter of constitutional review and required ordinary judges to reverse the habitual order of references by first referring to Rome and only later to Luxemburg in case fundamental rights' infringement.[49] The review of the relevant legislation would be performed in the light of both the Constitution and the Charter directly by the ICC. This rule was eventually softened in later cases and turned into a mere suggestion,[50] but it remarked the ICC's will to engage into autonomous review by means of the Charter.

Briefly, the domestic context shows tense confrontation between the Cassation and the Constitutional Court regarding the interpretation of article 111(8). This confrontation must be also placed in the context of a judiciary quite willful to use EU law in general and the Charter in particular in preliminary references, and of a Constitutional Court visibly worried of the decentralization of review on rights that might follow. The general context, in other words, is tense at the domestic level.

3 THE PRELIMINARY RULING: ORDER 19598/20

Given this complex national and supranational context, order 19598/20 (the *Randstad* order) by the Court of Cassation, submitting three preliminary questions to the Court of Justice, does not come as a surprise.

There is no need to conjecture: by means of the order, the Supreme Court is explicitly trying to overcome decision 6/2018 by the Constitutional Court and looks for help in Luxemburg. When looking at the argument of the Cassation, the right to effective judicial protection is pivotal. Articles 4(3) and 19 TEU, 267 TFEU, 47 CFREU are the backbone on which the order is based. While it is true that *Randstand* is, after all, a single referring order, it is equally true that empirical studies suggest that preliminary references from peak courts are treated as more important by the ECJ.[51] Thus, a single order coming from a supreme court as the Cassation is probably more threatening than a bunch coming from lower judges.

Factually, the order comes from an issue in public procurement. A public competitive procedure was called in Region Valle d'Aosta, but the two-stage tender immediately excluded several tenderers based on technical criteria set by the contracting authority. In the second stage, the remaining bids were considered from the financial point of view to select the most economically advantageous. The company Randstad Italia Spa was not admitted to the second stage and challenged the decision in court. The Regional Administrative Tribunal examined two groups of complaints. On the one side, the plaintiff protested the mistaken

[48] Silvana Sciarra and Angelo Jr Golia, 'Italy: New Frontiers and Further Developments' in Michal Bobek and Jeremias Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart Publishing 2020), 243-249.

[49] ICC 269/17 (n 25) para 5. Judgment 269/17 must likely be read together with the equally recentralizing *Taricco* saga, in which recentralization mainly focused on the supreme principles of the Constitution. See Giovanni Piccirilli, 'The "Taricco Saga": the Italian Constitutional Court continues its European Journey' (2018) 14 European Constitutional Law Review 814, 822-833.

[50] ICC 20/19 (n 25) para 2.3; ICC 63/19 (n 25) para 4.3.

[51] Michal Ovádek, Wessel Wijtvliet and Monika Glavina (n 46) 142-153.

technical evaluation of the offer, which led to the exclusion from the second stage. On the other, a series of faults in the second stage were underlined regarding the composition of the evaluating committee, the specification of the criteria to evaluate the financial viability of tenders, and the justification of the final decision. The Regional Administrative Tribunal examined and rejected both groups of complaints. The decision was appealed, and the Council of State rejected the demand again, but this time refused to even consider the second group of complaints, stating that a tenderer excluded in the first stage could only challenge the exclusion (first phase), not the second phase too (other vices). This decision was appealed again, and the appellant asked the Cassation to declare the judgment by the Council of State unlawful as it denied effective judicial protection by refusing to examine the second group of complaints. In fact, according to the appellant, the Cassation, as guardian of the proper division of judicial functions under article 111(8) of the Constitution, was entitled to declare whether the dismissal by the Council of State was valid. The Court of Cassation suspended the proceeding and issued a preliminary ruling to the ECJ asking three separate questions.

With the first question, the Court of Cassation asks whether articles 4(3) and 19(1-2) TEU, and 267 TFEU, 'also read in the light of article 47 of the Charter', are incompatible with a domestic interpretation which does not allow decisions incompatible with the ECJ's judgments on public procurement to be appealed in front of the Court of Cassation. The domestic interpretation is explicitly connected to judgment 6/2018 by the ICC as it allegedly threatens the uniform application and effective judicial protection of EU law.

With the second question, the Cassation asks whether the very same EU provisions are, again, incompatible with a domestic interpretation that prevents appeals to the Cassation of decisions by the Council of State which unlawfully avoid a preliminary reference to the ECJ (beyond the conditions enlisted in *CILFIT*).[52] Such interpretation would deprive the ECJ of its role of the guardian of EU legality and threaten the uniform application and effective judicial protection of EU law.

With the third question the Court asks whether under EU law a plaintiff may be prevented from challenging a public competition once it was excluded from participating after a first preliminary stage, also in the light of a series of previous decisions by the ECJ.[53] The first preliminary question in particular is grounded in rather interesting arguments.

First, the Court of Cassation explicitly asks the ECJ to overcome a national interpretation provided by the Constitutional Court. There is no hidden disagreement between the two courts; on the contrary, the divergence is plainly exposed and the ECJ conceived as a possible external arbiter. The first question is supported by recalling at length the already mentioned domestic conflict on the notion of 'jurisdiction'. By explicitly recalling both article 111(8) of the Constitution and the interpretation given by the ICC in judgment

[52] Case C-238/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* EU:C:1982:335, paras 10-20. Famously, the national courts are released from their obligation to refer questions under article 267 TFEU only when the ECJ has already dealt with the point of law or when the interpretation is obvious (so called *acte clair*). This doctrine has been recently challenged: AG Bobek has proposed the Court to reverse the *CILFIT* criteria and move from a doctrine aimed at ensuring the correct application of EU law in specific cases to one aimed at granting systematic uniform interpretation. See Case C-561/19 *Consorzio Italian Management, Catania Multiservizi SpA v Rete Ferroviaria Italiana SpA* EU:C:2021:291, Opinion of AG Bobek, paras 131-180.
[53] Case C-100/12 *Fastweb SpA v Azienda Sanitaria Locale di Alessandria* EU:C:2013:448; Case C-689/13 *Puligienica Facility Esco SpA (PFE) v Airgest SpA (Puglienica)* EU:C:2016:199; Case C-333/18 *Lombardi Srl v Comune di Auletta and Others* EU:C:2019:675.

6/2018, the Court of Cassation is clearly asking the ECJ to declare the duty under EU law to disapply a national constitutional provision, at least as interpreted by the Constitutional Court. For this reason, the Cassation quotes the (in)famous *Internationale Handelgesellschaft*[54] and the *Taricco I*[55] judgments by the ECJ as justifications of the possible disapplication of the constitutional provision. It is worth noting that the Cassation does not mention the reactions to the two cases, namely the *Solange I*[56] decision by the BVerfG after *Internationale Handelgesellschaft* and order 24/2017 by the Italian Constitutional Court after *Taricco I*, this way de facto abstracting the two judgments from their rather confrontational context. All in all, this preliminary ruling seems to openly foster constitutional conflict. In fact, what might follow is the Constitutional Court lifting the counter-limits against a decision in Luxemburg accepting the arguments used by the Cassation.[57] Truly, whether the possible disapplication of article 111(8) would trigger the counter-limits doctrine is not obvious, as Italian lawyers themselves do not agree on that,[58] but the possibility of open conflict is tangible.

Second, the referring judge draws an abstract distinction between cases in which ordinary judges fail to apply national law in areas under EU competence and cases in which the failure regards areas outside the scope of EU law. Only in the latter case we may speak of infringement of law in the classic sense of continental administrative law (*violation de loi*): here the judge would be an institution, part of a broader sovereign State, failing to properly perform the judicial function. In the former case, on the other hand, the judge is merely the executor of the EU's will, it acts as a supranational judge. In the material fields conferred to the EU, the State has given up its sovereignty: not even the legislator could regulate them. Thus, when a judge interprets domestic law on public procurement inconsistently with EU law (*qua* the ECJ's case law), she is not simply infringing the law, she is properly creating new (judicial) law in areas beyond the sovereignty of the State. Therefore, since in this case the judge is creating the law, she is exercising the legislative, not the judicial power. By exercising the power of another branch of government, she runs into the authority of the Court of Cassation (what I have called case b. of judgment 6/2018, see *supra* at 2.2). The idea that in areas conferred to the EU Member States have given up their sovereign powers and judges merely grant application to EU law is substantiated by referring to a series of decisions by the ECJ, including classic judgments as *Van gend en Loos*, *Costa*, *Simmenthal*, and Opinion 1/91. It does not, however, quote the pivotal *Granital* decision by the Constitutional Court, which explicitly recognized the autonomy of EU law and the mere effectiveness which national institutions, including judges, were bound to grant it.[59]

Lastly, the classic EU principle of procedural autonomy is recalled, but the Cassation immediately points out that procedural autonomy is limited by the countervailing principles of equivalence and effectiveness. The Cassation suggests that refusing to examine the second group of complaints threatens the uniform application and effectiveness of EU law. The only

[54] *Internationale Handelsgesellschaft* (n 4).
[55] Case C-105/14 *Criminal proceedings against Ivo Taricco and Others* EU:C:2015:555.
[56] BVerfG 37, 271 1971 (n 6).
[57] ICC 183/1973 para 9 (n 6); ICC 170/1984 (n 6) para 7; ICC judgment 24/2017, para 7.
[58] Eg Roberto Bin argues that counter-limits may be lifted in *Randstad*. See Roberto Bin, 'È scoppiata la terza "guerra tra le Corti"? A proposito del controllo esercitato dalla Corte di Cassazione sui limiti della giurisdizione' (2020) Federalismi 1, 8-10. On the other hand, former AG in Luxembourg and former President of the Constitutional Court Giuseppe Tesauro, takes the opposite stance (n 44) 240 and 254.
[59] ICC 170/1984 (n 6) paras 4-5.

remedy under domestic law would be the posthumous and allegedly inadequate action for State liability for breaches of EU law. Effectiveness, meant as judicial effective protection of rights, is the key principle of EU law on which the Cassation relies when trying to overcome the domestic interpretation of article 111(8) of the Constitution.

4 THE INSTRUMENTAL ROLE EFFECTIVE JUDICIAL PROTECTION

Randstad is reminiscent of the previous *Melki* saga, even more so as the Italian Cassation itself quotes the French precedent in the referring order. *Melki* too was a *guerre des judges* in which a domestic court, the French *Cour de Cassation*, asked the Court of Justice about the compatibility with EU law of a domestic constitutional arrangement, namely the constitutional reform introducing the so-called *question prioritaire de constitutionnalité*. In principle we can see a similar dynamic, with the supreme court reacting to a possible shift of power away from its hands by looking for advice (and support) in Luxemburg.[60] However, there is a crucial difference in the parameters of review, in the EU provisions that the referring judge uses to try reversing the shift at the domestic level. In *Melki*, the French Cassation referred to article 267 TFEU to try preventing the new mechanism of preliminary reference to the Constitutional Council from marginalizing its position in the French judiciary. In *Randstad*, on the other hand, the Italian Cassation relies on a wider series of EU norms, article 267 TFEU being only one of them.

Another case that must be recalled as a precedent is the *A v. B* case decided in 2014.[61] After the Austrian Constitutional Court pioneered the appropriation of the Charter by constitutional courts, the Court of Justice was asked by the Austrian Supreme Court whether the EU principle of equivalence required domestic judges to ask the Constitutional Court to quash internal provisions in conflict with the EU Charter (article 47 in that case) instead of simply disapplying it. In a centralized system, after an attempted recentralization on rights' protection by the constitutional court, the supreme court seeks for help in Luxemburg to regain autonomous scrutiny on rights (based on the Charter and the power of disapplication). The Court of Justice answered in the negative: no national legislation or judicial practice could deprive domestic judges of their power (and duty) to refer *ex* art. 267 TFEU to the Court of Justice, although they remained free to also submit the case to the national constitutional court, even before the preliminary reference.[62]

In all these cases the supreme court attempts overcoming an unpleasant constitutional rule due to either a constitutional reform (*Melki*) or to the interpretive activity of the constitutional court itself (*A v. B* and *Randstad*); in all three the supreme court looks for help in Luxemburg trying to regain jurisdiction exploiting its status of European judge *vis-à-vis* centralization in the hands of the constitutional court; in all three the core argument is that

[60] Joined cases C-188/10 and C-189/10 *Aziz Melki and Sélim Abdeli (Melki)* EU:C:2010:363. For a commentary of *Melki* see Arthur Dyevre, 'The Melki Way: The Melki Case and Everything You Always Wanted to Know About French Judicial Politics (But Were Afraid to Ask)' in Monica Claes et al (eds), *Constitutional conversations in Europe: actors, topics and procedures* (Intersentia 2012), 309-322.
[61] Case C-112/13, *A v B and Others* EU:C:2014:2195.
[62] ibid paras 36-37.

the centralization would risk resizing the powers of the referring judge *qua* European court and, therefore, the right to effective judicial protection.

Effective judicial protection is pivotal to cases of this kind. Let us consider in more detail the role that effective judicial protection plays in *Randstand*. The first preliminary question, as previously mentioned, refers to articles 4(3), 19(1-2) TEU, and 267 TFEU, 'also read in the light of article 47 of the Charter'. This wording is not perfectly clear, and the Court does not specify its meaning. Yet, it seems reasonable that it suggests consistent interpretation with article 47 CFREU of the other provisions on effective judicial protection. In other words, given various possible meanings of articles 4(3), 19(1-2) TEU, and 267 TFEU, one should look at article 47 to assess their interpretation.[63] The Court of Cassation is therefore close to the already mentioned case law (*ASJP*, *Achmea*, *LM*) which uses article 47 CFREU to interpret article 19 TEU.[64] This also means that, although *Randstad* is not identical to the cases that motivated judgment 269/2017 (as the potential marginalization of the Constitutional Court in it does not derive from an autonomous use of the Charter), it still relies on the use of article 47 CFREU as an interpretive parameter and it does this in a tense context when it comes to the use of the Charter by domestic judges.

The use of article 4(3) TEU is interesting too, since it underlines the connection between loyal cooperation and effectiveness: in applying EU law, Member States shall cooperate loyally by granting equivalent protection to both domestic and EU rights in an effective manner (the enforcement of the EU right shall not be impossible in practice), and this must happen under the shield of the judiciary.[65]

Finally, the role of article 267 TFEU in the reference deserves a few words. When justifying the first question, the Cassation claims that the *effet utile* of the preliminary ruling mechanism would be diminished if domestic judges could not disapply national law, including judicial interpretations coming from higher courts, in case of contrast with EU law as interpreted by the ECJ. The Cassation quotes *Simmenthal* and the more recent *Puligienica*[66] to justify the argument about *effet utile* of article 267 TFEU. In the second question, the Court recalls again article 267 TFEU, although in a slightly different manner. It wonders whether a national interpretation of procedural norms preventing a judge (the Cassation itself) to refer to Luxemburg would conflict with article 267 TFEU when objectively dubious provisions of EU law are involved.[67] The argument is that domestic judges are unlawfully prevented to perform their function of EU judges (prescribed by article 267 TFEU) by the doctrine enshrined in judgment 6/2018.

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[63] This would be a particular case of normative hierarchy (an interpretive one) between legal norms which is not new to the case law of the ECJ. Let me recall my own article - Orlando Scarcello, 'On the Role of Normative Hierarchies in Constitutional Reasoning: A Survey of Some Paradigmatic Cases' (2018) 31(3) Ratio Juris 346, 358-360 for a comment of a similar reasoning in Opinion 2/13.

[64] It is also worth recalling that article 47 is used as an interpretive criterion also in relation to secondary EU legislation. See Case C-556/17 *Alekszij Torubarov v Bevándorlási és Menekültügyi Hivatal* EU:C:2019:626, paras 55-56.

[65] Case C-33/76 *Rewe v Landwirtschaftskammer für das Saarland* EU:C:1976:188. See also Herwig Hofmann, 'The Right to an Effective Remedy' in Steve Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014), 1211-1212.

[66] Case C-106/77 *Amministrazione delle finanze dello Stato v Simmenthal* EU:C:1978:49, paras 19-20; *Puligienica* (n 53) paras 38-39.

[67] It is here that *Melki* is recalled by the Italian Cassation: *Melki* stated that such limitations on the power to use the preliminary reference would be illicit and would deprive EU law of its effectiveness. See *Melki* (n 60) paras 40-45.

As a result, *Randstad*, even more than its predecessors *Melki* and *A v. B*, is grounded in all these connective clauses: article 4(3) and 19 TEU, 267 TFEU, 47 of the Charter. It is by using this series of provisions that the Court of Cassation attempts to decentralize the judicial review of (constitutional) rights and circumvent article 111(8) of the Italian Constitution as currently interpreted. It follows that in *Randstad* we experience an instrumental use of EU law, in particular of effective judicial protection, used as a tool to reach specific internal goals of judicial politics. This holds true independently from the position that the Court of Justice will choose to take on the matter.

An even stronger way to conceptualize *Randstad* may lie in recalling a venerable concept in continental legal scholarship, the idea of 'abuse of right'. With a certain simplification, a legal right is abused when it is exercised by its holder in a way that is incompatible with the purpose the right was supposed to serve.[68] Typically, examples regard the use of goods by the owner with the sole aim of damaging their neighbors. Provided that rights include powers and duties,[69] such as the power/duty to refer to the Court of Justice, the preliminary reference may be, in a specific sense, a power used 'abusively', beyond its original purpose. The *Melki*-style reference is of course using the power conferred by article 267 TFEU to ask for clarification on the interpretation of EU law, but the ruling also has a second aim, namely circumventing judgment 6/2018 by the Constitutional Court. Thus, apart from the main aim of article 267 TFEU, namely the clarification of EU law, the reference is also aimed at reaching a rearrangement of internal constitutional boundaries (article 111 of the Constitution) through EU law. This latter goal may well be incompatible with the rationale of article 267 TFEU. Even more so as article 267 TFEU is the key to a mechanism of inter-court dialogue. In the entangled European legal order, in which EU and domestic law are closely connected, the idea of granting due consideration to the various legalities is not new and it has been proposed by scholars, for instance, in the form of the idea of 'constitutional tolerance',[70] the 'harmonic principles of contrapunctual law',[71] or the recent idea of inter-legality, suggesting that when various legalities are connected, the judge must take into account the entire series of norms potentially applicable to the case at stake and substantively scrutinize them to avoid injustice.[72] The duty to consider the whole law relevant to the case aims at ensuring the widest examination and justification of the legal reasons applicable to the case. If, however, the norms are recalled not that much with the aim of examining the whole law relevant to the case, but rather having in mind a different goal (eg overcoming or reinterpreting article 111(8) of the Constitution), then the reasoning might well be specious and 'abusive'.

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[68] On the history and definition of this notion see James Gordley, 'The Abuse of Rights in the Civil Law Tradition' in Rita de la Feria and Stefan Vogenauer (eds), *Prohibition of Abuse of Law A New General Principle of EU Law?* (Hart Publishing 2011), 33-42. On abuse of right in EU law, see Alexandre Saydé, *Abuse of EU Law and Regulation of the Internal Market* (Hart Publishing 2016), in particular chapters 1 and 3.

[69] Wesley N Hohfeld, 'Some Fundamental Legal Conceptions as Applied on Judicial Reasoning' (1913) 23 Yale Law Journal 16, 28-50.

[70] Joseph Weiler, 'Europe: The Case against the Case of Statehood' (1998) 4 European Law Journal 43, 61-62.

[71] Miguel Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in Neil Walker (ed), *Sovereignty in Transition* (Hart Publishing 2003).

[72] See Gianluigi Palombella, 'Theory, Realities, and Promises of Inter-Legality A Manifesto' in Gianluigi Palombella and Jan Klabbers (eds), *The Challenge of Interlegality* (CUP 2017), 383; Jan Klabbers, 'Judging Inter-Legality' in Gianluigi Palombella and Jan Klabbers (eds), *The Challenge of Interlegality* (CUP 2017), 362.

Of course, the instrumental and perhaps even abusive use of EU law is no novelty.[73] Studies such as Karen Alter's suggest that one of the key reasons for the success of European legal integration was the use of EU law by national courts in struggles between different levels of the judiciary.[74] However, the instrumental use of EU law in *Randstad* deserves special attention because of the different context it takes place in: as previously mentioned, quantitative studies show the current shift of importance of preliminary references from lower to higher courts.[75] Today, a reference from a peak court is more likely to be considered as 'important' by the Court of Justice (eg assigned to the Grand Chamber or to sections with an Advocate General) than one issued by a lower court. Although according to the same study the Italian Court of Cassation does not fare particularly well when compared to other European counterparts,[76] a preliminary reference by a high court remains a potentially influential one. Moreover, even if ultimately the reference would be blatantly dismissed by the Court of Justice, the very fact that inter-judicial conflicts like *Melki* are still present is an interesting finding to be registered.

We do not know what the answer in Luxemburg will be. The ECJ may try to avoid entering a domestic constitutional conflict. For instance, the Court may rely on the idea that manifest errors in the application of EU law, when committed by apex courts like the Council of State, shall be remedied simply through State liability, as expressed by AG Cruz Villalón in *Elchinov*,[77] differently from what the Italian Cassation thinks. The need to preserve legal certainty and procedural autonomy might be used by the Court of Justice to avoid entering in a tricky internal judicial conflict. This is just an example of the strategies the Court of Justice may use to avoid engaging directly in the interpretation of a delicate provision like article 111(8) of the Constitution and openly challenge the authority of the ICC. However, for the reasons just exposed, the case remains worth analyzing even at this stage: it witnesses the fact that the instrumental use of EU law by domestic judges which made the fortune of EU law is not dead at all. If the Court of Justice will bite, then the possible future reaction from the Constitutional Court will have to be adequately monitored. As a matter of fact, the Court of Justice following the interpretive line proposed by the Cassation would mean the realization of the worst nightmare for a constitutional court: a domestic court (the Cassation) using the EU law (and the ever-expanding Charter), backed by the Court of Justice, to overcome the current interpretation of the Constitution and follow an independent policy of rights' interpretation. What constitutional courts in Austria, Italy, and Germany consistently tried to avoid in the last few years might happen despite their efforts. Reactions to these

[73] Remaining in the context of Italy, consider the *Kamberaj* case (Case C-571/10 *Servet Kamberaj v Istituto per l'Edilizia Sociale della Provincia autonoma di Bolzano and Others* EU:C:2012:233), an attempt by the referring judge to overcome even the national supreme constitutional principles through EU law and dismissed by the Court as merely hypothetical (paras 44-46).

[74] Karen Alter, 'Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration' in Anne Marie Slaughter, Alec Stone Sweet, Joseph Weiler (eds), *The European Court and National Courts: Doctrine & Jurisprudence: Legal Change in its Social Context* (Hart Publishing 1998), 241-246; Karen Alter, *Establishing the Supremacy of European Law* (OUP 2001), 45-60; Karen Alter, 'The European Court's Political Power Across Time' and Space, in Karen Alter, *The European Court's Political Power* (OUP 2009).

[75] Michal Ovádek, Wessel Wijtvliet and Monika Glavina (n 46)142-153.

[76] ibid 150-153.

[77] Case C-173/09 *Georgi Ivanov Elchinov v Natsionalna zdravnoosiguritelna kasa* EU:C:2010:336, Opinion of AG Pedro Cruz Villalón, paras 23-40.

possible scenarios include the use of the counter-limits doctrine and a new constitutional clash after the *ultra vires* declaration in *Weiss-PSPP*.

5 CONCLUSION

In this paper I have considered the *Randstad* case. The Italian Court of Cassation has looked for help in Luxemburg to solve an internal struggle on the interpretation of a particularly complex constitutional provision, article 111(8) of the Constitution. The reference has happened in an era of tensions: while the use of the Charter by ordinary judges grows, the risk of being sidestepped is more and more perceived by constitutional courts, some of which are reacting by internalizing the Charter. Article 47 CFREU, and effective judicial protection more in general, are key norms in this process. In *Randstad*, the Italian Court of Cassation is in fact using effective judicial protection to circumvent the Constitutional Court's interpretation of article 111(8) Const.

We still do not know what the result of this reference will be. The ECJ may try to avoid entering the internal division of powers between the two courts, this way neutralizing the possible conflict. After all, despite the quite peculiar organization of the judiciary in Italy, with a dual system of review based on the rather puzzling divide between rights and legitimate interests, still one may say that the independency of the judiciary is not under threat, nor the individual protection of rights in courts systematically threatened. The other way around, it may support the reference and bring about another *Taricco* saga, possibly ending with the ICC lifting the counter-limits.

However, no matter the result of the saga, the *Randstad* reference resembles an instrumental use of EU law to solve internal disagreements between courts, in a way that recalls and perhaps overshadows cases like *Melki* and *A v. B*. Depending on the reaction of domestic constitutional courts, however, interpretive competition through EU law, suggested by Alter as an explanation for its success, may become a danger for its previous beneficiary.

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A BRIDE RUN: FREE MOVEMENT OF PEOPLE IN THE EU, THE FUNDAMENTAL RIGHT TO FAMILY, FAMILY REUNIFICATION, AND THE CASE OF DENMARK

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Danish legislation has made it increasingly difficult for Danish citizens who have not exercised their free movement (static EU citizens) to have their third country national (TCN) family member(s) reside with them in Denmark under family reunification. On the other hand, EU citizens (mobile EU citizens) who have exercised their free movement and reside in Denmark with their TCN family member(s), have access to far more generous EU family reunification legislation. This article explores the extent to which reverse discrimination effects Danish citizens compared to mobile EU compatriots living in Denmark and how this interacts with EU citizenship rights such as free movement and the fundamental right to family life.

1 INTRODUCTION

The Danish word for wedding is *bryllup*. It has roots in Old Norse, *brúd* meaning bride and *laup* meaning run. The etymology behind this word is said to stem from Viking traditions where the bride would move from her home, running away to the new husband's village – a bride run. Denmark has seemingly veered away from its Viking conceptions of marriage, as the Denmark of today is making it increasingly more difficult for third country nationals (TCN) to reside in Denmark with their Danish spouse, on the grounds of family reunification. Conversely, the European Union (EU) sees free movement of people as integral for the single market, that therefore includes the movement of accompanying TCN family members of EU citizens within Member States through comparatively generous family reunification legislation. Through using Denmark as a case study, the relationship between Danish legislation and EU legislation on family reunification will be analysed. Some claim this relationship has birthed a reverse discrimination phenomenon for Danish nationals, who are subject to stricter regulations than their EU compatriots residing in Denmark.[1] The right to family life is protected in a number of different international and European human rights instruments that have been ratified by Denmark. This instance of supposed reverse discrimination in the context of EU citizenship and fundamental rights can be seen in the EU jurisprudence, where the Court has interpreted both primary and secondary EU law, to in some instances broaden the right of free movement of EU citizens and their accompanying TCN family members, while in other instances placing limitations. Danish legislation for family reunification will then be examined alongside EU legislation to then ultimately assess the extent of this supposed discrimination.

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[1] Peter van Elsuwege, 'The Phenomenon of Reverse Discrimination: An Anomaly in the European Constitutional Order?' in Lucia Serena Rossi and Federico Casolari (eds), *The EU After Lisbon* (Springer 2014), 163.

2 LEGAL FRAMEWORK

The four freedoms of the European Union, being the freedom of movement of goods, services, capital and people, are considered as the cornerstone to the single market and common currency as well as being seen as one of the greatest achievements of the European integration project.[2] Free movement rights have evolved past their original inceptions as single market components to the 'hardcore of the political project of the EU, providing the basis for powerful, symbolic and functional tools for the construction for supranational identity through the reinforcement of supranational rights'.[3] The legislative protections for the free movement of EU citizens and their families will firstly be outlined, along with the established legislative protections of EU citizenship, followed by the protections for the fundamental right to family life.

2.1 EU CITIZENSHIP AND FREE MOVEMENT OF PEOPLE

The Treaty of the Functioning of the European Union (TFEU) establishes citizenship of the union, and states that 'every person holding nationality of a Member State shall be a citizen of the Union' that shall be 'additional and not replace national citizenship'[4] ensuring the right to move and reside freely within the territory of the Member States[5] subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.[6] The TFEU then sets out to guarantee the freedom of movement of workers to provide services throughout the Union.[7] The TFEU also establishes that discrimination on the grounds of nationality is prohibited, with the European Parliament and the Council to adopt rules designed to prohibit such discrimination.[8]

Directive 2004/38/EC ('the Directive') consolidated all previous regulations and directives on free movement of people within the EU and the greater European Economic Area (EEA).[9] The preamble of the Directive states that 'Union citizenship should be the fundamental status of nationals of the Member States when exercising their right of free movement and residence'[10] and then continues that this right of freedom of movement should, 'if exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality'.[11] The Directive sets out to define a Union

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[2] Jacques Delors Institut Berlin and Bertelsmann Stiftung, 'The four freedoms in the EU: Are they inseparable?' (2017) 1 <https://institutdelors.eu/wp-content/uploads/2018/01/171024jdigrundfreiheitenenwebeinzelseitena4.pdf> accessed 1 March 2021.
[3] Sara Sánchez, 'Free Movement Law within the European Union: Workers, Citizens and Third-Country Nationals' in Marion Panizzon, Gottfried Zürchera and Elisa Fornalé (eds) *The Palgrave Handbook of International Labour Migration: Law and Policy Perspectives* (Palgrave Macmillan 2015), 362.
[4] Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/47, art. 20(1).
[5] ibid art. 20(2)(a).
[6] ibid art. 21.
[7] ibid art. 45.
[8] ibid art. 18.
[9] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Directive 2004/38/EC) [2004] OJ L 158/77, preamble.
[10] ibid recital 3.
[11] ibid recital 5.

citizen meaning 'any person having the nationality of a Member State'[12] and a family member as 'the spouse, partner with whom the Union citizen has contracted a registered partnership… the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner… [or] the dependant direct relatives in the ascending line and those of the spouse'.[13] The Directive also defines the host Member State as 'the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence'.[14] The Directive is to apply to 'all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members'[15] and states that the Member State shall facilitate entry and residence' for a 'partner with whom the Union citizen has a durable relationship, duly attested'.[16] EU citizens have the right to reside in another Member State for up to three months without any conditions apart from a valid identity card or passport with the same rules applying 'to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen'.[17] After these three months, the EU citizen and their family members can continue residing in the host Member State if the EU citizen is; a worker or self-employed person, have sufficient resources for themselves and family members as well as comprehensive health insurance or must be a student with sufficient resources and health insurance.[18] Member States also have the right to adopt necessary measures to 'refuse, terminate or withdraw any right conferred by [the] Directive in the case of abuse of rights or fraud, such as marriages of convenience'.[19]

2.2 RIGHT TO FAMILY LIFE

A number of international human rights instruments protect the right of individuals to have their established family life respected along with the right to have and maintain family relationships.[20] On an international law level, this has often come into conflict with immigration policies of states, since deporting family members who are not validly residing in their territory can therefore violate the right to family life for the family members remaining, with international practice usually holding that the right of a State to control immigration outweighs the right to family life except in the most limited circumstances.[21] UN monitoring bodies have emphasised that it's not their task to 'supervise the government's immigration policy, but to examine whether the applicant's right to respect for family life has been ensured without discrimination'.[22] On a European level, the Charter of Fundamental Rights of the European Union protects the right to family life,[23] and gained legally binding

[12] Directive 2004/38/EC art. 2(1).
[13] ibid art. 2(2).
[14] ibid art. 2(3).
[15] ibid art. 3(1).
[16] ibid art. 3(2).
[17] ibid art. 6.
[18] ibid art. 7.
[19] ibid art. 35.
[20] See Universal Declaration of Human Rights [1948] (UDHR) art. 16, along with International Covenant on Civil and Political Rights [1966] (ICCPR) art. 23.
[21] Richard Burchill, 'The Right to Live Wherever You Want? The Right to Family Life Following the UN Human Rights Committee's Decision in *Winata*' (2003) 21(2) Netherlands Quarterly of Human Rights 225.
[22] *Abdulaziz and others v UK* App no 9214/80; 9473/81; 9474/81 (ECtHR, 24 April 1985).
[23] Charter of Fundamental Rights of the European Union [2012] 2012/C 326/02, arts. 7 and 33.

status to Member States after the Lisbon Treaty entered into force in 2009.[24] The European Convention for Human Rights also protects the right to respect for private and family life.[25]

EU citizenship and free movement of people are established EU legal principles that are integral in European integration. The Directive 2004/38/EC, that was then transposed into Member State national legislation, ensures the right of EU citizens to move and reside in other Member States with their family so long as the EU citizen is working, self-sufficient or studying. The fundamental right to family life is protected on an international and European level.

3 LEARNING FROM THE CJEU

Free movement of people and the development of EU citizenship has progressively advanced through secondary law, as discussed above, along with case law from ECJ, meaning that EU freedom of movement is usually considered to be a 'complex succession of legislative and jurisprudential events that continuously interact with each other'.[26] The CJEU has adjudicated on matters relating to the free movement of people within the EU with their accompanying third-country national ('TCN') family members in conjunction with fundamental rights such as the right to family life, establishing a strong foundation of case law on the matter.

3.1 CASE LAW BROADENING FAMILY REUNIFICATION RIGHTS OF EU CITIZENS AND THEIR ACCOMPANYING TCN FAMILY MEMBERS

The CJEU has played an active role in interpreting the treaties, directives, and regulations, that ensures free movement of people with their accompanying non-EU family members within the territories of the EU. As outlined in Chapter 2.1, it is clear that the EU robustly protects the freedom of movement of EU citizens along with their family, however is national law or EU law to apply when an EU citizen and their accompanying TCN family member return to the home EU state? In *Singh*, the Court established that since the couple, in this case, moved together to another Member State to work, then returned to the home state of the EU citizen (the UK), that EU law should then apply to them instead of national legislation on immigration.[27] The Court held that the right in EU law for a person to move to another Member State must also include the right to return, otherwise a person would be deterred from exercising this right in the first place.[28] The right of residence to a dependent family member of a returning EU national to the Member State of origin after exercising the right to free movement was granted by the Court, even when the returning EU national is

[24] Treaty on European Union (TEU) [2016] OJ C202/13 art. 6(1).
[25] European Convention for Human Rights [1950] art. 8(1). See also art. 8(2) where exceptions are listed: 'except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others'
[26] Sanchez (n 3) 362.
[27] Case C-370/90 *Surinder Singh* EU:C:1992:296, paras 21-25. Cf. Cases C-64/96 and C-65/96 *Uecker and Jacquet* EU:C:1997:285, paras 24 and 25, where the Court affirmed that a third-country national spouse could not rely on a Treaty right, since the European spouse was residing in their home state and had not yet exercised their right to free movement.
[28] *Singh* (n 27) para 23.

economically inactive.[29] The Court also affirmed that a TCN spouse of an EU citizen who was residing in a host Member State need not have been lawfully residing in another Member State prior to arrival in that host Member State, therefore being a spouse is sufficient to give derivative residence rights per the holding of *Metock*.[30]

Per Chapter 2.1, the Directive clearly confers the right of dependants to move and reside with the EU citizen, however in *Zhu and Chen* where the EU citizen (sponsor) in this case was an infant child and the dependant was the primary caregiver (her mother who was a Chinese national), the Court held that the mother must be given residence by the host Member State under EU law, as failing to do so would deprive the EU citizen of her right of residence to any 'useful effect' and thereby violate the child's fundamental right to family life.[31] The Chinese couple, working and residing in the UK, moved to Northern Ireland to give birth to their second daughter, who per Irish *jus solis* legislation at the time received Irish citizenship instead of UK citizenship, and therefore per EU family reunification law, claimed residence in the host Member State as a direct family member of the infant EU citizen who had sufficient funds (from the parents) to reside in the UK. The Court interpreted 'dependant' in the Directive as to not include the relationship between mother daughter,[32] as a dependent is characterised by the fact that 'material support for the family member is provided by the holder of the right of residence'.[33] However, the Court's decision rested on the fact that if her mother was denied residence with her daughter, the newborn daughter would not be able to live alone in the UK, thereby effectively upholding the right to family.[34] The reasoning of the Court in protecting the family unit under EU law is interesting here, as the mother only moved to Northern Ireland (still in UK territory) and therefore despite there being some physical movement paired with clever legal counsel through utilising previously generous Irish citizenship legislation, the Court still applied EU law without there technically being any exercise of this freedom of movement by the citizen.[35]

In another landmark decision, the Court goes a step further in *Ruiz Zambrano* to protect the free movement of EU citizens and their accompanying family members, by ensuring a derivative right of residence for Colombian parents who gave birth to two children in Belgium while applying for asylum (gaining Belgian citizenship per *jus solis*).[36] The Court held that the refusal to grant a right of residence to TCNs (the parents) has the effect of depriving citizens of the Union (the two children) of the 'genuine enjoyment' of the substance of the

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[29] Case C-291/05 *Eind* EU:C:2007:771, para 45.
[30] Case C-127/08 *Metock* EU:C:2008:449, para 80.
[31] Case C-200/02 *Zhu and Chen* EU:C:2004:639, paras 42-47.
[32] ibid para 42.
[33] ibid para 43.
[34] ibid paras 45 and 46. Note also that Chinese citizenship legislation does not allow for dual citizenship, hence why if the mother was denied right of residence under family reunification, the child would have to give up her EU citizenship to gain Chinese citizenship in order to live with her family. It would be interesting to know how the Court would have approached a scenario with analogous facts with a third country that allowed dual citizenship.
[35] Case C-34/09 *Ruiz Zambrano* EU:C:2011:124, Opinion of AG Sharpston, para 78. See also Case C-60/00 *Carpenter* EU:C:2002:434, paras 45 and 46, where a self-employed EU citizen who provided some services in other Member States, could confer a derivative right of residence on his third-country national partner, in the interests of protecting the right to family life, as his children from a previous marriage also resided with him in the UK.
[36] See Opinion of AG Sharpston on *Ruiz Zambrano* (n 35) footnote 8 where it is stated that according to Colombian law, children born outside the territory of Colombia do not automatically acquire nationality unless and express declaration is made with the consular officials – which was not made by the parents.

rights conferred by virtue of this status.[37] Interestingly, the Court makes no reference to fundamental rights but instead gives, in my opinion, a short simplistic reasoning, choosing only to look at the potential effects on the genuine enjoyment of the right to freedom of movement, unlike in *Zhu and Chen*. This is a stark contrast to the expansive, inspiring and humanist opinion of AG Sharpston, who claimed citizenship should be distinguished from economic freedoms, stating that 'citizens are not "resources" employed to produce goods and services, but individuals bound to a political community and protected by fundamental rights'.[38] She concludes that Article 21 of the TFEU contains separate rights: the right to reside separate from the right to free movement.[39] She also explores the concept of reverse discrimination in that 'static' union citizens 'were thereby still left to suffer the potential consequences of reverse discrimination even though the rights of 'mobile' union citizens were significantly extended'.[40]

In *Lounes*, the Court further protects the 'mobile' EU citizen, holding that a migrant EU citizen who naturalises to become a dual EU citizen cannot be compared to a native citizen – because they've exercised their free movement, they will continue to enjoy the family reunification rights as EU migrants.[41] Here it was a Spanish woman who had been living in the UK for 15 years who met and then subsequently married her TCN husband after naturalising. He requested derivative residence under the Directive but was denied.[42] How was her situation different to an indigenous Briton? If the Directive is designed to 'give a helping hand' to EU citizens who exercise their free movement and therefore need extra support in having their family members accompany (be they EU citizens or not), it doesn't make sense to allow the naturalised citizen this right but not static native citizens. However, here the CJEU takes a policy and purposive decision, that if EU citizens fear loss of rights when they naturalise, this would ultimately hinder integration.[43]

3.2 CASE LAW RESTRICTING FAMILY REUNIFICATION RIGHTS OF EU CITIZENS AND THEIR ACCOMPANYING TCN FAMILY MEMBERS

Alternatively, the Court has also delivered judgments that have restricted family reunification rights of EU citizens and their TCN national family members. *McCarthy* was a case concerning dual EU citizenship, as in *Lounes,* but with a UK citizen having never exercised her right to free movement and obtaining Irish citizenship (becoming a dual citizen) all before requesting her TCN husband reside in the UK with her per the Directive. The Court affirmed the general rule of EU citizenship[44] but placed limitations on her husband's right to access EU family reunification rights since she was economically inactive having always lived on welfare payments and therefore not satisfying the EU residence requirements.[45] The Court here establishes that even though the EU citizen here had dual EU citizenship, she

[37] Case C-34/09 *Ruiz Zambrano v Office National de l'Emploi* EU:C:2011:124, paras 42 and 45.
[38] Opinion of AG Sharpston on *Ruiz Zambrano* (n 35) para 127.
[39] ibid para 100.
[40] ibid para 133.
[41] Case C-165/16 *Lounes v Secretary of State for the Home Department* EU:C:2017:862, para 62.
[42] ibid paras 14-27.
[43] Gareth Davies, 'Lounes, Naturalisation and Brexit' (*European Law Blog*, 5 March 2018) <https://europeanlawblog.eu/2018/03/05/lounes-naturalisation-and-brexit/> accessed 3 March 2021.
[44] TFEU arts. 20 and 21, see also *Ruiz Zambrano* (n 37) para 41.
[45] Case C-434/09 *McCarthy v Secretary of State for the Home Department* EU:C:2011:277, para 57.

could not access EU family reunification rights through having exercised her free movement as an Irish citizen in the UK, as she did not satisfy the residence requirements of Article 7 of the Directive and was residing in the UK through her UK citizenship, meaning UK family reunification legislation applied. The Court interestingly diverges from *Ruiz Zambrano* and *Zhu and Chen* and establishes that a relationship of a carer-parent is to be considered essential for the continued residence of the citizen on the territory of the Union, whereas in *McCarthy* the same logic did not apply to the company of a spouse.[46]

Continuing with instances of economically inactive citizens, in *Dano*, a Romanian national and her infant son (who although had been born in Germany, was a Romanian national) both lived with her sister who materially supported them, while also receiving maintenance and child support payments from the German Government.[47] When she was denied unemployment benefits from the German Government despite not seeking work, she unsuccessfully claimed this amounted to discrimination as a German national would have been entitled to these payments. The Court, without making any reference to fundamental rights, presumably influenced by the Brexit climate and appeasing eurosceptic fears of 'benefit tourism',[48] held that the economically inactive Ms Dano had moved to Germany for the sole purpose of claiming benefits and was without sufficient resources, meaning she did not have right of residence.[49]

In *Dereci*, the Court offered a limited clarification to the scope of 'genuine enjoyment' test established in *Ruiz Zambrano*, where it held that EU law does not preclude a Member State from refusing to allow a TCN national to reside in its territory with their dependent EU citizen children, so long as this refusal does not lead to the denial of the genuine enjoyment of the substance of rights conferred by the virtue of their status as EU citizen.[50] The Court ultimately held that the desirability of residing together with a family member is insufficient to prove that the EU citizen will be forced to leave the Union territory in the event that the right is not granted.[51]

On the topic of 'genuine and effective residence' the Court has established that when an EU citizen merely makes weekend visits to their TCN spouse residing in another Member State[52] or an initial two-month visit followed by holiday visits to their TCN national spouse working in another Member State,[53] this is ultimately insufficient to be considered as having exercised their free movement and therefore have their family members gain a derivative residence from EU law when returning to the home state.

The CJEU has handed down a number of judgments in the area of free movement of EU citizens and their accompanying family members in conjunction with the fundamental right to family. The Court has established in key judgments that citizens returning to their home state with TCN family members can access EU family reunification rights instead of

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[46] Stephen Coutts, 'Case C- 434-09: Shirley McCarthy v. Secretary of State for the Home Department' (*Globalcit,* 10 May 2011) <https://globalcit.eu/case-c-434-09-shirley-mccarthy-v-secretary-of-state-for-the-home-department/> accessed 5 March 2021.
[47] Case C-333/13 *Dano v Jobcenter Leipzig* EU:C:2014:2358, para 33.
[48] Case C-333/13 *Dano* EU:C:2014:2358, Opinion of AG Wathelet, para 131.
[49] *Dano* (n 47) para 84.
[50] Case C-256/11 *Dereci and Others v Bundesministerium für Inneres* EU:C:2011:734, para 76.
[51] ibid para 67.
[52] Case C-456/12 *O v Minister voor Imigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B* EU:C:2014:135, para 61-63.
[53] ibid para 61.

sometimes stricter national legislation, that the TCN spouse need not have resided in another Member State with the EU citizen, that a TCN primary care-giver (parent) can access EU family reunification rights as not doing so would deprive the young EU citizen of their right to family and their potential for genuine enjoyment of the right to free movement, regardless of whether this young child is still only a 'static' EU citizen. On the other hand, the Court has placed some limitations (particularly in instances of economically inactive citizens) holding that an EU citizen must at very least not be a burden on social assistance of the host Member State in order to gain genuine residence in the host Member State and therefore access EU family reunification rights, that if a dual EU citizen is economically inactive in their home state and hasn't actively exercised their free movement previously they will be unable to access EU family reunification rights, and that when exercising free movement, the residence must be genuine and effective in order to access EU family reunification rights when returning to the EU citizens home state.

4 THE CASE OF DENMARK

Denmark is considered to have some of the strictest immigration policies in Europe.[54] Historically, immigration to Denmark can be categorised from the 1970s as initially having concern for human rights of the immigrants, yet then changing after increased immigration throughout the 80s and 90s, where the new concern became integration to Danish society and adopting fundamental Danish values, with a gradual reduction to residence rights for TCNs and TCN family members.[55] In the 2000s, Denmark began taking the neoliberal route of immigration by further restricting the entry of unprofitable migrant segments, but also going further to significantly restrict pathways to citizenship, intensifying employment and education incentives, along with withdrawing the legal right to family reunification and introducing the controversial 24-year rule.[56] The notorious 24-year rule was introduced in the 2000s and required the couple (foreign spouse applying for residence with Danish resident) to have aggregate ties to Denmark stronger than to those of any other country[57] in a purported effort to prevent forced involuntary marriages.[58] In the ECtHR case of *Biao*, a Ghanaian born man moved to Denmark to work and later naturalised as a Danish citizen, where he attempted to bring back his spouse who he married in Ghana. The spouse was denied residence as the couple could not satisfy the 24-year rule as although he naturalised, the couple had greater ties to Ghana than to Denmark, which the couple claimed was indirect discrimination per Article 14 ECHR as it discriminates against Danes of non-ethnic Danish origin, which the Court confirmed, along with his right to family life per Article 8 ECHR, which the Court found there to be no violation.[59] Although the Article 14 a key deciding

[54] Nikolaj Nielsen, 'EU court: Denmark's family-reunification law "unjustified"' (*euobserver*, 10 July 2019) <https://euobserver.com/migration/145411> accessed 6 March 2021.
[55] Per Mouritsen, Tore Vincent Olsen, 'Denmark between Liberalism and Nationalism' (2013) Ethnic and Racial Studies 36(4), 693-694 <https://doi.org/10.1080/01419870.2011.598233>.
[56] ibid, 697-698.
[57] *Udlændingeloven* (Aliens Act) (Consolidation) [2015] art. 9(1).
[58] Panu Poutvaara and Ilpo Kauppinen 'Family Migration and Policies: Lessons from Denmark' (2012) CESifo DICE Report 9, 38 <https://www.researchgate.net/publication/227345931_Family_Migration_and_Policies_Lessons_from_Denmark> accessed 6 March 2021.
[59] *Biao v Denmark* App n. 38590/10 (ECtHR, 24 May 2016), paras 58-60.

factor in the Court's reasoning, and despite the Court confirming that nationals of a country do not have an unconditional right to family reunion with a foreigner in their home country,[60] the Court did look to other EU states along with the EU Convention on Nationality finding a 'certain trend towards a European standard',[61] to which the 24-year rule was, to an extent, inconsistent with.[62]

Currently in Danish law, if a non-EU national wishes to reside in Denmark with their partner already living in Denmark, a residence permit on the grounds of family reunification will be issued to a foreigner if the following conditions are met. Both spouses must be over the age of 24,[63] along with cohabiting at a shared residence either as being in a legally valid voluntary marriage or cohabitation of prolonged duration.[64] The foreign spouse must actively participate in Danish language lessons, pass two Danish tests, must have visited Denmark at least once and completed their part of the integration requirements[65] that replaced the 24-year rule after it was repealed. The spouse already living in Denmark must be a Danish national or have held permanent residence for the past three years,[66] must have an adequate level of Danish,[67] must live in an independent residence (but not in an area mentioned in the current regulation about housing requirement list pertaining to certain levels of employment, crime, education, and income)[68] with specific requirements on the size and amenities of the owned or rented residence, be self-supporting, fulfil their parts of the integration requirements,[69] not have committed any criminal offenses, and pay collateral in the form of a financial guarantee, which at the current level is DKK 106,120.80 (€14,268) but increases with inflation annually, whereby any social benefits paid to the foreign spouse will come from this guarantee.

In order to be granted a residence permit for a foreign national child under family reunification, the child must be unmarried and not have started their own family, the family

[60] *Biao* (n 59) para 29. See also *Abdulaziz* (n 22).
[61] *Biao* (n 59) para 138.
[62] See also case C-89/18 *A v Udlændige- og Integrationsministeriet* EU:C:2019:580, para 47, where the Court similarly ruled that the attachment restriction constitutes a 'new restriction', within the meaning of that provision and such a restriction is unjustified.
[63] Aliens Act, art. 9(1)(i).
[64] ibid art. 9(1)(i).
[65] There are 6 integration requirements: 3 for the foreign spouse and 3 for the partner in Denmark, with a total of 4 of 6 met between the couple. The foreign spouse must have passed a Danish level 1 test (Prøve i Dansk1) or English B1 level, worked full-time for at least 3 of the last 5 years or completed 1 year of education. The spouse in Denmark must have passed a Danish level 3 (Prøve i Dansk 3) or have the appropriate school exam score to prove Danish proficiency (one of which is mandatory), worked full-time for at least 5 years or have at least 6 years of schooling. See Danish Immigration Service, 'Apply for family reunification as a spouse' (2020) New to Denmark <https://www.nyidanmark.dk/en-GB/You-want-to-apply/Family/Family-reunification/Spouse-or-cohabiting-partner> accessed 10 March 2021.
[66] Aliens Act, art. 9(1)(i)(d).
[67] ibid art. 10(7)(ii). See also Danish Immigration Service, 'Apply for family reunification as a spouse' (2020) New to Denmark <https://www.nyidanmark.dk/en-GB/You-want-to-apply/Family/Family-reunification/Spouse-or-cohabiting-partner> accessed 4 March 2021.
[68] Aliens Act, art. 9(18). See also Danish Immigration Service, 'Apply for family reunification as a spouse' (2020) New to Denmark <https://www.nyidanmark.dk/en-GB/You-want-to-apply/Family/Family-reunification/Spouse-or-cohabiting-partner> accessed 4 March 2021.
[69] See also Danish Immigration Service, 'Apply for family reunification as a spouse', New to Denmark, 1 August 2020, <https://www.nyidanmark.dk/en-GB/You-want-to-apply/Family/Family-reunification/Spouse-or-cohabiting-partner> accessed 4 March 2021.

reunification must be in the best interests of the child,[70] with the parent having appropriate custody over the child, not having been convicted of child abuse, be self-supporting and have legal residence in Denmark.[71] The application costs DKK 9,460 (€1296) regardless of whether the permit is granted. The visa must also be renewed every second year at the cost of DKK 2960 (€396). The cost of the language tests is a further DKK 5,640 (€760) provided both tests are passed on the first attempts. The expected processing time for a family reunification residence permit is 7 months (the foreign spouse cannot work during this time) but the average processing is considered to actually be closer to 10 months.[72]

The requirements and process for Danish family reunification residence permits have been made increasingly and purposefully more difficult, particularly for family reunification as a foreign spouse. A positive outcome of *Biao* was that the Court unmasked some of the negative stereotypes underlying the Danish Aliens Act as regards the presupposed marriage patterns of Danish nationals of foreign extraction and their (in-)ability to integrate in Danish society.[73] The dissenting judges rightly noted that the only way to eradicate discrimination here would be to abolish the 24-year rule, which followed from the judgment,[74] however as seen above, it has been replaced with further exhaustive integration requirements.

Denmark, having transposed the Directive into national law, allows residence for TCNs accompanying their EU spouse (or Danish citizen who has exercised their freedom of movement). This process requires the EU citizen to have genuine and effective residence in Denmark, per Article 7 of the Directive (work, self-sufficient or study) and must have documentation showing proof of relationship (marriage certificate or proof of partnership) with a processing time between 0 and 90 days along with no application fees.[75]

5 EVALUATING THE EXTENT OF REVERSE DISCRIMINATION

In the comparison between EU legislation and Danish legislation on family reunification, it is by now evident that the Danish route for family reunification is significantly more difficult both financially and in terms of timing. As a financial comparison, Danish family

[70] Danish Immigration Service, 'Apply for family reunification as a child' (2020) New to Denmark <https://www.nyidanmark.dk/en-GB/You-want-to-apply/Family/Family-reunification/Child> accessed 4 March 2021. The municipality will make an assessment of the parents' ability to care of the child, whether there is a risk the child could have serious social problems in Denmark, risk that the child could be removed from the home after moving to Denmark or a risk of abuse.

[71] Aliens Act art. 9(4). See also Danish Immigration Service, 'Apply for family reunification as a spouse' (2020) New to Denmark <https://www.nyidanmark.dk/en-GB/You-want-to-apply/Family/Family-reunification/Spouse-or-cohabiting-partner> accessed 4 March 2021.

[72] EU Commission, 'Denmark: Cost and criteria for family reunification can amount to discrimination' (2021) European Web Site on Integration, (*EUROPEAN WEB SITE ON INTEGRATION: Migrant Integration Information and good practices*, 21 January 2021) <https://ec.europa.eu/migrant-integration/news/denmark-cost-and-criteria-for-family-reunification-can-amount-to-discrimination> accessed 5 March 2021.

[73] Alix Schülter 'Biao v Denmark: Grand Chamber ruling on ethnic discrimination might leave couples seeking family reunification worse off' (*Strasbourg Observers*, 13 June 2016) <https://strasbourgobservers.com/2016/06/13/biao-v-denmark-grand-chamber-ruling-on-ethnic-discrimination-might-leave-couples-seeking-family-reunification-worse-off/> accessed 27 February 2021.

[74] *Biao* (n 59), Joint Dissenting Opinion of Villiger, Mahoney and Kjølbro, para 50.

[75] Danish Immigration Service, 'EU residence as a family member to an EU citizen' (2020) New to Denmark <https://www.nyidanmark.dk/en-GB/You-want-to-apply/Residence-as-a-Nordic-citizen-or-EU-or-EEA-citizen/EU-Family-member-EU-citizen> accessed 4 March 2021.

reunification can cost nearly €20,000, while the EU route is free. Timing wise, while EU family reunification residence can take between 0-90 days (with the TCN spouse allowed to work during this processing time), while processing times per Danish family reunification are estimated to take 10 months, where even after a large sum of money has been paid for this application, the TCN spouse cannot work in this processing time. The complex maze of integration requirements, from years of education to years of employment to Danish proficiency, is certainly not an easy task to even navigate through, especially as requirements are frequently updated and complexified. The European Commission has commented on the case of Denmark stating that the cost and criteria for family reunification can amount to discrimination with 'unsurmountable barriers for many couples', favouring economically prosperous couples above a certain age, and EU-nationals over non-EU nationals.[76] The Commission states that even though the bank guarantee is supposed to cover eventual expenses for the foreign spouse, the costs associated with administrating this guarantee is far more than the guarantee actually brings in – in 2020 alone, the Municipality of Copenhagen has not drawn money from the guarantee system at all in 2020 but spent DKK 1.3 million on its administration.[77] Another issue with the financial guarantee is that the family reunified couple may not receive public benefits, but that also applies to the Danish citizen, regardless of the Dane having paid into the social security net their entire life.[78]

Statistically, it is difficult deduce the extent to which Danish nationals are affected by Danish family reunification legislation in comparison to more generous EU legislation. Table 1 below shows statistical information available from the Danish Immigration and Integration Office, where a gradual but significant decrease in applications for family reunification through Danish law by more than half over the past 5 years can be seen. This likely coincides with the near doubling of the financial guarantee required in 2018, along with increase in integration requirements after the changes were made in the aftermath of *Biao*.[79] A steady increase in applications for family reunification under EU law for family members accompanying Danish nationals having exercised their free movement can be seen, however nothing significant enough to conclude that Danish nationals are opting for the 'European route' or the 'Swedish model' (these will be elaborated shortly) to circumvent stricter Danish legislation. Applications from family members accompanying EU citizens seeking residence under EU legislation has also grown steadily, while interestingly EU immigration to Denmark has remained fairly consistent.[80] As an overall percentage of immigration, EU/EEA immigration makes up 50% of total immigration to Denmark, with family reunification residence for accompanying family of EU citizens making up 6% of total immigration and immigration under Danish family reunification legislation making up 3% of total immigration.[81]

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[76] EU Commission (n 72).
[77] ibid.
[78] Michael Barrett, 'How the dizzying cost of family reunification keeps Danes and foreign partners apart' (*The Local*, 21 January 2021) <https://www.thelocal.dk/20210121/how-the-dizzying-cost-of-family-reunification-keeps-danes-and-foreign-partners-apart/> accessed 5 March 2021.
[79] *Biao* (n 59).
[80] See EU/EEA immigration to Denmark in 2015 at 37,366, increasing to 39,079 then decreasing to 36,865 remaining fairly stable per *Udlæninge- og Integrationsministeriet* (Danish Immigration and Integration) Report '*Tal og fakta og udlædningsområdet 2019*' (Figures and Statistics in the area of Foreigners 2019) (2020) <https://uim.dk/publikationer/tal-og-fakta-pa-udlaendingeomradet-2019-1> accessed 6 March 2021, 72.
[81] ibid.

	2015	**2016**	**2017**	**2018**	**2019**
Applications for residence permits for family reunification per Danish law	5,233	3,825	4,127	3,225	2,206
Applications for residence permits for family reunification under EU law for family of Danish citizens having exercised their free movement	315	296	313	390	466
Applications for residence permits for under EU law for accompanying family members of EU citizens	4,492	4,510	4,475	4,789	4,691

Table 1: Figures and statistics on Family Reunification Residence Permits from Udlæninge- og Integrationsministeriet (Danish Immigration and Integration) Report 'Tal og fakta og udlædningsområdet 2019' (Figures and Statistics in the area of Foreigners 2019) 9 September 2020, <https://uim.dk/publikationer/tal-og-fakta-pa-udlaendingeomradet-2019-1> 27 and 72.

Conclusions that can be drawn comfortably from these statistics are that the number of Danish nationals or residents who are applying for Danish family reunification is decreasing significantly, that as of 2019 Danish family reunification makes up a smaller percentage of total immigration (3%) compared to EU family reunification immigration (6%), and ultimately it could therefore be said EU family reunification residence is now more prevalent than family reunification through Danish legislation.

When comparing the EU legislation and Danish legislation as outlined in Chapter 2, 3, 4 and above, it becomes clear that reverse discrimination exists in the context of family reunification in EU legislation versus Danish legislation. An EU citizen can reside in Denmark with their accompanying family, yet a Danish citizen faces far more requirements, conditions and financial obligations in enjoying their right to family. This is unsurprising, as Denmark has been progressing towards more restrictive family reunification policies as well as general migration policies.[82] Denmark was reluctant to have the citizenship provision incorporated into the treaties per the Edinburgh Agreement.[83]

There is, however, a possible relief to this discrimination, whereby the static Danish citizen can exercise their freedom of movement by genuinely and effectively residing in another Member State in what is referred to as the 'Europe route'[84] or by crossing the Øresund Bridge from Copenhagen to reside in Malmö in Sweden in what is referred to as

[82] Anne Staver, 'Free Movement and the Fragmentation of Family Reunification Rights' (2013) 15(2) European Journal of Migration and Law 69, 83-85.
[83] Protocol (No 22) on the position of Denmark [2012] OJ C236/299.
[84] Hester Kroeze, 'Distinguishing between Use and Abuse of EU Free Movement Law: Evaluating Use of the "Europe-route" for Family Reunification to Overcome Reverse Discrimination' in Nathan Cambien, Dimitry Kochenov and Elise Muir, *European Citizenship Under Stress*, (Brill 2020), 226.

the 'Swedish model'.[85] However, does this then constitute an abuse of EU legislation, and therefore allow Member States to legislate against this behaviour per Article 35 of the Directive as outlined in Chapter 2.1? With the case law discussed in Chapter 3, the current EU jurisprudential standpoint on this is that so long as the residence is genuine and effective in the other Member State, then regardless of the couple's overall intentions to purely exercise this right only to then benefit from more generous EU family reunification legislation when they return (referred to as a U-turn construction) is generally not considered an abuse.[86] The EU Commission has commented on this alleged abuse stating that although Member States are allowed to pass legislation to combat 'marriages of convenience', they are not to discourage freedom of movement, regardless if the true intent is to circumvent family reunification legislation and only reside in the other Member State for a short period.[87] The Commission makes clear that a marriage cannot be considered a marriage of convenience simply because it brings an immigration advantage and that 'the quality of the relationship is immaterial to the application of Article 35'.[88]

EU jurisprudence has established that reverse discrimination is difficult to reconcile with the notion of EU citizenship.[89] This is based upon the idea that EU citizenship is fundamentally different from the other economic freedoms of the internal market.[90] It seems peculiar that the Court has separated within the right to family life: the right to have a spouse and the right to be in the care of your parent, essentially stating that the latter able to access EU family reunification rights regardless of whether static or mobile, unlike the former. Reverse discrimination within the EU is problematic from the perspective of equal treatment and legal certainty and should be eradicated. However, EU law provides no direct means for doing so as it lies beyond its competence, along with the inability for judicial intervention to fully resolve this phenomenon.[91]

Ultimately, although unable to quantify statistically the exact extent to which 'static' Danish citizens are affected by this established reverse discrimination, it is clear that there is a notable difference in the accessibility to family reunification residence through EU law compared to Danish law. Although the 'European route' may exist as a potential relief to this reverse discrimination, AG Sharpston comments that it would be paradoxical that an EU citizen can rely on fundamental rights under EU law when exercising an economic right to free movement, or when national law comes within the scope of the Treaty, or when invoking EU secondary legislation (such as the services of a directive) but could not do so when merely 'residing' in that Member State.[92]

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[85] EU Commission (n 72).
[86] Kroeze (n 84) 247-248.
[87] Communication from the Commission to the European Parliament and the Council, COM(2009) 313 final, 15.
[88] ibid.
[89] Cases C-80/85 and C-159/85 *Edah* EU:C:1986:426, Opinion of AG Mischo. See also *Ruiz Zambrano* opinion of AG Sharpston (n 35) para 138.
[90] Case C-184/99 *Grzelczyk* EU:C:2001:458, para 31.
[91] Staver (n 82) 70.
[92] *Ruiz Zambrano* Opinion of AG Sharpston (n 35) para 84.

6 CONCLUSION

As outlined, there seems to be a clear instance of reverse discrimination in Denmark, whereby Denmark discriminates against its own nationals in comparison with the generous EU legislation on family reunification for nationals of other Member States who have exercised a free movement right in Denmark.[93] The Directive protects free movement of EU citizens along with their accompanying family members, with the right to family being protected on an international and European level. CJEU case law has interpreted the rights within the Treaties on the right to family life, EU citizenship, free movement of people, and the Directive. The Court has delivered a series of judgments on the interpretation of the right of free movement, EU citizenship and the Directive in conjunction with the fundamental right to family. The Court has broadened the family reunification rights for EU citizens and their accompanying family, however in certain scenarios also limited these rights, particularly in cases involving economically inactive citizens. In terms of national legislation, Denmark has strict legislation on residence for TCN through family reunification, with exhaustive integration, financial, language, residential and employment requirements. On the other hand, EU legislation on family reunification in Denmark transposed from the Directive is far less burdensome in comparison. For Danish citizens who haven't resided in another Member State, they must consider exercising this freedom of movement to genuinely and effectively reside in another Member State to then return and be able to access the rights conferred in the Directive under EU law - the same rights that were already accessible to their EU compatriots already residing in their own country.

Circling back to the 'bride run' etymological analogy from earlier, the bride in this hypothetical, assuming she is from a foreign village outside of the kingdom, would have great difficulties in gaining residence in Denmark under arduous and expensive Danish family reunification legislation. It would require the Viking couple to move outside of the Danish territory to an EU Member State to exercise the Danish spouse's right to free movement thereby becoming a 'mobile' Union citizen, genuinely and effectively reside in this host Member State, to then move back to Denmark where the bride could claim a derivative right of residence through EU law. This 'European route' seems burdensome and overly bureaucratic when the overall goal is to merely have a family unit, living and working together in Denmark. It is understandable that a country with such a strong welfare system could be protectionist, however this also seems to run contrary to the Danish egalitarian disposition, by only prioritising couples with financial means. Conversely, in recent years, Denmark has celebrated a 'bride run' scenario with Mary Donaldson, an Australian immigrant who married Crown Prince Frederik of Denmark. Naturally, Prince Frederik did not need to exercise his freedom of movement to access EU law, nor did Mary apply for residence per Danish family reunification and thus prove a level of Danish, sufficient residence and financial stability (the latter two easily satisfied no doubt). The Danish parliament simply passed a law granting the new bride automatic citizenship – a true fairy tale ending.[94] On a personal level, the author of this article was married to a Danish citizen, but as an Australian immigrant like Mary, was

[93] Elspeth Guild, 'EU Citizens, Foreign Family Members and European Union Law' (2019) 21(3) European Journal of Migration and Law 358.
[94] Law nr. 212 of 31/03/2004 *Lov om meddelelse af dansk indfødsret til Mary Elizabeth Donaldson* (Law on Granting Danish Citizenship to Mary Elizabeth Donaldson) *Folketinget* (Danish Parliament).

not offered a passport, or even residence, as the financial requirements were too burdensome. Although moving to another EU Member State was considered, the financial and administrational pressure led to the eventual dissolution of the relationship. In my opinion, EU freedom of movement and its relationship to the right to family life cannot be better summarised than by AG Sharpston in her Opinion on *Ruiz Zambrano*:

> When citizens move, they do so as human beings, not as robots. They fall in love, marry, and have families. The family unit, depending on circumstances, may be composed solely of EU citizens, or of EU citizens and third country nationals, closely linked to one another. If family members are not treated in the same way as EU citizens exercising rights of free movement, the concept of free movement becomes devoid of any real meaning.[95]

Although it's not necessarily possible to statistically quantify the full degree to which this reverse discrimination phenomenon effects Danish citizens, what can be deduced is that Denmark is aware and comfortable with the discriminatory outcomes on its own citizens. Instead of relieving the discriminated group by repealing legislation that makes family reunification far more difficult and therefore align with EU legislation, it has chosen to accept and ignore this reverse discrimination on its own citizens – to prioritise immigration control over the fundamental right to family life.

[95] *Ruiz Zambrano*, Opinion of AG Sharpston (n 35) para 128.

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RESTRICTION BY OBJECT: A RESTRICTION BASED PURELY ON EXPERIENCE OR ALSO ON EFFECTS?

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This article claims that restriction by object is a concept purely based on experience and for which the effects of a disputed agreement are not relevant. While an examination of an agreement's effects requires a counterfactual assessment, a restriction by object does not. Decisive for a restriction by object is whether a disputed agreement may be subordinated under a by object type of collusion, considering the agreement's content, objectives, and context, albeit not effects. By object types of collusion can be described as general rules which are inductively based on the experience that agreements with certain content, objectives, and context are sufficiently likely sufficiently harmful to competition.

1 INTRODUCTION

Article 101 of the Treaty on the Functioning of the European Union (henceforth "TFEU") establishes a prohibition of agreements between undertakings[1] that have as their object or effect the restriction of competition on the internal market.[2] If a restriction by object or effect is established, the disputed agreement is void,[3] unless the defendant[4] proves that the agreement is justified according to Article 101(3) TFEU.[5] Restrictions by object and effect are alternative, not cumulative.[6] Additionally, they are sequential, in that the latter is following the prior. First, one considered whether there is a restriction by object. Only if the answer is negative, one should consider effects.[7] However, establishing a restriction by object does not prevent an examination also (but separately) of a restriction by effect.[8] Consequently, restrictions by object must in principle be distinguished from restrictions by effects.

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[1] In this article, the concept of agreements between undertakings includes also concerted practices and decisions by associations of undertakings.

[2] See Article 101(1) TFEU.

[3] See Article 101(2) TFEU.

[4] In this article, the concept of defendant refers to the undertaking alleged of an infringement of EU competition law.

[5] See Alison Jones, Brenda Sufrin, and Niamh Dunne, *Jones & Sufrin's EU Competition Law: Text, Cases, and Materials* (7th edn, Oxford University Press 2019) 207 and 261ff.

[6] See Case 56/65 *Société Technique Minière v Maschinenbau Ulm* ECLI:EU:C:1966:38, 249; Case C-209/07 *Beef Industry Development and Barry Brothers* ECLI:EU:C:2008:643, para 15; Case C-172/14 *ING Pensii* ECLI:EU:C:2015:484, para 29; C-228/18 *Budapest Bank and Others* ECLI:EU:C:2020:265, para 33.

[7] See eg Case C-8/08 *T-Mobile Netherlands and Others* ECLI:EU:C:2009:343, para 28; C-172/14 *ING Pensii* (n 6), para 30; David Bailey, 'Article 101(1)' in Bailey D, and John LE (eds), *Bellamy & Child: European Union Law of Competition* (8th edn, Oxford University Press 2018), 164f.; Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements [2014] OJ C 89/3 (henceforth Technology Transfer Guidelines), paras 13–15.

[8] See C-228/18 *Budapest Bank* (n 6), para 40.

Yet, the distinction is not clear. Despite restrictions by object having been described as "the most serious violations"[9] of EU competition law, confusion exists in legal doctrine. Confusion concerns particularly the delimitation between restrictions by object and effect, which several doctrinal authors consider being blurred.[10] Simultaneously, the Court of Justice (henceforth "CJ") appears satisfied with how things currently stand, by continuously resorting to practically standardised expressions on the definition of restrictions by object.[11]

In three new judgements, however, the CJ has added an important explanation: restrictions by object, which are based on content, objectives, and context of the disputed agreement, are different from restrictions by effect in that no counterfactual assessment is to be undertaken.[12] Thus, this is a suitable time for revisiting the concept of restriction by object on a fundamental basis, in means of elucidating its meaning. In this article, I argue that restrictions by object can be construed as based only on experience and thereby as being fully detached from effects in casu.

However, before proceeding to the main content, I will provide two basic points of information about restrictions by object. Firstly, restriction by object is strictly interpreted.[13] Secondly, the aim of restrictions by object may be described as to pursue legal certainty (including deterrence), by providing predictability, and procedural economy, by easing the burden on responsible authorities.[14] Hence, the concept of restrictions by object may facilitate combatting of anti-competitive conduct and, thereby, the overarching objective of Article 101 TFEU of ensuring that competition in the internal market remains undistorted.[15] Simultaneously, it may entail over-enforcement by prohibiting conduct not being anti-

[9] See Filippo Amato, 'Defining Agreements and Concerted Practices Restricting Competition in EU Competition Law' in Cortese B (ed), *EU competition law: Between Public and Private Enforcement* (Kluwer Law International 2013), 39.

[10] See Van Bael & Bellis, *Competition Law of the European Union* (6th edn, Kluwer Law International 2021) 63f.; Jones, Sufrin, and Dunne (n 5), 225ff.; Bailey, *Bellamy & Child* (n 7), 167; Richard Whish, and David Bailey, *Competition Law* (8th edn, Oxford University Press 2018), 125f.; Maria Ioannidou, and Julian Nowag, 'Can two wrongs make it right? Reconsidering minimum resale price maintenance in the light of Allianz Hungária' (2015) 11(2–3) European Competition Journal 340.

[11] See eg Case C-591/16 P *Lundbeck v Commission* ECLI:EU:C:2021:243, para 112; Case C-228/18 *Budapest Bank* (n 6), paras 51–55; Case C-307/18 *Generics (UK) and Others* ECLI:EU:C:2020:52, paras 64-68; Case C-345/14 *Maxima Latvija* ECLI:EU:C:2015:784, paras 16–20; Case C-67/13 P *CB v Commission* ECLI:EU:C:2014:2204, paras 48–53 and 58.

[12] See C-591/16 P Lundbeck (n 11), paras 139–141; C-601/16 P *Arrow Group and Arrow Generics v Commission* ECLI:EU:C:2021:244, paras 84–78; C-611/16 P *Xellia Pharmaceuticals and Alpharma v Commission* ECLI:EU:C:2021:245, paras 115–117.

[13] See eg C-67/13 P *CB* (n 11), para 58; C-307/18 *Generics* (n 11), para 68; C-228/18 *Budapest Bank* (n 6), para 54.

[14] See C-67/13P *CB* (n 11), opinion of AG Wahl ECLI:EU:C:2014:1958, para 35; C-8/08 *T-Mobile* (n 7), opinion of AG Kokott ECLI:EU:C:2009:110, para 43; Van Bael & Bellis (n 10), 62; Whish and Bailey (n 10), 127; Olga Stefanowicz, 'Guidance on the Limits for the Use of Restrictive Clauses in Commercial Lease Agreements: Once Again on Restrictions by Object' (2016) 9(14) Yearbook of Antitrust and Regulatory Studies 279, 286; comp Maria-Corina Wahlin, 'Post-Cartes Bancaires: Restrictions by Object and the Concept of Vertical Hardcore Restrictions' (2014) 13(4) Comp Law 329, 340; David Bailey 'Restrictions of Competition by Object under Article 101 TFEU' (2012) 49(2) CML Rev 559, 560.

[15] See on the overarching objective C-194/14 P *AC-Treuhand v Commission* ECLI:EU:C:2015:717, para 36; see also Case 6/72 *Europemballage Corporation and Continental Can Company v Commission* ECLI:EU:C:1973:22, paras 23–25; Protocol (No 27) on the internal market and competition [2008] OJ C 115/309; Bailey, *Bellamy & Child* (n 7), 10; Jones, Sufrin, and Dunne (n 5), 42.

competitive (henceforth "false positives"). Accordingly, a balance between facilitating enforcement and preventing incorrect enforcement is warranted.[16]

In the following, I explore the concept of restriction by object and its relation to effects. Firstly, I explain restrictions by object as fundamentally being about experience – a disputed agreement is restrictive by object only if subsumed under a by object type of collusion (section 2). Secondly, I develop the relationship to experience by exploring the concept of by object types of collusions; I describe those types of collusions as inductively created general rules based on the clustering of collusions which are by experience sufficiently likely to cause sufficient harm to competition (section 3). Thirdly, I examine how to subsume a disputed agreement under a by object type of collusion (section 4). Fourthly, I consider the division of the burden of proof for subsuming a disputed agreement under a by object type of collusion (section 5). Lastly, some elaborating and summarizing remarks conclude the article (section 6).

2 RESTRICTIONS BY OBJECT AS FUNDAMENTALLY ABOUT EXPERIENCE

The wording of Article 101(1) TFEU does not reveal the underlying complexity of the concept of restriction by object. Theoretically perplexing, the concept of restriction by object has been defined objectively. Subjective intentions of the parties merely constitute potential proof but cannot be decisive;[17] a finding of pro-competitive (and lack of anti-competitive) subjective intent does not as such prevent a finding of a restriction by object.[18] Instead, the concept of restriction by object is based on "the objective meaning and purpose of the agreement considered in the economic context in which it is to be applied".[19] Accepting this objective definition, the question is what requirements must be met for establishing that an agreement objectively pursues the object of restricting competition (in other words an anti-competitive object).

It appears that 'revealing a sufficient degree of harm to competition' constitutes the summarising epithet of what is required to establish a restriction by object. More specifically, in case C-228/18 *Budapest Bank*, the CJ proclaimed that "the essential legal criterion"[20] is that the agreement "reveals in itself a sufficient degree of harm to competition for it to be considered that it is not necessary to assess its effects".[21] Read in its context, it appears that "certain types"[22] of collusion reveal such harm. The rationale is that "certain collusive

[16] See Jones, Sufrin, and Dunne (n 2), 55f., 215ff, and 234f.; comp. C-67/13 P *CB* (n 11), para 58.
[17] See eg C-209/07 *BIDS* (n 6), para 21; Bailey, 'Restrictions of Competition by Object under Article 101 TFEU' (n 14), 578f.
[18] See Jones, Sufrin, and Dunne (n 5), 219f.; Bailey, *Bellamy & Child* (n 7), 169; Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C 101/97 (henceforth Article 101(3) Guidelines), para 22; Luc Peeperkorn, 'Defining "By Object" restrictions' [2015] 3 Concurrences 40, 49; Ola Kolstad, 'Object contra effect in Swedish and European competition law' (Uppdragsforskningsrapport 2009:3, Konkurrensverket: Swedish Competition Authority 2009), 13; Bailey, 'Restrictions of Competition by Object under Article 101 TFEU' (n 14), 578f.
[19] See Whish and Bailey (n 10), 123; Joined cases 29/83 and 30/83 *CRAM v Commission* ECLI:EU:C:1984:130, paras 25–26.
[20] See C-228/18 *Budapest Bank* (n 6), para 37.
[21] See ibid, para 37; see also eg Bailey, *Bellamy & Child* (n 7), 165; C-209/07 *BIDS* (n 6), para 15; C-8/08 *T-Mobile* (n 7), para 28; C-307/18 *Generics* (n 11), para 67.
[22] See C-228/18 *Budapest Bank* (n 6), para 35.

behaviour […] may be considered so likely to have negative effects […] that it may be considered redundant […] to prove that it has actual effects on the market."[23] The court explained that we can know this because "[e]xperience shows"[24] that so is the case.

One can discern a two-step procedure from the court's reasoning. First, certain types of collusion reveal, based on experience, a sufficient degree of harm to competition (henceforth, called 'by object types of collusion'). Secondly, the contested agreement in a particular case must be possible to subsume under one such type of collusion.[25] In hindsight, this appears not to be a new approach. It has been tenably proposed that it was adopted already in case C-67/13 P *CB*.[26] The traits of the approach can furthermore be traced back to at least Case 19/77 *Miller*, where the court held that "by its very nature, a clause prohibiting exports constitutes a restriction on competition".[27]

Still, these findings leave three questions unanswered. Firstly, what are by object types of collusion? Secondly, what is required for an agreement to be subsumed under a by object type of collusion? Thirdly, how is the burden of proof divided between the responsible competition authority and the defendant, respectively? In the following, these questions are explored in turn.

3 BY OBJECT TYPES OF COLLUSION

An agreement must be subsumed under a by object type of collusion to be restrictive by object. The subsumption of an agreement under a by object type of collusion is possible if "[e]xperience shows that such behaviour leads to"[28] sufficient harm with sufficient likeliness.[29] Two questions arise. Firstly, when is experience sufficient for allowing clustering of certain agreements into a 'type' of collusion that is considered sufficiently likely to be sufficiently harmful? Secondly, what do sufficient harmfulness and sufficient likeliness mean?

As to the first question, it appears that the court has established four guiding conditions for the sufficiency of experience. For an agreement to be restrictive by object, the experience must be "sufficiently reliable and robust"[30] and "sufficiently general and consistent".[31] Only experience meeting those conditions may show that a type of collusion is sufficiently likely to cause sufficient harm as to be considered anti-competitive by its very nature.[32]

About the meaning of those four concepts, the following can be adduced. The requirement of 'reliable' and 'robust' experience appears to be related to whether the experience is substantial enough for doubtlessly considering a type of collusion to be

[23] See ibid, para 36.
[24] See ibid, para 36; comp Bailey, *Bellamy & Child* (n 7), 168; Article 101(3) Guidelines (n 18), para 21.
[25] See Peeperkorn (n 18), 50; Case C-611/16 P *Xellia Pharmaceuticals* (n 12), para 121; comp Kolstad (n 18), 6ff. and 19f.
[26] See Peeperkorn (n 18), 43.
[27] See Case 19/77 *Miller International Schallplatten GmbH v Commission* ECLI:EU:C:1978:19, para 7.
[28] See C-228/18 *Budapest Bank* (n 6), para 36 and 54; see also C-286/13 P *Dole Food and Dole Fresh Fruit Europe v Commission* ECLI:EU:C:2015:184, para 115; C-67/13 P *CB* (n 11), para 51; Article 101(3) Guidelines (n 18), para 21.
[29] See eg C-286/13 P *Dole* (n 28), paras 113–115; C-67/13 P *CB* (n 11), paras 49–51; C-307/18 *Generics* (n 11), paras 64–67; comp Jones, Sufrin, and Dunne (n 5), 281f.; Ioannidou and Nowag (n 10), 350.
[30] See C-228/18 *Budapest Bank* (n 6), para 76.
[31] See ibid, para 79.
[32] See ibid, paras 76 and 79 with 35 and 36; see for that effect C-67/13 *CB* (n 11).

sufficiently likely to entail sufficient harm.[33] As for generality and consistency, the implication is obscure since the court has not defined those concepts. However, the concepts could tenably be understood as subordinated to the requirement of reliable and robust experience.[34] As Advocate General Bobek has expressed the matter, the question is whether the experience is sufficiently widespread and consistent for classifying the relevant type of collusion as "*generally* harmful to competition".[35]

As for the meaning of 'general', the concept could semantically be understood as requiring sufficient experience for the inductive creation of a generalised rule.[36] The experience that certain agreements sufficiently likely entail sufficient harm,[37] should allow for clustering of those agreements into a 'type' of collusion based on discovered commonalities (common denominators).[38] Two important points should be made in this regard. Firstly, relevant experience appears not to be confined to previous case-law but may include also other experiences such as economic theory.[39] Secondly, a type of collusion is not necessarily confined to a "specific category of an agreement in a particular sector";[40] instead, Advocate General Kokott has described the experience-based rule in the following way:

> [C]ertain *forms of collusion*, such as the exclusion of competitors from the market, are, *in general and in view of the experience gained*, so likely to have negative effects on competition that it is not necessary to demonstrate that they had such effects in the particular case at hand.[41]

Consequently, a novel form of agreement can be found restrictive by object, if it features the common denominators of a (generally defined) by object type of collusion.[42]

As for the meaning of 'consistency', in its turn, it could semantically be understood as concerning whether the overall result of the clustered collusions renders the type of collusion

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[33] See C-228/18 *Budapest Bank* (n 6), para 76 with the presumption of innocence; see on the presumption of innocence including the principle that any doubt should benefit the defendant T-442/08 *CISAC v Commission* ECLI:EU:T:2013:188, paras 92–93; Jones, Sufrin, and Dunne (n 5), 140; Case C-89/11 P *E.ON Energie v Commission* ECLI:EU:C:2012:738, para 72; C-593/18 P *ABB v Commission* ECLI:EU:C:2019:1027, para 100; see also about similarities with criminal law Jones, Sufrin, and Dunne (n 5), 882ff.; C-272/09 P *KME Germany and Others v Commission* ECLI:EU:C:2011:810, opinion of AG Sharpston ECLI:EU:C:2011:63, para 67; C-501/11 P *Schindler Holding and Others v Commission* ECLI:EU:C:2013:522, para 33.

[34] See for indication of such subordination C-228/18 *Budapest Bank* (n 6), opinion of AG Bobek ECLI:EU:C:2019:678, paras 70–71.

[35] See C-228/18 *Budapest Bank*, opinion of AG Bobek (n 34), para 63, seemingly followed by the court in C-228/18 *Budapest Bank* (n 6), para 77; see also Peeperkorn (n 18), 44.

[36] See for the definition of 'general' Cambridge dictionary – "involving or relating to most or all people, things, or places, especially when these are considered as a unit" < <https://dictionary.cambridge.org/dictionary/english/general>, visited 2021-04-06; Merriam-Webster > "involving, relating to, or applicable to every member of a class, kind, or group" <https://www.merriam-webster.com/dictionary/general>, visited 2021-04-06.

[37] Comp C-591/16 P *Lundbeck* (n 11), opinion of AG Kokott ECLI:EU:C:2020:428, para 156.

[38] See on common denominators C-307/18 *Generics* (n 11), para 90–93; comp. C-611/16 P *Xellia Pharmaceuticals* (n 12), paras 96–99 and 121 – clarifying that there are certain categories of agreements, based on certain traits, being harmful to competition.

[39] See Case C-67/13 P *CB*, opinion of AG Wahl (n 14), para 56 and 79; Stina Tannenbaum, 'The concept of the restriction of competition 'by object' under article 101(1)' (2015) 22(1) MJECL 138, 143f.; Peeperkorn (n 18), 44f.; comp. C-591/16 P *Lundbeck* (n 11), para 130.

[40] See C-591/16 P *Lundbeck*, opinion of AG Kokott (n 37), para 156.

[41] See C-591/16 P *Lundbeck*, opinion of AG Kokott (n 37), para 156 (emphasis added).

[42] See T-472/13 *Lundbeck v Commission* [2016] ECLI:EU:T:2016:449, paras 438 and 774, confirmed on appeal in C-591/16 P *Lundbeck* (n 11), para 130; comp Peeperkorn (n 18), 44f.

sufficiently likely to cause sufficient harm.[43] Experience that a type of collusion merely sporadically entails sufficient harm could barely be considered to reliably and robustly support the conclusion that that collusion is sufficiently likely harmful.[44]

In summary, it could be understood that experience is sufficiently reliable and robust for classifying an agreement as a by object type of collusion if the experience is sufficiently general and consistent. Experience is sufficiently general and consistent if common denominators can be discerned for agreements that are sufficiently likely to cause sufficient harm to competition.

As to the second question – the meaning of sufficient harmfulness and sufficient likeliness – a general description of by object types of collusions that has figured in case-law is that those types of collusion "reveal a sufficient degree of harm to competition to be regarded as being restrictions by object".[45] This is because they are "so likely to have negative effects"[46] as to render consideration to their actual effects redundant.[47] As discerned above, sufficient likeliness and sufficient harm are determined based on experience. In the following part of this section, I examine, first, the required degree of harm and, subsequently, the required likeliness.

The substance of a sufficient degree of harm is not apparent, but two constituent elements are tenable. As for the first element, it has been proposed in the legal doctrine that a certain type of collusion is 'sufficiently harmful' only if experience shows that it entails not only negative effects on competition but *net negative* effects. The latter implies that the relevant type of collusion should be restrictive under Article 101(1) as well as not justified under Article 101(3) TFEU.[48] This understanding is tenable as endorsing consistency. Namely, case-law describes by object types of collusion as entailing a fall in competitive benefits, to the detriment of consumers,[49] which is ultimately the case only absent fully counteracting efficiency gains.[50] Furthermore, the understanding explains and legitimises the perception that restrictions by object are only unlikely (albeit not impossibly) justified under Article 101(3) TFEU.[51] Lastly, it harmonises with the restrictive interpretation of restrictions by object,[52] thus reducing the risk of false positives.[53]

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[43] See for the definition of 'consistent' Cambridge dictionary – "always behaving or happening in a similar, especially positive, way" < https://dictionary.cambridge.org/dictionary/english/consistent>, visited 2021-04-06>; Merriam-Webster – "marked by harmony, regularity, or steady continuity" < https://www.merriam-webster.com/dictionary/consistent>, visited 2021-04-06.

[44] Comp C-228/18 *Budapest Bank* (n 6), para 79; Mark Friend, 'Restrictions by Object Under EU Competition Law' (2020) 79(3) CLJ 423, 426f.

[45] See C-228/18 *Budapest Bank* (n 6), para 35.

[46] See ibid, para 36.

[47] See eg C-286/13 P *Dole* (n 28), paras 113–115; C-67/13 P *CB* (n 11), paras 49–51; C-307/18 *Generics Generics* (n 11), paras 64–67; comp Jones, Sufrin, and Dunne (n 5), 281f.; Ioannidou and Nowag (n 10), 350.

[48] See Peeperkorn (n 18), 41f. and 49; Pablo Ibáñez Colomo and Alfonso Lamadrid, 'On the Notion of Restriction of Competition: What We Know and What We Don't Know We Know' (SSRN 2016) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2849831> accessed 27 March 2021, 21; comp C-228/18 *Budapest Bank* (n 6), paras 35–36; C-228/18 *Budapest Bank*, opinion of AG Bobek (n 34), para 40.

[49] See C-228/18 *Budapest Bank* (n 6), para 36; C-57/13 P *CB* (n 11), para 51.

[50] Comp Article 101(3) Guidelines (n 18), para 85; Jones, Sufrin, and Dunne (n 5), 269.

[51] See Article 101(3) Guidelines (n 18), para 46; Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice, SWD(2014) 198 final (henceforth By Object Guidance), 4; Bailey, 'Restrictions of Competition by Object under Article 101 TFEU' (n 14), 593ff.; Amato (n 9), 40 and 46.

[52] See C-67/13 P *CB* (n 11), para 58; C-307/18 *Generics* (n 11), para 68; C-228/18 *Budapest Bank* (n 6), para 54.

[53] Comp Peeperkorn (n 18), 49.

As a second and additional element, only collusion having, by experience, an appreciable effect on competition appears to be 'sufficiently harmful'. Namely, sufficient is when something amounts to at least what is required; as settled since early days, agreements with merely an "insignificant effect"[54] on competition fall outside the scope of Article 101(1) TFEU. This condition has later been titled a requirement of appreciable effect on competition.[55] Naturally, by object types of collusion should thus entail at least an appreciable restriction of competition. Not the least, a condition of appreciable restriction would explain the notorious expression in case C-226/11 *Expedia* – the restriction caused by an agreement classified as a restriction by object is appreciable "by its nature".[56]

Leaving the requirement of sufficient harm, such harm must additionally be sufficiently likely. Tenably understood, the latter requires experience to render negative effects so likely that there can be no reasonable doubt as to their realisation.[57] A high requirement of likeliness would be consistent with both the restrictive interpretation of restrictions by object,[58] and the principle within competition law that any doubt must benefit the defendant.[59] Consonantly, the court has proclaimed that the likeliness shall render an assessment of effects superfluous; in other words, "it may be considered redundant […] to prove that [the disputed agreement] has actual effects on the market".[60]

Importantly, however, the requirement of likeliness relates only to the effects of the relevant type of collusion in general (by experience) and not of an individual disputed agreement.[61] Adopting a likeliness requirement in casu would amount to an alignment of restrictions by object and restrictions by effect since the latter is conditioned upon actual or potential (likely) anti-competitive effects in casu.[62]

To sum up, seemingly only types of collusion that by experience are sufficiently likely to entail sufficient harm to competition are by object types of collusion. A palatable interpretation is that a sufficient degree of harm requires the relevant type of collusion to be, by experience, sufficiently likely to entail both appreciable and net negative effects. This harm is sufficient likely if experience precludes any reasonable doubt as to the realisation of the restrictive effects of the type of collusion in general.

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[54] Case 5/69 *Voelk v Vervaecke* ECLI:EU:C:1969:35.
[55] See Jones, Sufrin, and Dunne (n 5), 196; Jonathan Faull and others, 'Article 101' in Jonathan Faull and Ali Nikpay (eds), *Faull & Nikpay: the EU law of competition* (3rd edn, Oxford University Press 2014), 243; Bailey, 'Restrictions of Competition by Object under Article 101 TFEU' (n 14), 590ff.
[56] See C-226/11 *Expedia* ECLI:EU:C:2012:795, para 37; comp Bailey, *Bellamy & Child*, 171 (n 7); Faull and others (n 55), 246f.; Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) [2014] OJ C 291/1 (henceforth De Minimis Notice), paras 2 and 13.
[57] Comp Wahlin (n 14), 340.
[58] See C-67/13 P *CB* (n 11), para 58; C-307/18 *Generics* (n 11), para 68; C-228/18 *Budapest Bank* (n 6), para 54.
[59] See T-442/08 *CISAC* (n 33), paras 92–93; Jones, Sufrin and Dunne (n 5), 140; C-89/11 P *E.ON* (n 33), para 117.
[60] See C-228/18 *Budapest Bank* (n 6), para 36; C-67/13 P *CB* (n 11), para 51; C-345/14 *Maxima Latvija* (n 11), para 19.
[61] See C-67/13 P *CB* (n 11), para 51; C-228/18 *Budapest Bank* (n 6), para 36; C-307/18 *Generics* (n 11), opinion of AG Kokott ECLI:EU:C:2020:28, para 159.
[62] See Jones, Sufrin, and Dunne (n 5), 240; Ibáñez Colomo and Lamadrid (n 48), 35; T-347/94 *Mayr-Melnhof Kartongesellschaft v Commission* ECLI:EU:T:1998:101, para 136; Case C-67/13 P *CB* (n 11), paras 82–83; Faull and others (n 55), 284ff.; Bailey, *Bellamy & Child* (n 7), 176f.; Article 101(3) Guidelines (n 18), para 24.

4 SUBSUMPTION UNDER A BY OBJECT TYPE OF COLLUSION

As discerned above, restrictions by object are fundamentally about subsuming the disputed agreement under (in other words, match it with) a by object type of collusion, based on experience. In establishing a restriction by object, one must have regard to three factors: the agreement's content, its objectives, and its economic and legal context.[63] Thus, the same three factors should form constituents of the experience of by object types of collusion.[64] Yet, while content and objectives relatively clearly are necessary for the matching procedure,[65] there is less clarity in the role of context.

Namely, it has been proposed that the context analysis, rather than being part of the requirement of matching with experience, establishes a second requirement: a limited effects analysis, capable of rebutting an experience-based conclusion drawn from the content and objectives.[66] The origins are most clearly derived from case C-32/11 *Allianz Hungária*, based on case C-8/08 *T-Mobile*. In *Allianz Hungária*, the court proclaimed the following:

> [I]t is sufficient that [an agreement] has the potential to have a negative impact on competition, that is to say, that it be *capable in an individual case* of resulting in the prevention, restriction or distortion of competition within the internal market.[67]

On this backdrop, it has been proposed that the context analysis includes consideration to effects. Thus, the distinction between a context and effects analysis would be "more one of degree than of kind".[68]

In contrast to those proposals, the subsequent parts of section 4 of this article present an explanation of restrictions by object as not including any assessment of a disputed agreement's effects. The explanation is closely connected to the judgements of the CJ which, as I show in the following, can be structured in a two-step approach. The first step is to establish a match between the disputed agreement and the common denominators of a by object type of collusion. The second step is to assess whether the disputed agreement – despite a match in the first step – features contextual anomalies, preventing subsumption of the agreement under a by object type of collusion.

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[63] See Peeperkorn (n 18), 50; comp C-67/13 P *CB* (n 11), para 53.

[64] Comp Tannenbaum (n 39), 142ff. and 148 – relating context to experience and distinguish it from effects; Peeperkorn (n 18), 45ff. and 50 – recognising context as a factor for matching with experience; See for example on content, objectives, and context in relation to experience C-307/18 *Generics*, opinion of AG Kokott (n 61), para 159 – "market sharing between competitors"; C-67/13 P *CB* (n 18), para 51 – "horizontal price-fixing by cartels".

[65] See Peeperkorn (n 18), 46 – "While the wording of every agreement and its clauses may be different, an investigation of its content and objectives will usually make clear whether the agreement in question, for instance, is a price fixing agreement."; Friend (n 44), 425.

[66] See in general eg Jones, Sufrin, and Dunne (n 5), 236; C-228/18 *Budapest Bank*, opinion of AG Bobek (n 34), paras 49–50; see about proposals of a quick effects analysis Ioannidou and Nowag (n 11), 361ff.; comp Bailey 'Restrictions of Competition by Object under Article 101 TFEU' (n 14), 585ff.; see about proposals of an incapability defence C-228/18 *Budapest Bank*, opinion of AG Bobek (n 34), paras 48–49; Okeoghene Odudu, 'Restriction of Competition by Object – What's the Beef?' (2009) 8(1) Comp Law 11, 15; Faull and others (n 55), 242.

[67] See C-32/11 *Allianz Hungária Biztosító and Others* ECLI:EU:C:2013:160, para 38 (emphasis added); comp C-8/08 *T-Mobile* (n 7), para 31.

[68] See C-228/18 *Budapest Bank*, opinion of AG Bobek (n 34), para 50; comp Ioannidou and Nowag (n 10), 363; Faull and others (n 55), 242.

Step 1 – Match between the disputed agreement and common denominators of a by object type of collusion considering content, objectives, and context, but not effects

Proposing a link between context and effects indubitably appears inappropriate. Firstly, analysing the context (an observable setting) is an essential element of any restriction – by object as well as by effect – since no restrictions can occur in an economic or legal vacuum.[69] Thus, inevitably, our experience of restrictive collusions includes not only content and objectives, but also context.[70] For instance, by object types of collusion may vary depending on the competitive relation – horizontal or otherwise – between the colluding parties.[71] Secondly, an assessment of context (the observable setting) is separate from an assessment of effects (the result of a particular cause).[72] The latter requires both an observation of the context of the agreement, and a comparison with the context in a counterfactual scenario; the differences discerned are the effects.[73] In other words, while a restriction by object requires consideration to "the economic and legal context of which [the disputed agreement] forms a part",[74] a restriction by effect requires, additionally, that "competition should be assessed within the actual context in which it would occur *in the absence of the agreement* in dispute".[75]

The presented division between consideration to context and effects is apparent from case C-591/16 P *Lundbeck*. In this case, the CJ held as follows:

> [U]nless the clear distinction between the concept of 'restriction by object' and the concept of 'restriction by effect' […] is to be held not to exist, an examination of the 'counterfactual scenario', the purpose of which is to make apparent the effects of a given concerted practice, cannot be required in order to characterise a concerted practice as a 'restriction by object'.[76]

Aligned with this expression, case-law has settled that "there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention,

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[69] See Bailey, *Bellamy & Child* (n 7), 153; see about restriction by object C-209/07 *BIDS* (n 6), para 16; C-31/11 *Allianz Hungária* (n 67), para 36; C-345/14 *Maxima Latvija* (n 11), para 16; C-591/16 P *Lundbeck* (n 11), para 112; see about restriction by effects C-345/14 *Maxima Latvija* (n 11), para 26; C-234/89 *Delimitis v Henninger Bräu* ECLI:EU:C:1991:91, para 14; Case 23/67 *Brasserie De Haecht v Wilkin Janssen* ECLI:EU:C:1967:54, 415.

[70] Comp Peeperkorn (n 18), 45 and 50; C-611/16 P *Xellia Pharmaceuticals* (n 12), paras 116, 117, 120, and 121; C-601/16 P *Arrow* (n 12), para 87; C-67/13 P *CB* (n 11), para 78; Tannenbaum (n 39), 143f. and 148.

[71] See Peeperkorn, 46; By Object guidance (n 51), 4; C-228/18 *Budapest bank* (n 6), para 36 – giving the example of "horizontal price-fixing by cartels" as a by object type of collusion.

[72] See C-611/16 P *Xellia Pharmaceuticals* (n 12), paras. 116–117; C-601/16 P *Arrow* (n 12), paras 85–87; see about an early conclusion on this matter Tannenbaum (n 39), 148.

[73] see Bailey, *Bellamy & Child* (n 7), 158f.; C-382/12 P *MasterCard and Others v Commission* ECLI:EU:C:2014:2201, paras 164–169; Horizontal Co-operation guidelines, para 29; Vertical Guidelines, para 97.

[74] See C-228/18 *Budapest Bank* (n 7), para 51; see also C-67/13 P *CB* (n 11), para 53; C-591/16 P *Lundbeck* (n 11), para 112.

[75] See C-307/18 *Generics* (n 11), para 118 (emphasis added); see also C-228/18 *Budapest Bank* (n 6), para 55; Case 42/84 *Remia BV and others v Commission* ECLI:EU:C:1985:327, para 18; C-382/12 P *MasterCard* (n 73), paras 164–169.

[76] See C-591/16 P *Lundbeck* (n 11), para 140.

restriction or distortion of competition."[77] In conclusion, and contrary to what has been proposed as a matter of legal consensus,[78] the finding of a restriction by object does not necessitate a counterfactual assessment, and (consequently) not an assessment of effects.[79]

Since context and effect are distinct concepts, consideration to the prior naturally does not justify consideration to the latter. Consequently, only one requirement for establishing a restriction of competition by object appears to exist; it suffices that disputed agreements "can in fact be classified as 'restrictions by object"'.[80] An agreement can be classified as a restriction by object only if it "reveals a sufficient degree of harm to competition".[81] From experience, by object types of collusion reveal a sufficient degree of harm to competition.[82] Thus, an agreement can be classified as restrictive by object only if the experience of a by object type of collusion is sufficiently robust and reliable for being applied to that agreement, having regard to its content, objectives, and context.[83] This assessment is limited to considering the possibility to rely on the experience of by object types of collusion; as the CJ held in Lundbeck, the Commission could declare an agreement restrictive by object solely based on its content, objectives, *and* context but "was not required, however, to examine the effects thereof."[84] Phrased differently, the scope of the assessment appears limited to whether the traits of the disputed agreement correlates (matches) with the common denominators of a by object type of collusion.

I will now concretise these findings by an example based on case C-307/18 *Generics*. This case concerned GlaxoSmithKline ("GSK") that produced a medicine to which it held related patents. Several (potential) competitors contemplated entering the relevant market with generic medicines, which led GSK to initiate genuine patent infringement proceedings.[85] The proceedings were concluded by settlement agreements. Through these agreements, the alleged patent infringers undertook, in return for substantial payments by GSK, to neither enter the relevant market nor challenge the patents of GSK. Simultaneously, the agreements included provisions allowing for limited distribution of generics by the alleged patent infringers.[86]

The CJ in *Generics* described the relevant experience for establishing that a dispute settlement agreement is harmful by nature. It held that such agreements are in principle not

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[77] See Joined cases 56 and 58/64 *Consten and Grundig v Commission of the EEC* ECLI:EU:C:1966:41, 342; see also C-209/07 *BIDS* (n 6), paras 16 and 18; C-228/18 *Budapest Bank* (n 6), paras 35, 34 and 54; C-307/18 *Generics* (n 11), para 64; C-591/16 P *Lundbeck* (n 11), para 141; C-68/12 *Slovenská sporiteľňa* ECLI:EU:C:2013:71, para 17; C-601/16 P *Arrow* (n 12), para 84–87; C-440/11 P *Commission v Stichting Administratiekantoor Portielje* ECLI:EU:C:2013:514; Bailey, *Bellamy & Child* (n 7), 170.

[78] See about proposed legal consensus Ibáñez Colomo and Lamadrid (n 48), 4, 8ff., and 44; comp Article 101(3) Guidelines (n 18), para 17.

[79] Comp C-382/12 P *MasterCard* (n 73), paras 186–192; n 75 and text thereto.

[80] C-307/67 *Generics* (n 11), para 65.

[81] See C-228/18 *Budapest Bank* (n 6), para 51.

[82] See ibid, paras 35–36.

[83] See, to that effect, C-228/18 *Budapest Bank* (n 6)*;* C-67/13 *CB* (n 11); Comp Peeperkorn (n 18), 45f.; C-591/16 P *Lundbeck* (n 11), para 112; C-307/18 *Generics* (n 11), paras 64–67 and 103; C-345/14 *Maxima Latvija* (n 11), paras 16–20; C-307/18 *Generics*, opinion of AG Kokott (n 61), paras 100–101.

[84] See C-591/16 P *Lundbeck* (n 11), para 141; comp C-601/16 P *Arrow* (n 12), para 87; C-382/12 P *MasterCard* (n 73), para 186 – the court concluded that the GC had not adopted a restriction by object because it had based its decision on effects.

[85] See about genuine disputes C-307/18 *Generics* (n 11), para 76.

[86] See C-307/18 *Generics* (n 11), para 75.

problematic.[87] However, a settlement agreement was considered restrictive by object if the value transferred by it "cannot have any explanation other than the commercial interest of both the holder of the patent and the party allegedly infringing the patent not to engage in competition on the merits".[88] The court outlined three conditions for making the latter finding. Firstly, there should be a settlement agreement between a patent holder and a (potential) competitor, where the latter undertakes not to enter the relevant market.[89] Secondly, the value transferred to the alleged infringers should not be justified by "any quid pro quo or waivers"[90] by the patent holder. Thirdly, the value transferred should appear sufficiently beneficial as to, irrespective of a counterfactual scenario, incentivise the alleged infringer to abstain from entering the market.[91]

The conditions outlined could be understood as the common denominators of the relevant by object type of collusion. The common denominators are not as clearly outlined for all by object types of collusion. For instance, concerning horizontal price-fixing, the conditions have been expressed in different terms, which, however, all boils down to (firstly) an agreement between competitors, that (secondly) aims at directly or indirectly removing uncertainty regarding future pricing.[92] If the common denominators are met by an agreement, it "must, *in principle*, be characterised as a 'restriction by object'".[93] Contrastingly, if not met, a restriction by object appears not possible to establish; the agreement cannot, in that case, be classified as a by object type of collusion.[94]

The understanding of restrictions by object which is presented in this section appears by no means revolutionary. Advocate General Kokott has already shed light in this direction. In her opinion in *Generics*, she explained that contextual elements, firstly, are necessary for classifying an agreement as a by object type of collusion[95] and, secondly, may cast doubt on that classification[96] without effects having to be considered.[97] Furthermore, in her opinion in *T-Mobile*, she framed the requirement for finding a restriction by object in the following way:

> [I]t is sufficient that a [disputed agreement] has the potential – *on the basis of existing experience* – to produce a negative impact on competition. In other words, the [disputed agreement] must simply be capable in an individual case, that is, having regard to the specific legal and economic context, of resulting

[87] See ibid, para 85–86.
[88] See ibid, para 87.
[89] See ibid, para 90.
[90] See ibid, para 92.
[91] See ibid, para 93; comp C-591/16 P *Lundbeck* (n 11), para 140.
[92] See eg C-286/13 P *Dole* (n 28), paras 121, 122, 124 and 134; C-8/08 *T-Mobile* (n 7), para 43; By Object Guidance (n 51), 6; comp Article 101(1)(a) TFEU; C-228/18 Budapest Bank (n 6), para 36.
[93] See C-307/18 *Generics* (n 11), para 95 (emphasis added).
[94] Comp ibid, paras 85–87; n 36 – 42 and text thereto; See about agreement not meeting the common denominators C-345/14 *Maxima Latvija* (n 11), para 21.
[95] See C-307/18 *Generics*, opinion of AG Kokott (n 61), paras 158–159.
[96] See ibid, paras 165, 166, and 180.
[97] See ibid, para 164.

> in the prevention, restriction or distortion of competition within the common market.[98]

This expression does illuminate the nearly identical expressions about capability in *T-Mobile* and *Allianz Hungária*;[99] particularly considering that the CJ, in *T-Mobile,* adopted the approach "as pointed out by the Advocate General at point 46 of her Opinion".[100] Thus, maybe it has never been about effects – maybe it has always been about matching with experience. That understanding is attractive considering the quite consequent assurance by the CJ that restrictions by object are separated from effects.[101]

Step 2 – Agreement at dispute does not present any contextual anomalies that bring doubt to reliance on experience

Even if the common denominators are met, an agreement is only "in principle"[102] possible to subsume under a by object type of collusion. All the relevant factors of the individual case must be assessed; contextual factors in addition to the common denominators (henceforth called 'contextual anomalies') may exist which cast doubt on the reliability of experience in casu.[103] This is not strictly a question of rebuttal, since a restriction by object is not a presumption but rather an inchoate offence.[104] Once a restriction by object is established, the agreement is prohibited unless objectively justified under Article 101(1) TFEU or justified under Article 101(3) TFEU.[105] Instead of rebutting a finding of a restriction by object, the question appears to concern only whether the experience is sufficiently reliable and robust for fulfilling the standard of proof for finding that the disputed agreement is a by object type of collusion and thus restrictive by object.[106] In the following, I will explain, firstly, that experience can tell whether contextual anomalies are relevant or not and, secondly, that effects in casu are still not necessary to assess.

Firstly, in *Generics* the CJ dismissed three factors as not precluding reliance on experience as to the restrictive object. In the first instance, the court held as settled case-law that a patent "does not permit its holder to enter into contracts that are contrary to Article 101 TFEU".[107] In the second instance, the court dismissed any relevance of uncertainty as to the outcome of the court proceedings, and thus to the patent's strength – such uncertainty is, as settled, part of the competitive process.[108] In the last instance, the court held that *alleged*

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[98] See C-8/08 *T-Mobile*, opinion of AG Kokott (n 15), para 46 (emphasis added); see also Ibáñez Colomo and Lamadrid (n 48), 34f.
[99] See C-8/08 *T-Mobile* (n 7), para 31; C-32/11 *Allianz Hungária* (n 67), para 38 and text thereto.
[100] See C-8/08 *T-Mobile* (n 7), para 31.
[101] See n 77–79.
[102] See C-307/18 *Generic* (n 11), para *65*.
[103] See C-307/18 *Generics*, opinion of AG Kokott (n 61), paras 158–161; Comp C-307/18 *Generics* (n 11), para 67; C 601/16 P *Arrow* (n 12), para 87.
[104] See eg Bailey, 'Restrictions of Competition by Object under Article 101 TFEU' (n 14), 561ff.; C-8/08 *T-Mobile*, opinion of AG Kokott (n 14), para 47; comp C-8/08 *T-Mobile* (n 7), para 31; Bailey, *Bellamy & Child* (n 7), 170f.
[105] See eg C-307/18 *Generics*, opinion of AG Kokott (n 61), para 162 and 147–156; Bailey, 'Restrictions of Competition by Object under Article 101 TFEU' (n 14), 579ff. and 593ff.; By Object Guidance (n 51), 4.
[106] See C-307/18 *Generics*, opinion of AG Kokott (n 61), para 161 with para 162; C-307/18 *Generics* (n 11), para 107 with paras 67 and 111.
[107] See C-307/18 *Generics* (n 11), para 97; comp about Article 102 TFEU Case T-201/04 *Microsoft v Commission* [2007] ECLI:EU:T:2007:289, para 690.
[108] See C-307/18 *Generics* (n 11), para 100 with para 81.

pro-competitive effects cannot preclude a restriction by object unless the defendant demonstrates[109] that those effects are relevant,[110] specifically related to the agreement concerned,[111] and "sufficiently significant, so that they justify a reasonable doubt as to whether the [agreement] caused a sufficient degree of harm to competition, and, therefore, as to its anticompetitive object."[112] Consequently, experience can answer what contextual factors are irrelevant and, assumptively, also which are relevant.[113]

Secondly, the CJ in *Generics* appears to have considered that effects in casu can rebut a finding of a restriction by object. In the following, I will explain three untenable interpretations of the judgment. Subsequently, one more attractive interpretation is explained, which does not recognise any role of effects in casu.

A first interpretation would be that a restriction by object is a presumption that can be rebutted if the undertakings concerned prove that the disputed agreement is plausibly net pro-competitive.[114] If an agreement is proven to be net pro-competitive, there is either no restriction at all or a restriction that is counterweighed by positive effects. Rebutting a restriction by object in the latter scenario would bring a rule of reason to the assessment of restrictions by object. That order would both blur the distinction between Article 101(1) and 101(3) TFEU[115] and contradict expressions in case-law that there exists no rule of reason under Article 101(1).[116] Factors other than those calling in question the *existence* of a restriction should be considered only under Article 101(3).[117] Consequently, the idea appears too broad to be correct.

A second interpretation would be that the court considered the likelihood of certain effects in casu. This is untenable. Requiring sufficient certainty as to the restrictive effects in casu would undermine the established division between restrictions by object and effect;[118] one cannot overlook the CJ's statements that an assessment of restriction by object, including consideration to context, "does not imply an assessment of the anticompetitive effects"[119] of the disputed agreement.

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[109] See ibid, para 105 with para 103.
[110] See ibid, para 105.
[111] See ibid, para 105.
[112] See ibid, para 107.
[113] See about contextual factors being relevant for instance specialisation agreements fixing prices for joint distribution to immediate customers Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements, Article 4(a); By Object Guidance (n 51), 7.
[114] See Ibáñez Colomo and Lamadrid (n 48), 24.
[115] See about Article 101(3) TFEU requiring net-positive effects Article 101(3) Guidelines (n 18), para 85; Jones, Sufrin, and Dunne (n 5), 269.
[116] See C-307/18 *Generics* (n 11), para 104; C-307/18 *Generics*, opinion of AG Kokott (n 61), para 148; Case T-208/13 *Portugal Telecom v Commission* ECLI:EU:T:2016:368, para 102; comp C-209/07 *BIDS* (n 6), opinion of AG Trstenjak ECLI:EU:C:2008:467, para. 55–58; see for the possibility of application of Article 101(3) to restrictions by object Wahlin (n 14), 330f.; Article 101(3) Guidelines (n 18), paras 20 and 46; Jones, Sufrin, and Dunne (n 5), 262f.; Case T-168/01 *GlaxoSmithKline Services v Commission* ECLI:EU:T:2006:265, upheld in the relevant regard in joined cases C-501/06, 513/06, 515/06, and C-519/06 P *GlaxoSmithKline Services and Others v Commission and Others* ECLI:EU:C:2009:610.
[117] See C-382/12 P *MasterCard* (n 73), paras 180–181; Article 101(3) Guidelines (n 18), para 11; Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C 11/1 (henceforth Horizontal Co-operation Guidelines), para 20; C-307/18 *Generics*, opinion of AG Kokott (n 61), para 147; C-209/07 *BIDS*, opinion of AG Trstenjak (n 116), para 59.
[118] See n 6-8 and 77-79 and text thereto.
[119] See C-611/16 P *Xellia Pharmaceuticals* (n 12), para 117; see also n 69-79 and text thereto.

A third interpretation would be that the court in *Generics* considered objective justifications under Article 101(1) TFEU, such as the ancillary restraints doctrine.[120] This is untenable. The court refers to "doubt"[121] as to the harmful nature of the disputed agreement as a factor capable of excluding a restriction by object specifically;[122] however, the doubt referred to does not also exclude a restriction by effects – "where the anticompetitive object of [the disputed agreement] is not established, it is necessary to examine its effects".[123] Contrastingly, an objective justification excludes any finding of an unlawful restriction, by object as well as by effect.[124] Thus, a distinction appears between objective justifications and calling a restriction by object into doubt.[125]

Instead of the above interpretations, the question seems to be whether the standard of proof required for establishing a restriction by object is (still) fulfilled[126] after having had regard to pro-competitive effects (or rather factors alleged to have such effects) *invoked* by the defendant.[127] In other words, the court assesses whether contextual anomalies (i.e. deviations from the relevant experience of by object types of collusion) exist, and whether – in accounting for those deviations – one can still be (by experience) certain about the common denominators' 'reaction', without assessing the likelihood of certain effects in casu.[128] To theoretically exemplify by an analogy: imagine a flask containing three substances, the blend of which creates a familiar reaction. Imagine now that, for the first time, a new substance is to be added. Without experience (actual or theoretical)[129] that renders the new reaction sufficiently certain, actual mixing is required for determining the reaction. Assumptively, the new-gained knowledge can be added to the previously held experience.

In *Generics*, as for a real-world example, the court set out to assess whether the disputed settlement agreement pursued the object of allowing the parties' to, in their mutual commercial interest, not engage in competition on the merits. Undisputedly, the disputed settlement agreement, in addition to the common denominators, provided for a potentially pro-competitive distribution of generics. However, this anomaly was merely a potential drop in the ocean that, even if the exact effects of the agreements were unknown, could safely be assumed not to cause an unanticipated reaction.[130] Consequently, a tenable alternative

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[120] See about objective justifications eg Jones, Sufrin, and Dunne (n 5), 247ff.; Bailey, 'Restrictions of Competition by Object under Article 101 TFEU' (n 14), 580ff.; C-307/18 *Generics*, opinion of AG Kokott (n 61), paras 149–156; Case C-439/09 *Pierre Fabre Dermo-Cosmétique* ECLI:EU:C:2011:649, para 39.
[121] See C-307/18 *Generics* (n 11), paras 107 and 110.
[122] See ibid, para 103.
[123] See ibid, para 66; comp C-307/18 *Generics*, opinion of AG Kokott (n 61), para 164.
[124] See C-307/18 *Generics*, opinion of AG Kokott (n 61), paras 149–156; Faull and others (n 55), 251; Bailey, *Bellamy & Child* (n 7), 162; C-382/12 P *MasterCard* (n 73), paras 89–90; Jones, Sufrin, and Dunne (n 5), 247ff.
[125] See for that effect C-307/18 *Generics*, opinion of AG Kokott (n 61), paras 149–180; C-67/13 P *CB*, opinion of AG Wahl (n 14), para 56.
[126] Comp Council regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1 (hereinafter Reg. 1/2003), Article 2.
[127] See C-307/18 *Generics*, opinion of AG Kokott (n 61), paras 164–165 with C-8/08 *T-Mobile*, opinion of AG Kokott (n 14), para 46; C-307/18 *Generics* (n 11), paras 103, 107, and 111 with para 67.
[128] See C-307/18 *Generics* (n 11), para 107; C-228/18 *Budapest Bank* (n 6), paras 82–83; C-601/16 *Arrow* (n 12), para 87 – declaring that the context assessment concerns doubt but "does not also imply an assessment of the anticompetitive effects"; comp for early thoughts in this direction Tannenbaum (n 39), 143ff. and 148.
[129] Comp C-67/13 P *CB*, opinion of AG Wahl (n 14), para 56.
[130] See C-307/18 *Generics* (n 11), paras 107–110.

understanding of the agreement had not been sufficiently substantiated as to provide for "any explanation other"[131] than that the agreements pursued an anti-competitive object.

As for a second example, in case *CB*, a similar situation featured, albeit with a successful outcome for the defendant. In *CB*, the CJ set out to assess whether the GC wrongly concluded that the disputed agreements "have as their object the restriction of competition […] in that, essentially, they hinder the competition of new entrants on the [relevant market]."[132] The court pinpointed that "that restrictive object must be established",[133] and found that, in the present dispute it could not sufficiently be so.[134] The rationale appears to have been that there existed a contextual anomaly to the relevant experience;[135] namely, the agreements concerned two interrelated markets. Based on that anomaly, the defendants argued that the agreements pursued the legitimate objectives of creating a balance between the related markets and of combatting so-called free-riding.[136] The CJ recognised the argument and concluded that it could, in keeping with an experience-based assessment, neither be assumed nor ruled out that the agreement in casu was restrictive on competition; an assessment of effects would be necessary for such a finding.[137]

5 DIVISION OF BURDEN OF PROOF

The existence of an anti-competitive object cannot be found in the abstract but only by taking into consideration all the relevant factors of an individual case.[138] The burden of proof, in this regard, lies on the responsible competition authority[139] which must establish an anti-competitive object by jointly considering content, objectives, and context with the relevant experience of by object types of collusion.[140] Context, like content, and objectives, serves an incriminatory function.[141] However, case-law has settled that the assessment of context may "be limited to what is strictly necessary in order to establish the existence of a restriction of competition by object".[142] This expression indicates an eased burden on the relevant competition authority but leaves unanswered to what extent context is necessary to consider.

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131 See ibid, para 87.
132 See C-67/13 P *CB* (n 11), para 60; comp C-209/07 *BIDS* (n 6) – this is the case on which the Commission, in *CB*, based its allegations.
133 See C-67/13 P *CB* (n 11), para 70.
134 See ibid, paras 73–75.
135 See about experience C-67/13 P *CB* (n 11), para 51; C-67/13 P *CB*, opinion of AG Wahl (n 14), paras 79 and 56; comp C-209/07 *BIDS* (n 6) – this was the reference case constituting central experience in *CB*.
136 See C-67/13 P *CB* (n 11), paras 75–76.
137 See ibid, paras 80–81, with 51; see C-67/13 P *CB*, opinion of AG Wahl (n 14), paras 56, 79, and 131.
138 See Bailey, 'Restrictions of Competition by Object under Article 101 TFEU' (n 14), 582f.; Bailey, *Bellamy & Child* (n 7), 153; C-67/13 P *CB*, opinion of AG Wahl (n 14), paras 40–41; C-551/03 P *General Motors* ECLI:EU:C:2006:229, para 66; C-307/18 *Generics*, opinion of AG Kokott (n 61), para 158.
139 See Reg. 1/2003 (n 126), Article 2.
140 See to that effect C-228/18 *Budapest Bank* (n 6), paras 66–79; comp C-591/16 P *Lundbeck* (n 11), para 112; Bailey, 'Restrictions of Competition by Object under Article 101 TFEU' (n 14), 582f.; see about necessity of considering content, objectives and context C-228/18 *Budapest Bank* (n 6), para 51; see also C-67/13 P *CB* (n 11), para 53; Jones, Sufrin, and Dunne (n 5), 219f.; Faull and others (n 55), 236; Bailey, *Bellamy & Child* (n 7), 166; Article 101(3) Guidelines (n 18), para 22.
141 See Bailey, 'Restrictions of Competition by Object under Article 101 TFEU' (n 14), 582f.; Kolstad (n 18), 16; comp Jones, Sufrin, and Dunne (n 5), 225.
142 See C-373/14 P *Toshiba Corporation v Commission* ECLI:EU:C:2016:26, para 29; see also C-469/15 P *FSL and Others v Commission* ECLI:EU:C:2017:308, para 107; Jones, Sufrin, and Dunne (n 5), 225; Bailey, *Bellamy & Child* (n 7), 167; Van Bael & Bellis (n 10), 65; Whish and Bailey (n 10), 126.

AG Bobek has proposed the understanding that the relevant competition authority must "check that there are no specific circumstances that may cast doubt on the presumed harmful nature of the agreement in question."[143] In consequence, consideration to all circumstances would be required, since the existence of circumstances establishing doubt could otherwise not be ruled out. Arguably, consideration to all circumstances is not impeccably aligned with either the administrative efficiency objective of restrictions by object,[144] or the expression that contextual consideration may be *limited* to what is necessary.[145] Considering context only in uncertain (borderline) cases could not remedy these problems;[146] namely, uncertainty may depend on the context, to begin with,[147] and context must be considered in all cases.[148]

Another understanding emerges from the CJ's judgment in *Generics*. The court declared that once the responsible competition authority has proven, according to the requisite standard of proof, that the common denominators are met, the disputed agreement "must, in principle, be characterised as a 'restriction by object'".[149] Once that is accomplished, the defendant has to produce counterproof of contextual anomalies capable of causing reasonable doubt as to the reliance in casu on the experience of the effects of the common denominators and thus to the alleged anti-competitive object.[150] If the defendant produces such counterproof, the pendulum returns to the responsible authority that might have to undertake further necessary considerations to contextual factors to re-discharge the burden of proof.[151]

6 CONCLUDING ELABORATIONS

A by object type of collusion can be described as an abstract and general rule created through inductive reasoning based on experience. The experience includes previous case-law as well as other knowledge such as economic theory. Sufficiently reliable and robust, including sufficiently general and consistent, experience makes it possible to discern certain traits (common denominators) shared by several collusive conducts. These collusive conducts may be considered harmful by their nature if they are sufficiently likely to cause sufficient harm to competition. Through inductive reasoning, the common denominators discerned can be adopted as 'conditions' in a general rule (the by object type of collusion). This rule can be deductively applied on future agreements, rendering an effects assessment superfluous for establishing a restriction of competition.

For a disputed agreement to be restrictive by object, the responsible competition authority must prove that it meets the common denominators of a by object type of collusion, considering content, objectives, and context. The burden of proof is no longer

143 See C-228/18 *Budapest Bank*, opinion of AG Bobek (n 34), para 48.
144 Comp n 14.
145 See n 142.
146 See for such considerations Ioannidou and Nowag (n 10), 363.
147 Comp C-209/07 *BIDS*, opinion of AG Trstenjak (n 116), para 59; C-307/18 *Generics* (n 11), para 107; Kolstad (n 18), 16.
148 See n 69.
149 See C-307/18 *Generics* (n 11), para 95.
150 See, for that effect, C-307/18 *Generics* (n 11), paras 96–111; C-307/18 *Generics*, opinion of AG Kokott (n 61), para 149; C-591/16 P *Lundbeck* (n 11), paras 119–128.
151 Comp C-469/15 P *FSL* (n 142), para 108.

discharged if the defendant produces arguments (counterproof) about contextual anomalies which render doubtful the reliance on experience in casu as to the effects of agreements featuring the common denominators (the experienced effects). The defendant's arguments must be relevant. Relevant arguments should bring reasonable doubt to the experienced effects – any doubt must benefit the defendant. Such arguments should substantiate circumstances in casu additional to the common denominators (i.e. contextual anomalies) which may be pro-competitive compared to the experienced effects; naturally, arguing that the contextual anomalies are aggravating (or not affecting) the experienced effects would not call the experienced harmful nature in question. Furthermore, it is insufficient for the defendant to argue that the contextual anomalies bring countervailing efficiencies – such efficiencies are assessed only under Article 101(3) TFEU. Instead, the arguments must question the experienced effects, to begin with.

In no part of the assessment of a restriction by object is it relevant to examine the effects of the disputed agreement. Firstly, context is separate from effects. Secondly, consideration to contextual anomalies concerns not whether it is likely or unlikely that the disputed agreement will have specific effects. Instead, relevant is only the possibility to *rely on the experienced effects*. If experience can be relied on, the agreement is subsumed under a by object type of collision, rendering it harmful by its nature and its effects superfluous to consider. However, if reasonable doubts exist as to the experience after having considered arguments about contextual anomalies, the agreement cannot be considered harmful without assessing its effects to ensure whether the arguments are correct.

To widen the perspective, the approach I present seemingly pursues the objectives of restrictions by object and Article 101 TFEU in a balanced manner. It facilitates legal certainty by adopting only one relatively simple and (possible to make) clear requirement. Additionally, it facilitates administrative efficiency by neither requiring consideration to effects nor all circumstances of a case, but only to the reliability of experienced effects. Consequently, it facilitates effectiveness in prohibiting anti-competitive agreements. Simultaneously, it facilitates a restrictive interpretation and the avoidance of false positives by allowing defendants to avoid by object restrictions merely by adducing reasonable doubts. In sum, the approach appears to reasonably balance the relevant objectives.

Concludingly, it can be assumed that a distinction between restrictions by object and effect is possible to uphold. For a restriction by object, it suffices that the disputed agreement can be subsumed under a by object type of collusion. Such subsumption requires consideration to content, objectives, and context of the disputed agreement in comparison with experience of by object types of collusion. The relevant question is only whether the experience can without reasonable doubt be applied in casu for declaring the disputed agreement harmful by its nature.

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EXTENDING THE PRESUMPTION OF DECISIVE INFLUENCE TO IMPUTE PARENTAL LIABILITY TO PRIVATE EQUITY FIRMS FOR THE ANTICOMPETITIVE CONDUCT OF PORTFOLIO COMPANIES

VASILIKI FASOULA*

The private equity firms' goal is to increase the profitability of their portfolio companies, run them up to an initial public offering and exit them. This includes improvements in corporate governance and management practices. The operational economic model of private equity firms is that of financial investors and not that of industrial owners of subsidiaries. However, this economic distinction makes no legal difference when engaging a company's parental liability for the anticompetitive behaviour of its subsidiaries under the European competition law provisions. This was the case when, on 27 January 2021, the Court of Justice of the European Union rejected the Goldman Sachs Group's appeal against a judgment of the General Court of the European Union validating the fine the Commission had imposed for the participation of one of its indirectly owned subsidiaries in a cartel during the period it was under Goldman Sachs' control. For the first time, the Court extended the presumption of the effective exercise of decisive influence to the majority of the voting rights, and any involvement in the day-to-day business of the portfolio company was further proof of this actual exercise. Revitalising the debate of the fundamentals of parental liability in competition law and juxtaposing the differences between European and American legal tradition, the Goldman Sachs case leaves no choice to equity firms but to take strict measures and to harden the negotiations before any acquisition takes place, hoping to escape the strict application of the single economic entity doctrine.

1 INTRODUCTION

On 27 January 2021, the Court of Justice of the European Union ("CJEU") adopted a judgement[1] rejecting the Goldman Sachs Group's[2] ("Goldman Sachs") appeal seeking to set aside the judgment of the General Court of the European Union ("GCEU") of 12 July 2018.[3] The GCEU had dismissed the Goldman Sachs' action seeking, firstly, the annulment of the

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1 Case C-595/18 P *The Goldman Sachs Group Inc. v European Commission* [2021] ECLI:EU:C:2021:73.

2 According to the Group's website, the Goldman Sachs Group, Inc. is a leading global financial institution that delivers a broad range of financial services across investment banking, securities, investment management and consumer banking to a large and diversified client base that includes corporations, financial institutions, governments and individuals. Founded in 1869, the firm is headquartered in New York and maintains offices in all major financial centers around the world. <https://www.goldmansachs.com/> accessed 27 February 2021.

3 Case T-419/14 *The Goldman Sachs Group, Inc. v European Commission* [2018] ECLI:EU:T:2018:445.

European Commission's ("EC") Decision[4] imposing a fine to Goldman Sachs for the participation of one of its indirectly owned subsidiaries in the power cable cartel during the period it was under Goldman Sachs' control and, secondly, a reduction of the fine imposed on it. The CJEU confirmed the fine of EUR 37,303,000 million imposed to Goldman Sachs on a joint and several basis. Despite the fact that the investor was left with a minority stake in the subsidiary after an initial public offering ("IPO"), the CJEU upheld the investor's parental liability. The totality of voting rights attached to the minority stake, as well as a sufficient representation of the holding at the board of directors and a management oversight of its subsidiary were, according to the CJEU, evidence of the holding's decisive influence over the subsidiary's economic and commercial policy. The judgment is of major interest to private equity funds and other financial investors, whose business mainly consists of buying and selling stakes in other companies under a purely financial investment perspective. They need to implement strategies to ensure that they might not be found liable under the European Union ("EU") competition law provisions for any anticompetitive practices of their portfolio companies.

2 FACTS

Between 29 July 2005 and 28 January 2009 Goldman Sachs was the parent company indirectly, through its private equity portfolio manager GS Capital Partners V Funds and other intermediary companies, of Prysmian SpA ("Prysmian") and its wholly owned subsidiary Prysmian Cavi e Sistemi Sri ("Prysmian CS") world leading players in the submarine and underground power cables sector. The EC found that Prysmian and Prysmian CS were members of a cartel that was in place from February 1999 to the end of January 2009 between the main European, Japanese and South Korean producers of submarine and underground power cables that allocated markets and customers, thereby distorting the normal competitive process. Goldman Sachs initially held 100% of the shares in Prysmian for 41 days. Its holding was then gradually reduced, on 7 September 2005 and then again on 21 July 2006 to 91.1% and 84.4% respectively, until 3 May 2007, date of the IPO on the Milan Stock Exchange (pre-IPO period). After the IPO and until 28 January 2009, Goldman Sachs' shares fell to 31.69% (post-IPO period).

On 2 April 2014, the EC found Prysmian and Prysmian CS, amongst others, liable for the infringement of Article 101 of the Treaty on the Functioning of the European Union ("TFEU")[5] for their involvement in a cartel in the power cables sector. Despite the fact that there were no evidence that Goldman Sachs knew or encouraged the subsidiary's participation in the cartel, it was held jointly and severalty liable for EUR 37,303,000 million of the EUR 104,613,000 million fine imposed on Prysmian, proportional to its four-year investment at it, between 29 July 2005 and 28 January 2009. The EC based its decision on the following grounds: (i) a presumption that Goldman Sachs exercised a decisive influence

[4] *Power Cables* (Case AT.39610) Commission Decision relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement C(2014) 2139 final [2014] OJ C/319.

[5] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union - Consolidated version of the Treaty on the Functioning of the European Union - Protocols - Annexes - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 - Tables of equivalences [2012] OJ C/326.

over Prysmian's and thus Prysmian CS's behaviour on the market and (ii) according to the analysis of the economic, organisational and legal links with these companies, Goldman Sachs actually did exercise a decisive influence over Prysmian's behaviour and consequently over Prysmian CS.

3 THE JUDGMENT OF THE GCEU OF 12 JULY 2018 IN CASE T-419/14 *THE GOLDMAN SACHS GROUP INC. V EUROPEAN COMMISSION*

Goldman Sachs has brought an appeal against the EC's decision before the GCEU, seeking its annulment and/or a reduction of the fine. The appeal was dismissed. The presumption of exercising a decisive influence was rightly upheld by the EC. Although Goldman Sachs' holding in Prysmian was not 100% during the whole of the relevant period, the GCEU held that the position of a parent company that holds all the voting rights attached to the shares of its subsidiary, combined with a very high majority holding in its subsidiary's capital, as was the case here during the pre-IPO period, is similar to the position of a single shareholder of that subsidiary. It could be therefore presumed that the parent company determines the economic and business strategy of the subsidiary, even if it does not hold all or almost all of the subsidiary's share capital.[6] During the post-IPO period, although Goldman Sachs was left with a minority share of 31,69% the GCEU found that it actually did exercise decisive influence as it had management oversight of Prysmian and Prysmian CS through its powers to (i) appoint the members of Prysmian's boards of directors, (ii) call Prysmian's shareholder meetings, (iii) propose the removal of board members or of all boards of directors of Prysmian, (iv) have a relevant role in the boards of directors and (v) receive regular updates and monthly reports from Prysmian.[7]

4 THE JUDGMENT OF THE CJEU OF 27 JANUARY 2021 IN CASE C-595/18 P THE GOLDMAN SACHS GROUP INC V EUROPEAN COMMISSION

In its appeal to the CJEU, Goldman Sachs relied on two grounds to claim that the GCEU was wrong to find that the EC had correctly applied Article 101 TFEU and Article 23(2) of Regulation 1/2003[8] to find Goldman Sachs liable for an infringement committed by Prysmian and Prysmian CS: (i) that the presumption of decisive influence, as established in *Akzo*,[9] applies only to wholly owned subsidiaries, thus it should not have been taken into consideration for the pre-IPO period ; (ii) that there was an error in law regarding the elements taken into consideration to establish that Goldman Sachs actually did exercise decisive influence within the meaning required by EU established case-law for the post-IPO period. The appellant also claimed that the CJEU should extend to it the benefit of any fine reduction granted to Prysmian and Prysmian CS, by reducing the amount of the fine imposed

[6] Case C-595/18 P *The Goldman Sachs Group Inc. v European Commission* [2021] ECLI:EU:C:2021:73, para 17.
[7] Case C-595/18 P *The Goldman Sachs Group Inc. v European Commission* [2021] ECLI:EU:C:2021:73, para 18.
[8] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance) [2003] OJ L/1.
[9] Case C-97/08 P *Akzo Nobel NV and Others v Commission of the European Communities* [2003] ECLI:EU:C:2009:536.

jointly and severally on it and Prysmian and Prysmian CS, in the event that the CJEU upholds the appeal brought by those companies against the EC's Decision on the power cable cartel case.[10]

The CJEU dismissed Goldman Sachs' appeal in its entirety. The EC has constantly relied on the rebuttable presumption that a parent company has decisive influence over the strategy of its subsidiaries when it holds the totality or the almost totality of the subsidiary's capital. In the present case, the CJEU recognised that even though Goldman Sachs did not hold 100% of Prysmian's capital during the entire pre-IPO period, it held, however, the totality of the voting rights. The CJEU held that the GCEU did not err when upholding that a parent company which holds all the voting rights associated with its subsidiary's shares is, in that regard, in a similar situation to that of a parent company holding all or virtually all the capital of the subsidiary, so that the parent company is able to determine the subsidiary's economic and commercial strategy.[11] It also reaffirmed that the burden of rebutting this presumption fell on Goldman Sachs who, however, had failed do so.[12] Because of Goldman Sachs' presumed actual exercice of decisive influence through the voting rights, the CJEU equated Goldman Sachs with an industrial owner of Prysmian instead of attributing a pure financial investor role to Goldman Sachs.[13] The EU competition law does not attach parental liability, for the breach committed by a subsidiary, to pure financial investors, i.e. investors who hold shares in a company in order to make a profit, but who refrain from any involvement in its management and its control. For the CJEU, the element of a pure financial investor does not constitute a legal criterion, which would mean that the EC would have to bear the burden of proof, but is an example of a circumstance in which it is open to a parent to rebut the presumption of the actual exercise of decisive influence.[14]

For the post-IPO period, the CJEU upheld that there was no error in law committed by the GCEU when evaluating a body of consistent evident regarding the economic, organisational and legal links tying the subsidiary to its parent, even if some of that evidence, taken in isolation, is insufficient to establish the existence of decisive influence. That body of evidence may include elements relating to a period prior to the infringement as long as the relevance of these elements to the period of the infringement can be established.[15] Furthermore, the existence of decisive control may be demonstrated through a formal relationship between the parent and the subsidiary but also through informal relationships, consisting, inter alia, in examining personal links between the legal entities comprising the economic unit formed by the parent company and its subsidiary. This may happen for example, in cases where a person who sits on the board of directors of a subsidiary is connected to the parent company by means of previous advisory services or consultancy agreements.[16]

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[10] Case T-475/14 *Prysmian and Prysmian Cavi e Sistemi v Commission* [2018] ECLI:EU:T:2018:448.
[11] Case C-595/18 P *The Goldman Sachs Group Inc. v European Commission* [2021] para 35.
[12] Case C-595/18 P *The Goldman Sachs Group Inc. v European Commission* [2021] paras 36-41.
[13] Case C-595/18 P *The Goldman Sachs Group Inc. v European Commission* [2021] paras 45-47.
[14] Case T-419/14 *The Goldman Sachs Group, Inc. v European Commission* [2018] para 151; Case T-392/09 *1. garantovaná a.s. v European Commission* [2012] ECLI:EU:T:2012:674 paras 50-52.
[15] Case C-595/18 P *The Goldman Sachs Group Inc. v European Commission* [2021] paras 67-68.
[16] Case C-595/18 P *The Goldman Sachs Group Inc. v European Commission* [2021] paras 93-94.

5 SIGNIFICANCE OF THE CJEU'S JUDGEMENT

5.1 THE PARTICULAR RELATIONSHIP BETWEEN EQUITY FIRMS AND PORTFOLIO COMPANIES

A private equity firm is a group of investment professionals that raises money from investors and pools it in one or more investment vehicles, the private equity funds, for the purpose of engaging in private equity. The companies that private equity firms acquire are their portfolio companies. The private equity firm's main strategy is to take control of a portfolio company for a limited period of time, to increase the company's profitability, run it up to an IPO and then exit the company.[17] In the United States ("US") private equity ownership is very common. Until the late 70s', private equity investments were undertaken by wealthy families, industrial corporations and financial institutions that invested directly in issuing firms. The US regulatory and tax changes in the 80s' allowed this activity to grow and to be undertaken by professional private equity managers on behalf of institutional investors. This was possible through a limited partnership were the institutional investors, like Goldman Sachs, are the limited partners and the investment managers are the general partners.[18] While private equity ownership is also increasing in Europe, so is the criticism against private equity firms from trade unions and some members of the European Parliament accusing them of profiting off of companies' asset-stripping, of instigating restructurings with negative impacts on employment and of using leverage and off-shore holding companies to reduce tax charges.[19]

Many studies have shown that there are, generally, three ways in which private equity ownership can increase the profitability of portfolio companies: (i) there can be a more effective use of debt and other financial instruments; the private equity's established reputation with creditors in the debt market reduces portfolio companies' cost of debt capital giving them a borrowing advantage over other companies;[20] (ii) an improvement of firm-level productivity is possible through efficient reallocations of labour and capital; (iii) value can be created through better corporate governance and management practices.[21] Private equity firms regularly replace top management, both before and after they invest in a company. They also set up small boards of directors with a mix of portfolio company's insiders, outsiders and private equity investors.[22] The private equity firm exercise control over portfolio companies through their representation on the companies' board of directors. The chief executive officers ("CEOs") of portfolio companies are not members of the private

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[17] Steven Kaplan, Per Strömberg, "Leveraged Buyouts and Private Equity" [2009] J.Econ.Persp. 121.
[18] George Fenn, Nellie Liang, Stephen Prowse, "The Economics of the Private Equity Market" [1996] Fed. Res. Bull. 26; Helen Kenyon (ed), 'Preqin Special Report: Banks as Investors in Private Equity' (2012) <https://docs.preqin.com/reports/Preqin_Special_Report_Banks_as_Investors_in_Private_Equity.pdf> accessed 27 February 2021.
[19] Mike Wright, Kevin Amess, Charlie Weir, et al. "Private equity and corporate governance: Retrospect and prospect" [2009] Corporate Governance: An International Review 353.
[20] Elisabeth De Fontenay, "Private equity firms as gatekeepers" [2013] Rev. Banking & Fin. L. 115.
[21] Nicholas Bloom, Raffaella Sadun, John Van Reenen, "Do private equity owned firms have better management practices?" [2015] American Economic Review 442.
[22] Paul Gompers, Steven Kaplan, Vladimir Mukharlyamov, "What do private equity firms say they do?" [2016] Journal of Financial Economics 449.

equity firms' management, and the operating managers of these companies are more autonomous than unit managers in public companies.[23]

5.2 THE US LIABILITY REGIME FOR ANTITRUST INFRINGEMENTS COMMITTED BY A SUBSIDIARY

In the US, a company can only be personally liable for the legal infringements it has committed. In cases involving parent companies and subsidiaries, the corporate separateness generally prevails and any imputation of liability to another legal entity other than the one that committed the infringement is only used as an "extreme remedy."[24] In these extreme cases, there are three traditional methods of holding parent companies liable for the infringements of their subsidiaries: imputing liability via agency law principles, imputing liability by means of piercing the corporate veil,[25] and imputing liability through standard inducement principles, which means that the parent must have known, encouraged or actively contributed to the subsidiary's infringement.[26] The same applies to US federal antitrust enforcement which is both criminal and civil in nature. In criminal cases, the government must prove the direct involvement of the parent company to the antitrust infringement of its subsidiary. In antitrust suits, parent liability will be attached to the company if it was actively involved in the antitrust violation or if the criteria for piercing the subsidiary's corporate veil can be met by a plaintiff.[27] In a recent case, involving a private equity firm, Lion Capital, the District Court for the Southern District of California ruled that the firm must face trial in class action litigation alongside its portfolio company, Bumble Bee Seafoods, in a case concerning price-fixing in the market of canned tuna.[28] The plaintiffs claimed that the firm discovered the subsidiary's role in the price-fixing conspiracy during its acquisition in 2010 and proceeded with the transaction in an attempt to reap supra-competitive profits. They further claimed to have detailed evidence of the investor's direct involvement in the conspiracy.

5.3 THE EU LIABILITY REGIME FOR ANTITRUST INFRINGEMENTS COMMITED BY A SUBSIDIARY

In Europe, instead of a direct or indirect involvement in the infringement, the liability of the parent for the anticompetitive behaviour of its subsidiary is attached to the notion of control and to the single economic undertaking rationale.[29] The first case where a parent company

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[23] Felix Barber, Michael Goold, "The Strategic Secret of Private Equity" [2007] Harvard Business Review 53; Ulrich Lossen, *Portfolio Strategies of Private Equity Firms-Theory and Evidence*, (Deutscher Universitäts-Verlag 2007).

[24] *Sonora Diamond Corp. V. Superior Court* [2000] 83 Cal. App. 4th 523, 539.

[25] Traditional "piercing" jurisprudence rests on a demonstration of three fundamental elements: the subsidiary's lack of independent existence; the fraudulent, inequitable, or wrongful use of the corporate form; and a causal relationship to the plaintiff's loss. Unless each of these three elements has been shown, courts have traditionally held "piercing" unavailable, see John Matheson, "The modern law of corporate groups: An empirical study of piercing the corporate veil in the parent-subsidiary context" [2008] NCL Rev. 1091.

[26] Emma Tracy, "Imputed Liability: How to Determine When Parent Companies Should Be Held Liable for the Patent Infringements of Their Subsidiary Companies" [2017] Mo. L. Rev. 82.

[27] Carsten Koening, "Comparing Parent Company Liability in EU and US Competition Law" [2018] World Competition 70.

[28] Case No.: 15-MD-2670 JLS (MDD) *In re Packaged Seafood Products Antitrust Litigation* [2018] United States District Court, S.D. California, 338 F.Supp.3d 1118.

[29] According to EU case-law "*in certain circumstances, a legal person who is not the perpetrator of an infringement of the competition rules may nevertheless be penalised for the unlawful conduct of another legal person, if both those persons form part of the same economic entity*", see Joined Cases C-231/11 P to C-233/11 P *European Commission v Siemens AG*

was held liable for the anticompetitive behaviour of its subsidiaries was in 1969 where the parent was found to have given explicit directions to its subsidiaries to raise the prices.[30] The parent company lodged an appeal and the CJEU upheld that the fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company. Such may be the case in particular where the subsidiary, although having separate legal personality, does not decide independently upon its own conduct on the market but carries out, in all material respects, the instructions given to it by the parent company with which it forms one economic unit.[31] The lack of autonomy and the rebuttable presumption of decisive influence of the parent to the subsidiary was upheld in *AEG – Telefunken*,[32] where the CJEU concluded that the parent company necessarily determined the commercial policies to its wholly owned subsidiary without any additional burden of proof for the EC other than the detention of shares. The same presumption was also applied when the parent had almost the totality of the subsidiary's capital.[33]

3.2[a] Extending the presumption of decisive control to the totality of the subsidiary's voting rights

In *Akzo,* the CJEU clearly established the rebuttable presumption of the parent's decisive influence upon its wholly owned subsidiaries based on the single economic undertaking doctrine: "*it is for the parent company to put before the Court any evidence relating to the economic and legal organisational links between its subsidiary and itself which in its view are apt to demonstrate that they do not constitute a single economic entity.*"[34] In her Opinion in *Akzo*, the Advocate General ("AG") Kokott stated that "*the decisive factor is whether the parent, by reason of the intensity of its influence, can direct the conduct of its subsidiary to such an extent that the two must be regarded as one economic unit*."[35] She emphasised that the absence of a single commercial policy can be established only on the basis of an assessment of the totality of all the economic, organisational and legal links which tie the parent and the subsidiary. This presumption allows the EC to hold the parent company liable for the subsidiary's conduct by simply proving that the parent company owns

Österreich and Others and Siemens Transmission & Distribution Ltd and Others v European Commission [2014] ECLI:EU:C:2014:256 para 45. Also, "*there is no requirement, in order to impute to a parent company liability for the acts undertaken by its subsidiary, to prove that that parent company was directly involved in, or was aware of, the offending conduct. It is not because of a relationship between the parent company and its subsidiary in instigating the infringement or, a fortiori, because the parent company is involved in the infringement, but because they form a single undertaking for the purposes of Article 81 EC that the Commission is able to address the decision imposing fines to the parent company*" see Case T-77/08 *The Dow Chemical Company v European Commission* [2012] ECLI:EU:T:2012:47 para 106; Nada Ina Pauer, *The single economic entity doctrine and corporate group responsibility in European antitrust law* (Wolters Kluwer 2014).

[30] *Dyestuffs*, (IV/26.267) Commission Decision 69/243/EEC [1969] OJ L195/11.

[31] Case 48-69 *Imperial Chemical Industries Ltd. v Commission of the European Communities* [1972] ECLI:EU:C:1972:70 paras 132-134 ; Wils Wouters, *The Optimal Enforcement of EC Antitrust Law* (Kluwer Law International 2002).

[32] Case 107/82 *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission of the European Communities* [1983] ECLI:EU:C:1983:293 para 50.

[33] Case T-168/05 *Arkema SA v Commission of the European Communities* [2009] ECLI:EU:T:2009:367 para 70

[34] Case C-97/08 P *Akzo Nobel NV and Others v Commission of the European Communities* [2009] ECLI:EU:C:2009:536 para 65.

[35] Case C-97/08 P *Akzo Nobel NV and Others v Commission of the European Communities* [2009] ECLI:EU:C:2009:262 Opinion of AG Kokott para 93 ; Benjamin Cheynel, 'La responsabilité des sociétés mères du fait de leurs filiales' in Valerie Giacobbo-Peyronnel, Christophe Verdure (eds), *Contentieux du droit de la concurrence de l'Union européenne* (Bruylant 2017).

all or almost all of the shares of the subsidiary. The case-law has also applied the presumption when two shareholders each hold 50% of a subsidiary.[36]

In *Goldman Sachs*, the detention of the totality of voting rights associated with the subsidiaries shares, despite a minority holding of its capital during the post-IPO period, is equated with the detention of the totality or almost totality of its capital because of the degree of control of the parent over the subsidiary implied in those cases. The two situations entail, therefore, the same legal consequence, i.e. the EC can rely on the presumption that the parent company actually exercises decisive influence over its subsidiary's market conduct.

3.2[b] Exercising decisive influence through the involvement in the subsidiary's day-to-day operations

In cases where the presumption cannot be applied, i.e. where the parent company holds only a minority stake in the subsidiary's capital, the EC bears the burden of proof that the parent was in a position to exercise decisive influence over the subsidiary's conduct, as well as, that the parent did actually exercise that influence. The EC can use all factual evidence including "*in particular any management power.*"[37] In *Fuji,*[38] it was upheld that such an influence was actually exercised by the parent company which was a minority stakeholder with rights greater than those normally granted to minority shareholders in order to protect their financial interests. Those rights, when evaluated in the light of a set of consistent legal or economic indicia, were such as to show that a decisive influence was exercised over the subsidiary's market conduct. In *Toshiba*,[39] the parental liability was attached to a minority stake with veto rights that went beyond the normal rights of minority shareholders.

In *Goldman Sachs*, the minority capital of the financial investor was coupled with management powers to (i) appoint the members of the subsidiary's boards of directors, (ii) call the subsidiary's shareholder meetings, (iii) propose the removal of board members or of all boards of directors of the subsidiary, (iv) have a relevant role in the boards of directors and (v) receive regular updates and monthly reports from the subsidiary. On the one hand, the attachment of parental liability because of the above-mentioned management oversight seems to follow the same line as the *Fuji* and *Toshiba* case-law and the single economic undertaking rationale. However, on the other hand, it cancels *de facto* the possibility for financial investors, may they be institutional investors, private equity firms or investment banks as partners of equity firms, to create value in their portfolio companies through corporate engineering and management practices. Involvement in the day-to-day operations entails the risk of imputing joint and several parental liability to investors for EU antitrust infringements committed by their portfolio companies.

[36] Case T-314/01 *Coöperatieve Verkoop- en Productievereniging van Aardappelmeel en Derivaten Avebe BA v Commission of the European Communities* [2006] ECLI:EU:T:2006:266.
[37] Case T-314/01 *Coöperatieve Verkoop- en Productievereniging van Aardappelmeel en Derivaten Avebe BA v Commission of the European Communities* [2006] ECLI:EU:T:2006:266 para 36.
[38] Case T-132/07 *Fuji Electric Co. Ltd (anciennement Fuji Electric Holdings Co. Ltd) v European Commission* [2011] ECLI:EU:T:2011:344, para 183.
[39] Case C-623/15 P *Toshiba Corp. v European Commission* [2017] ECLI:EU:C:2017:21 paras 107-113.

5.4 THE EU LIABILITY REGIME FOR ANTITRUST INFRINGEMENTS COMMITED BY A SUBSIDIARY

So far, the EU case-law is quite strict when finding the parent companies liable for their subsidiaries' competition law infringements. Arguments from parent companies based on measures they took to discourage or eliminate anticompetitive behaviour by their subsidiaries have been rejected by the Courts. Disregarded instructions of the parent company to the subsidiary's sole manager to not to proceed with anticompetitive agreements,[40] adoption of internal guidelines, code of conduct and audits performed by a compliance officer in order to avoid competition violations[41] or even setting up formal written policies for compliance with competition law[42] have not, so far, succeeded at exonerating parent companies. When those initiatives were decided by the investors and imposed on the portfolio companies, they were considered to be proof of the investors' control over the companies. Any investor's involvement in the subsidiary's management, even if it doesn't concern the day-to-day operations will most likely be interpreted as an element of exercising a decisive influence over the subsidiary's conduct in the market, hence constituting a single economic unit with it.

The ECN+ Directive,[43] aiming at empowering the national competition authorities in their missions, encourages the imposition of effective, proportionate and dissuasive fines on undertakings and associations of undertakings where, intentionally or negligently, they infringe Article 101 or 102 TFEU. Financial investors are, much like the classical industrial owners, exposed not only to fines but to actions for damages as well.[44] The difference is, though, that in the case of financial investors the range of countries in which an action can be brought against them is much larger. That could encourage any claimants' *forum shopping* intentions. A financial investor holds a variety of portfolio companies, throughout the period it is operational in the market. Thus, it is highly probable he might be liable for the anticompetitive behaviour of portfolio companies more than once. In that case, the investor would be considered as a repeat infringer[45] risking heavier penalties because of that aggravating circumstance.[46]

In the aftermath of Goldman Sachs, financial investors must be vigilant in regards to management oversight by limiting their direct responsibility for board decisions and avoiding

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[40] C-155/14 P *Evonik Degussa GmbH and AlzChem AG v European Commission* [2016] ECLI:EU:C:2016:446 para 15.

[41] Case T-138/07 *Schindler Holding Ltd and Others v European Commission* [2011] ECLI:EU:T:2011:362 para 88.

[42] Cases T-141/07, T-142/07, T-145/07 and T-146/07, *General Technic-Otis Sàrl* (T-141/07), *General Technic Sàrl* (T-142/07), *Otis SA and Others* (T-145/07) *and United Technologies Corporation* (T-146/07) *v European Commission* [2011] ECLI:EU:T:2011:363 para 85.

[43] Directive (EU) 2019/1 of the European parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (Text with EEA relevance) [2019] OJ L/11, recital 46, art. 13.

[44] Directive 2014/104/EU of the European parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (Text with EEA relevance) [2014] OJ L/349, recital 37, art. 11.

[45] Wils Wouter, "Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis" [2012] World Competition 5; Ludovic Bernardeau, Nils Wahl, *La récidive en droits de la concurrence* (Bruylant 2017)

[46] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (Text with EEA relevance) [2006] OJ C/210.

the receipt of any unnecessary financial and management information from portfolio companies that may be linked to day-to-day operations.[47] Before the acquisition of a portfolio company, it would be useful for the investors to verify if the company has its own compliance programmes, codes of conduct in order to prevent competition law violations and training programs for its employees; if the investors impose those measures to a company that itself has none of those measures implemented, the investors' good intentions may backfire as the EC and the Courts may view them as an involvement in the conduct of the subsidiary. The due diligence process should be stricter in regards to any pre-existing antitrust problem. According to the findings, investors and portfolio companies can further negotiate the purchase price and draft clearer investment and exit agreements with specific clauses in case of competition law infringements, e.g. clauses allocating liability, allocating between the parties the fine's payment that could be imposed jointly and severally on them, clauses extending the indemnity liability to cover any civil damages awards and costs, etc.[48] After the acquisition, competition law audits in a regular basis can help identify immediate and potential threats. Investors always have the option to take procedural steps when an EU competition law infringement can be identified during the due diligence and/or the audits, like the leniency application[49] which can be a very useful tool in the hands of proactive financial investors.[50]

6 CONCLUSION

The rationale behind parental liability in EU competition law has always been a thorny subject for both academics and practitioners. Despite the arguments of parent undertakings, the single economic entity doctrine rarely allows a parent company to be exonerated for an infringement committed by its subsidiaries. The presumption that the parent has in fact exercised decisive influence over the subsidiary in cases where the parent has total ownership of the voting rights means that the EC has no need to recourse to any factual criteria in order to attach parental liability. In cases where the parent does not hold the totality of shares or voting rights, the EC can establish the exercise of decisive influence over the market conduct

[47] Financier Worldwide, 'Parent company liability in Europe' (2014). <https://www.financierworldwide.com/parent-company-liability-in-europe> accessed 27 February 2021 ; WilmerHale LLP, 'Antitrust and Competition: Investment Firms' Voting Rights—The Devil is in the Potential Antitrust Liability' (2021) <https://www.wilmerhale.com/en/insights/client-alerts/20210201-antitrust-and-competition-investment-firms-voting-rights-the-devil-is-in-the-potential-antitrust-liability> accessed 27 February 2021.

[48] Paul Hastings LLP, 'EU Court Ruling Highlights Antitrust Risks for Investment Funds' (2021) <https://www.paulhastings.com/insights/client-alerts/eu-court-ruling-highlights-antitrust-risks-for-investment-funds> accessed 27 February 2021 ; Dechert LLP, 'EU Court of Justice: Financial Investors Liable for Anticompetitive Conduct of Portfolio Companies' (2021), <https://www.dechert.com/knowledge/onpoint/2021/1/eu-court-of-justice--financial-investors-liable-for-anticompetit.html> accessed 27 February 2021 ; Squire Patton Boggs, 'Mitigating EU Antitrust Liability Risk in Private Equity Deals', (2021), <https://www.squirepattonboggs.com/-/media/files/insights/publications/2021/02/mitigating-eu-antitrust-liability-risk-in-private-equity-deals/privateequitydealsalert.pdf> accessed 27 February 2021.

[49] Commission Notice on Immunity from fines and reduction of fines in cartel cases (Text with EEA relevance) [2006] OJ C/298.

[50] Baskaran Balasingham, *The EU Leniency Policy : Reconciling Effectiveness and Fairness* (Wolters Kluwer 2016) ; Emma Salemme, *Enforcing European Competition Law Through Leniency Programmes in the Light of Fundamental Rights- With an Overview of the US Leniency Programme* (Nomos Verlag 2019).

of its subsidiary, that is therefore not acting autonomously, by means of other evidence, e.g. the involvement of the parent in the subsidiary's day-to-day management regarding its operational business or the parent's strategic control over the subsidiary's general corporate structure through the appointment of senior managers with or without personal links to the parent company, budget and business plan oversight or regular reporting obligations.

The *Goldman Sachs* case seems to ignore the operational specificities of financial investors and equates them with industrial owners of subsidiaries. In doing so, the investors' operational model of managing investments by creating value through a more effective management and corporate governance for a short period of time is seriously challenged. Furthermore, private equity firms can be exposed to fines as well as to damages claims for EU competition law infringements that the portfolio company may have started to commit many years before its acquisition and has continued to do so, after the acquisition, with or without the private equity's firm knowledge of this ongoing infringement. Due diligence, audits, compliance programmes, contractual agreements between investors and companies taken place before the acquisition, so that they may not be considered as an involvement in the portfolio company's operational business or corporate structure, as well as use of leniency programmes if an infringement is uncovered can help the pro-active financial investors to weather the EU antitrust storm.

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PROTECTING THE UNION RULE OF LAW THROUGH NATIONAL COURT SCRUTINY? A COMMENT ON JOINED CASES C-354/20 PPU AND C-412/20 PPU *L AND P*

AGNES BAUDE*

This contribution is a comment on the ECJ's judgment of 20th December 2020 in L and P, which is a follow-up on the Court's earlier ruling in LM – Minister for Justice and Equality (Deficiencies in the system of justice). It covers the key findings of the Advocate General's Opinion, the judgment of the Court of Justice and the following implications for the national courts within the Judicial cooperation in criminal matters. The analysis investigates the case-law from a constitutional as well as a national perspective, with its main focus on pivotal considerations for the national courts within the execution of a European Arrest Warrant issued by a Rule of Law-backsliding country. The theoretical horizontal dialogue established by the Court is scrutinised in an attempt to concretise the diverse steps of the national examination of the judiciary in the issuing Member State.

1 INTRODUCTION

On 20th December 2020 in the *L and P*[1] case the Court of Justice of the EU (CJEU, ECJ, the Court) continued its earlier case-law stemming from the *LM*[2] case and the landmark ruling in *Aranyosi and Căldăraru*[3]. The issue of fact concerns European extradition through the Framework Decision of a European Arrest Warrant[4] (FD EAW) but raises broader questions vis-à-vis Member State compliance with fundamental rights and the rule of law. Notably, the balance between the cornerstone principles of effectiveness[5] of the EU area of freedom, security and justice (AFSJ)[6], i.e. the principle of mutual trust and the principle of mutual recognition[7] vs. the common values of the EU in Article 2 TEU plays a central role in the Court's reasoning.

The rule of law backsliding in some EU Member States, especially Poland and Hungary, through deficiencies in the judiciary has led to a crisis impacting several dimensions of the European cooperation.[8] Respect for the rule of law is of fundamental importance in

* Mannheimer Swartling.

[1] Joined Cases C-354/20 and C-412/20 *L and P* EU:C:2020:1033.

[2] Case C-216/18 PPU *LM - Minister for Justice and Equality (Deficiencies in the system of justice)* EU:C:2018:586.

[3] Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* EU:C:2016:198.

[4] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24).

[5] The principle of mutual recognition was established within the internal market concerning free movement of goods in the landmark ruling in Case C-120/78 *Cassis de Dijon* EU:C:1979:42.

[6] Article 3.2 TEU.

[7] See e.g. Recital 6 of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States; Case C-216/18 PPU *LM* EU:C:2018:586, para 41; Joined Cases C-354/20 and C-412/20 *L and P* EU:C:2020:1033, para 36.

[8] Theodore Konstadinides, *The Rule of Law in the European Union: The Internal Dimension* (Hart Publishing, 2017), IX.

the Union[9] and thus a pre-condition for accession to the EU according to Article 49 TEU. Pursuant to Article 2 TEU, the rule of law is a common value between the Member States.[10] In a situation when a Member State no longer observe the EU common values, Article 7 TEU - "the nuclear option"[11], provides a political mechanism by which the concerned Member State might lose authorities within the Union.[12] The mechanism is political since the decision making lies within the authority of the Council. Furthermore, the decision requires unanimity, which in practice rules out the implementation of the mechanism in a situation where there are more than one Member State that disrespects the fundamental values of the EU. In 2017, the European Commission (Commission) launched a reasoned proposal in accordance with Article 7(1) for a Council decision on the determination of a clear risk of a serious breach by Poland of the rule of law.[13] In September 2018, the Parliament launched a proposal against Hungary.[14] Today, more than three years later, the negotiations are still pending in the Council.

The European judicial cooperation in criminal matters, which is founded on the principles of mutual trust and mutual recognition[15], is one dimension that is perceptibly affected by the dismantling of the judiciary's independence. The principle of mutual recognition introduced free movement for judgments and decisions in criminal matters, primarily on grounds of effectiveness in the fight against organised crime and terrorism in the EU.[16] The cooperation in criminal matters presupposes autonomous and functioning national courts that are able to ensure the fundamental rights of individuals[17], e.g. the right to an effective remedy and a fair trial in Article 47 of the EU Charter. The FD EAW, launched in June 2002, was the first mechanism applying the principle of mutual recognition in the European judicial cooperation in criminal matters, and likely still the most substantial result of the judicial cooperation.[18] As an immediate response on the 9/11 attacks the

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[9] The founding character of the rule of law within the Union was established for the first time in Case 294/83 *Les Verts v. Parliament* EU:C:1986:166.

[10] Article 2 TEU states "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. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".

[11] SPEECH/13/684, Barroso "State of the Union address 2013" (11 September 2013). <http://europa.eu/rapid/press-release_SPEECH-13-684_en.htm> accessed 19 May 2021.

[12] Article 7(3) TEU.

[13] European Commission, Reasoned proposal in accordance with Article 7.1 of the Treaty on European Union regarding the rule of law in Poland: Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM(2017) 835 final.

[14] Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Hungary of the rule of law, 2018/0902(NLE).

[15] Case C-216/18 PPU *LM* EU:C:2018:586, para 41; Joined Cases C-354/20 and C-412/20 *L and P* EU:C:2020:1033, para 36.

[16] Theodore Konstadinides 'The Europeanisation of extradition: how many light years away to mutual confidence?', in Christine Eckes (eds), *Crime within the Area of Freedom, Security and Justice* (Cambridge University Press, 2011) 192-223, 192; Ester Herlin-Karnell 'Ett konstitutionellt perspektiv på frågan om tillit inom EU:s straffrättsliga samarbete' in Antonina Bakardjieva Engelbrekt et al (eds.) *Tilliten i EU i ett vägskäl* (Santérus förlag, 2017) 161–184, 163.

[17] Case C-452/16 PPU *Poltorak* EU:C:2016:858, paras 44-45; Koen Lenaerts 'La vie après l'Avis: Exploring the principle of mutual (yet not blind) trust', Common Market Law Review, Vol. 54 (2017) 805-840, 810-813.

[18] European Commission, Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, COM(2005) 63 final, 2; Libor Klimek *European Arrest Warrant* (Springer International Publishing, 2015), 32.

Commission introduced a new system for European extradition replacing the traditional system with a faster and more effective procedure through e.g. limited grounds for non-execution.[19] The FD EAW is well-established in the Union, a "success"[20] according to the Commission, but still controversial[21] and has raised multiple questions in the context of preliminary ruling procedures.[22]

ECJ's most recent ruling in the area, *L and P*, does not in substance differ from its earlier case-law in *LM* and the two-step test concerning a horizontal rule of law scrutiny of the issuing authority of an EAW. Nevertheless, *L and P* is of interest because of the Court's explicit confirmation of the executing authority's responsibility to thoroughly perform each step of the complex examination of the independence of its European counterpart. The following case-note starts off by giving a background to the *L and P* case, including the facts of the case. The third section consists of the Opinion of the Advocate General, followed by the key findings in the Court's judgment in section four. Section five covers an analysis of *L and P* from two perspectives: a general constitutional perspective, and a national perspective. Within the analysis of the national perspective, the judgment's concrete implications for the national courts is discussed. The case-note ends with concluding remarks concerning e.g. the suitability of the chosen method of the Court.

2 BACKGROUND TO THE CASE

2.1 GENERAL BACKGROUND

The present weakening of the judiciary's independence, particularly in Poland, has been subject for numerous infringement procedures from the Commission as well as multiple preliminary ruling procedures from both national courts in Poland and courts of other Member States, the latter notably in the area of the AFSJ.[23] In a situation where the political alternatives, such as the Article 7-procedure and the Commission's different soft law frameworks[24], reveals to be insufficient, the ECJ has stepped up to protect the independence of the European courts and judges.[25] The judicial independence within the EU rule of law has via the case-law of the Court of Justice gradually evolved to a constitutional principle in

[19] Libor Klimek *Mutual Recognition of Judicial Decisions in European Criminal Law* (Springer International Publishing, 2017), 142; Theodore Konstadinides 'The Europeanisation of extradition: how many light years away to mutual confidence?' (n 16) 197.
[20] European Commission, Report from the Commission on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, COM(2007) 407 final, 2.
[21] Theodore Konstadinides, 'Judicial independence and the Rule of Law in the context of non-execution of European Arrest Warrant: *LM*', Common Market Law Review, Vol. 56 (2019) 743-770, 744.
[22] See for example Case C-396/11 *Radu* EU:C:2013:39; Case C-399/11 *Melloni* EU:C:2013:107; Case C-452/16 PPU *Poltorak* EU:C:2016:858; Case C-128/18 *Dorobantu* EU:C:2019:857.
[23] Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* EU:C:2016:198.
[24] See e.g. European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on 2020 Rule of Law Report, COM(2020) 580 final; European Commission, Communication from the Commission to the European Parliament and the Council on A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final.
annual Rule of law report (2020), rule of law framework (2014) etc.
[25] Laurent Pech and Dimitry Kochenov 'Respect for the Rule of Law of the European Court of Justice: A Casebook Overview of Key Judgments since the *Portugese Judges* Case', SIEPS Report (Stockholm, 2021), 2-3.

the Union which is enforceable through a combined reading of Article 19(1) TEU and Articles 2 and 4(3) TEU.[26] Sub-components of the principle of judicial independence has been substantialised via Article 47 of the Charter, comprising inter alia the principle of irremovability of judges.[27]

In a preliminary ruling requested from an Irish court in 2018 (*LM - Minister for Justice and Equality*[28]), the ECJ established a horizontal dialogue between the Member States concerning the independence of the issuing judicial authority of an EAW. The *LM* case confirmed a two-step test that initially had been adopted in the *Aranyosi and Căldăraru* case in the context of systematic deficiencies affecting the conditions in prisons, which were potentially detrimental to the dignity of the person of surrender pursuant to an EAW.[29] In essence, the *LM* test shall be carried out by an executing judicial authority within the execution of an EAW issued from a rule of law backsliding country. The test entails an assessment of the deficiencies in the judiciary as a whole, alongside a scrutiny of the independence of the specific issuing judicial authority of the EAW and the potential implications in the concrete case at hand. To summarise, the test requires: (1) systematic or generalised deficiencies affecting the independence of judicial bodies in the issuing Member State, and (2) evidence of a real risk that the requested person's fundamental rights will be breached in the context of surrender by an EAW[30], i.e. a risk of suffering a breach of the rights to a fair trial pursuant to Article 47 of the Charter. The steps in the two-pronged rule of law test are cumulative and cannot be confused or assessed in general terms.[31] If both the general test and the individual test are met, the executing country shall refuse to extradite the requested person.[32] In order to fulfill the *LM* test the executing judicial authority shall use the mechanism for additional information provided in the FD EAW[33], thus initiating a wide-ranging horizontal dialogue between the executing and issuing authorities.

In the so-called *Prosecutors' Cases*[34] the ECJ established the notion of a 'judicial authority' within the FD EAW as "an autonomous concept of EU law"[35]. The criteria revolve around the independence of the authority and the possibilities of political interference in its decision-making, not only in the specific case, but in general.[36] The mere formal possibility in law, even if never used in practice, to receive instructions from the executive in the exercise of its

[26] Case C-64/16 *Associação Sindical dos Juízes Portugueses* (*ASJP*) EU:C:2018:117, was the first landmark ruling in the materialization of the Union rule of law; see also Pech and Kochenov (n 25).
[27] Pech and Kochenov (n 25) 9-10.
[28] Case C-216/18 PPU *LM* EU:C:2018:586.
[29] Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* EU:C:2016:198, paras 85-90.
[30] Opinion of Advocate General Campos Sánchez-Bordona in Joined Cases C-354/20 PPU and C-412/20 PPU *L and P* EU:C:2020:295, para 1.
[31] Joined Cases C-354/20 and C-412/20 *L and P* EU:C:2020:1033, para 55-56.
[32] Case C-216/18 PPU *LM* EU:C:2018:586, para 78.
[33] Article 15(2) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.
[34] Case C-452/16 PPU *Poltorak* EU:C:2016:858; Case C-453/16 PPU *Özçelik* EU:C:2016:860; Case C-477/16 PPU *Kovalkovas* EU:C:2016:861; Joined Cases C-508/18 and C-82/19 PPU *OG and PI* EU:C:2019:456; Case C-509/18 *PF* EU:C:2019:457; Joined Cases C-566/19 PPU and C-626/19 PPU *JR and YC* EU:C:2019:1077; Case C-625/19 PPU *XD* EU:C:2019:1078; Case C-627/19 PPU *ZB* 2019:1079; Case C-510/19 *AZ* EU:C:2020:953; C-584/19 *Staatsanwaltschaft* EU:C:2020:1002.
[35] Case C-477/16 PPU *Kovalkovas* EU:C:2016:861, para 48.
[36] Joined Cases C-508/18 and C-82/19 PPU *OG and PI* EU:C:2019:456, paras 78-80.

functions precludes status as a 'judicial authority' within the FD EAW.[37] The *Prosecutors' cases* has thus established a considerably more strict requirement of the judicial authority's independence than the two-pronged test stated in *LM*.[38]

2.2 FACTS OF THE CASE

The ECJ ruling in joined cases *L and P* originate in the deteriorating rule of law situation in Poland subsequent the *LM* ruling. In particular, the worsening of the situation regard the recent extensive reforms of the judiciary which became effective in February 2020 (the "muzzle law"[39]) and the outcome of several preliminary rulings referenced by Polish courts, such as *AK and Others (Independence of Disciplinary Chamber)*[40] and *Miasto Łowicz and Prokurator Generalny*[41]. The reference for a preliminary ruling in *L and P* came from a Dutch court, Rechtbank Amsterdam, which is the sole executing judicial authority in the Netherlands. The national cases concern the surrender of two Polish citizens pursuant to EAWs issued by Polish courts. In L, the person was requested for criminal prosecution.[42] In P, the person was requested to be surrendered for execution of a custodial verdict, sentenced in July 2019.[43]

The questions for reference were submitted in July and September 2020 and primarily drew upon two alternative lines. The first line relates to the *Prosecutors' Cases* and the possible application of the Court's case-law when examining a *court* as the issuing judicial authority. The alternative line concerns the executing authority's obligation to ascertain risks in the individual case; the Dutch court argued that it is apparent from the recent developments in Poland that the systemic and generalised deficiencies concerning the independence of the Polish judiciary, with the result that the right to an independent tribunal is no longer guaranteed for any person obliged to appear before a Polish court, results in the second step being unnecessary.[44] In other words, as put by the Advocate General, the national court asks if "it is entitled to refuse the surrender requested by a Polish court without the need to examine in detail the specific circumstances pertaining to the EAW"[45]. Within the reference

[37] Joined Cases C-508/18 and C-82/19 PPU *OG and PI* EU:C:2019:456, 88; Martin Böse 'The European arrest warrant and the independence of public prosecutors: *OG & PI, PF, JF & YC*', Common Market Law Review, No. 57 (2020) 1259-1282, 1279.

[38] Laurent Pech and Dimitry Kochenov 'Respect for the Rule of Law of the European Court of Justice: A Casebook Overview of Key Judgments since the *Portugese Judges* Case', SIEPS Report (Stockholm, 2021), 117.

[39] The so-called muzzle law has led to multiple controversies both internal and external, i.e. from EU-horizon as well as from the Venice commission and other international organisations. See e.g. Laurent Pech, Sadurski Wojciech and Kim Lane Scheppele 'Open Letter to the President of the European Commission regarding Poland's "Muzzle Law"' (*Verfblog* 9 March 2020) <https://verfassungsblog.de/open-letter-to-the-president-of-the-european-commission-regarding-polands-muzzle-law/> accessed 19 May 2021; Themis newsletter 'Close to the point of no return (newsletter about the situation of the Polish judiciary)' (20 February 2020) <http://themis-sedziowie.eu/wp-content/uploads/2020/02/Newsletter.pdf> accessed 19 May 2021; Euronews 'Hundreds of judges and lawyers protest against Polish 'muzzle-law" (11 January 2020) <https://www.euronews.com/2020/01/11/hundreds-of-judges-and-lawyers-join-warsaw-protest-against-polish-muzzle-law> accessed 19 May 2021; Freedom House 'Poland: Restrictive Judiciary Law Sets Dangerous Precedent' (23 January 2020) <https://freedomhouse.org/article/poland-restrictive-judiciary-law-sets-dangerous-precedent> accessed 19 May 2021.

[40] Joined Cases C-585/18, C-624/18 and C-625/18 *AK and Others* EU:C:2019:982.

[41] Joined Cases C-558/18 and C-563/18 *Miasto Łowicz and Prokurator Generalny* EU:C:2020:234.

[42] Request for a preliminary ruling in Case C-354/20 PPU.

[43] Joined Cases C-354/20 and C-412/20 *L and P* EU:C:2020:1033, para 23.

[44] Joined Cases C-354/20 and C-412/20 *L and P* EU:C:2020:1033, paras 14-19.

[45] Opinion of Advocate General Campos Sánchez-Bordona in Joined Cases C-354/20 PPU and C-412/20 PPU *L and P* EU:C:2020:295, para 5.

of the posterior case (*P*), Rechtbank Amsterdam added questions regarding the relevant time for the examination of the independence of the courts in the issuing country.[46]

3 ADVOCATE GENERAL CAMPOS SÁNCHEZ-BORDONA'S OPINION

The Opinion of Advocate General (hereinafter AG) Campos Sánchez-Bordona focuses on the second question from the referring court, namely, if the recent Polish legislative reforms concerning the independence of the judiciary in themselves can constitute a sufficient ground to refuse to execute an EAW due to the overall risk that a person's right to a fair trial before an independent and impartial tribunal, guaranteed by Article 47 of the Charter, may be breached.[47] The AG commenced with declaring that the issue of matter in *L and P* refers to Article 1(3) of the FD EAW relating to the obligation of the Member States to respect fundamental rights, applicable in the *LM* and *Aranyosi and Căldăraru* cases.[48] In the view of the AG, the questions concerning the possibility of refusal to execute an EAW on account of systemic or generalised deficiencies affecting the independence of the judiciary in the issuing Member State "are most important from a general point of view"[49].

The Opinion of the AG follows the *LM* caselaw in a strict sense and stresses that the exception earlier laid down by the Court is in itself an "*exceptional* response" in the context of the FD EAW, a framework which does not lay down any grounds for non-execution in such circumstance. However, when circumstances of such "*exceptional nature*" concerning generalised or systematic deficiencies of the judiciary's independence exist, the "EU law responds […] in terms which are also *exceptional*".[50] The "*exceptional response*" of the Union law is, however, limited and does not "go so far as to require the automatic non-execution of every EAW issued by the judicial authority of Member State affected by systematic or generalised deficiencies".[51] When systematic or generalised deficiencies has been established through "objective, reliable, specific and properly updated evidence"[52], and after finding "that those deficiencies entail a real risk of infringement of the right to fair trial"[53], the executing judicial authority must "*as a second step, asses specifically and precisely* whether, in the particular circumstances of the case, there are substantial grounds for believing that, following his surrender to the issuing Member State, the requested person will run that risk"[54]. The AG underlined that "no matter how thought-provoking the solution by the referring court may be", the solution is neither compatible with the Court's earlier caselaw nor the FD EAW stating that the EAW mechanism may only be suspended when a determination by the Council pursuant to Article 7(2) and (3) has been laid down.[55] "[A] global solution" where all EAW issued from a from a rule of law backsliding country is thus

[46] Joined Cases C-354/20 and C-412/20 *L and P* EU:C:2020:1033, para 25.
[47] Opinion of Advocate General Campos Sánchez-Bordona in Joined Cases C-354/20 PPU and C-412/20 PPU *L and P* EU:C:2020:295, para 29.
[48] ibid, para 27.
[49] ibid, para 35.
[50] ibid, para 44.
[51] ibid, para 45.
[52] ibid, para 42.
[53] ibid, para 46.
[54] ibid.
[55] ibid, paras 50 and 54-56.

"reserved for when the [Council] formally determines that an issuing Member State has breached the values referred to in Article 2 TEU"[56]. The AG did indeed agree with the referring court that the "situation obtaining at the time when judgment was given in [*LM*] was concerning, the subsequent data appear to point to the worsening of that situation"[57] and that the legislative reforms mentioned in the order for reference as well as the ECJ's most recent judgments "make clear that the systematic or generalised deficiencies discernible in relation to the independence of courts in [Poland] are liable to threaten the fundamental rights of persons coming under their jurisdiction"[58]. Nevertheless, according to the AG, the key question is not whether the threat to the independence of Polish courts have worsened or not, but instead "the *nature* of the body with responsibility for making that finding and acting on it"[59] – it is not possible to "simply suspend, automatically and indiscriminately, the application of the [FD EAW] in respect of [all EAWs] issued by those courts"[60].[61]

The view firmly expressed by the AG is that "once systemic or generalised deficiencies have been confirmed in the issuing Member State"[62] the executing judicial authority is entitled to refuse surrender of the requested person *only* "if, having regard to that person's personal situation, the nature of the offence for which he is being prosecuted and the factual context that forms the basis of the EAW, it concludes that that person may actually suffer a breach of the fundamental right he is guaranteed by Article 47 of the Charter"[63]. As such, the possibility to refuse an EAW "requires a rigorous examination", divided into two steps, to be carried out by the executing country.[64] "In the light of increased systemic or generalised deficiencies, and in the absence of a formal determination by the [Council], [the executing authority] must, therefore, be *even more rigorous* in its examination of the circumstances pertaining to the EAW which it has been requested to execute, but it is not exempt from the duty to carry out that examination in particular"[65]. The AG further clarified that the information requested by the issuing judicial authority within the subsequent horizontal dialogue under Article 15(2) of the FD EAW "does not only have to be information which is necessary for the purposes of conducting that particular examination but must also be limited to information which the issuing authority is reasonably in a position to provide"[66].

The rationale behind the AG's reasoning appears to be that the systematic or generalised deficiencies which can be identified of Polish courts in the first step of the examination does not "deprive those courts of their nature as courts"[67]. In the perspective

[56] ibid, para 55.
[57] ibid, para 57, referring to the Commission Staff Working Document, 2020 Rule of Law Report, Country Chapter on the rule of law situation in Poland (SWD(2020) 320 final): "In its report of September 2020 on the situation regarding the rule of law in the EU, the Commission notes that, in Poland, 'the reforms, impacting the Constitutional Tribunal, the Supreme Court, ordinary courts, the National Council for the Judiciary and the prosecution service, have increased the influence of the executive and legislative powers over the justice system and therefore weakened judicial independence'".
[58] Opinion of Advocate General Campos Sánchez-Bordona delivered in Joined Cases C-354/20 PPU and C-412/20 PPU *L and P* EU:C:2020:295, para 58.
[59] ibid, para 61.
[60] ibid, para 60.
[61] ibid, paras 59-61.
[62] ibid, para 62.
[63] ibid.
[64] ibid, para 47.
[65] ibid, para 76, italics added.
[66] ibid, para 77.
[67] ibid, para 72.

of the AG, the Polish courts continue to be courts within the meaning of EU law, "even though the independence of the judiciary, taken to mean a group of courts which exercise jurisdiction, is threatened by governmental structures (or, also, by the anomalous performance of disciplinary functions)"[68].

Concerning the relevant time for the assessment whether the authority is an independent judicial body, the AG "believe[s] that it is irrelevant"[69] whether the systematic or generalised deficiencies had worsened before or after an EAW was issued.[70] The principal consideration for the executing judicial authority is whether the issuing judicial body, which has "to rule on the requested person's fate following his surrender"[71], "retains its independence to give judgment on that person's situation free from external interference, threats or pressure"[72]. The AG stresses the importance for the executing judicial authority to "liaise with a *judicial* interlocutor in the issuing Member State"[73], and given the EAW procedure's impact on liberty it may be "necessary to gather additional information which will enable the executing authority to establish exactly the facts which form the basis of the EAW […] and, in particular, what circumstances the requested person will find himself in following his surrender"[74]. In other words, when the executing authority is faced with a situation of increasing systematic and generalised deficiencies in the judiciary of the issuing country, the executing judicial authority may be obliged to not only interfere with the issuing judicial authority in the context of the rule of law-examination, but to also seek objective information concerning the independence of that issuing authority and the individual situation for the requested person.

4 FINDINGS OF THE COURT

In substance, the judgment of the Court (Grand Chamber) upholds the same position as the Opinion from the Advocate General. The reasoning, particularly concerning the first question from the referring court, does however differ from the Opinion. The Court also elaborated on the relevant time for the assessment of the issuing judicial authority's independence.

4.1 CASE-LAW ON 'ISSUING JUDICIAL AUTHORITY' NOT APPLICABLE

The Court first dealt with the primary question from the referring court: if the case-law regarding the notion of "judicial authority" in the context of the FD EAW is applicable in the situations at hand.[75] ECJ started to highlight that both the fundamental principles of mutual trust and mutual recognition requires, "save in exceptional circumstances"[76], all Member States to consider that their Union counterparts comply "with EU law and

[68] ibid.
[69] ibid, para 81.
[70] ibid.
[71] ibid, para 82.
[72] ibid.
[73] ibid, para 84.
[74] ibid, para 85.
[75] Joined Cases C-354/20 and C-412/20 *L and P* EU:C:2020:1033, para 34.
[76] ibid, para 35.

particularly with the fundamental rights recognised by EU law"[77]. All Member States are, pursuant to the principle of mutual recognition explicitly stated in Article 1(2) of the FD EAW, required to execute an EAW issued by another Member State. Following the FD EAW and the exhaustively listed grounds for non-execution, execution of an EAW constitutes the rule, and refusal to execute is an exception which must be interpreted strictly.[78] However, the above stated only applies to 'judicial decisions' issued by a 'judicial authority' within the meaning of Article 6(1) of the FD EAW, which implies that "the authority concerned acts independently in the execution of those of its responsibilities which are inherent in the issuing of [an EAW]"[79]. In that regard, the Court recalled that "the requirement of judicial independence forms part of the essence of the fundamental right to a fair trial, a right which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States, set out in Article 2, in particular the rule of law, will be safeguarded"[80].

Nonetheless, the Court found that an executing judicial authority cannot "deny the status of 'issuing judicial authority', within the meaning of the [EAW], to all judges and courts […], acting by their nature entirely independently of the executive"[81], in a rule of law backsliding Member State. Such interpretation, encouraged by the referring court, would "amount to extending the limitations that may be placed on the principles of mutual trust and mutual recognition beyond 'exceptional circumstances' by leading to a general exclusion of the application of those principles in the context of [EAWs] issued by the courts of the Member State concerned by […] deficiencies".[82] In the view of the ECJ, this would accordingly result in that "no court of that Member State could any longer be regarded as a 'court or tribunal' for the purposes of the application of other provisions of EU law, in particular Article 267 TFEU"[83].

The Court consequently ruled out the applicability of the case-law from the *Prosecutors' Cases* with reference to the substantive differences between those cases and the situations at hand in *L and P*, as well as the situation in *LM*.[84] In the context, the Court drew attention to its previous findings in *OG and PI (Lübeck and Zwickau Public Prosecutor's Offices)*, in which it stated that the notion of 'judicial authority' "are not limited to designating *only the judges or courts* of a Member State, but must be construed as designating, more broadly, the authorities participating in the administration of criminal justice in that Member State, as distinct from, inter alia, ministries or police services which are part of the executive"[85]. The Court thereafter ascertained that "[i]n European Union law, the requirement that courts be independent

[77] ibid, referring to e.g. Opinion 2/13 of the Court, EU:C:2014:2454, which raised the principles of mutual trust and mutual recognition to the status as fundamental principles in EU law, thus establishing a strict approach of effectiveness – See Eduardo Gill-Pedro and Xavier Groussot 'The Duty of Mutual Trust in EU Law and the Duty to Secure Human Rights: Can the EU's Accession to the ECHR Ease the Tension?', Nordic Journal of Human Rights, 35:3 (2017), 258-274.
[78] Joined Cases C-354/20 and C-412/20 *L and P* EU:C:2020:1033, para 37.
[79] ibid, para 38, referring to e.g. Joined Cases C-508/18 and C-82/19 PPU *OG and PI* EU:C:2019:456.
[80] Joined Cases C-354/20 and C-412/20 *L and P* EU:C:2020:1033, para 39.
[81] ibid, para 42.
[82] ibid, para 43.
[83] ibid, para 44.
[84] ibid, paras 45-50; i.e. the difference between 'prosecutors' and 'courts' within the law enforcement service.
[85] ibid, para 46, italics added, referring to Joined Cases C-508/18 and C-82/19 PPU *OG and PI* EU:C:2019:456, para 50.

precludes the possibility that they may be subject to a hierarchical constraint or subordinated to any other body and that they may take orders or instructions from any source whatsoever"[86]. Given the reasoning of the Court, the more stringent independence-test construed in the *Prosecutors' Cases* concerning 'judicial authority' is thus precluded in situations when a *court* has issued the EAW.

4.2 NO SHORTCUT IN THE TWO-STEP TEST

After dealing with the notion of 'judicial authority' within Article 6(1) of the FD EAW, the Court turned to the second question of the referring court, namely if the executing judicial authority, on account of systematic or generalised deficiencies concerning the independence of the judiciary of the issuing Member state, may presume (i.e. without carrying out a specific and precise assessment of the person's individual situation) that he or she will run a real risk of breach of his or her fundamental right to a fair trial guaranteed by Article 47(2) of the Charter.[87]

The Court, similar to the AG, maintains its earlier case-law and leaves no room for a simplification of the two-step test established in *LM* concerning the possibility of refusing to execute an EAW pursuant to Article 1(3) of the FD EAW.[88] The Court stressed that the two steps of the assessment involve "an analysis of the information obtained on the basis of different criteria, with the result that those steps cannot overlap with one another"[89]. In the context of the first step, the executing judicial authority must "determine whether there is objective, reliable, specific and properly updated material indicating that there is a real risk of breach of the fundamental right to a fair trial […] on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary"[90]. Within the second step, the executing authority must first determine "specifically and precisely, to what extent those deficiencies are liable to have an impact at the level of the courts of that Member State which have jurisdiction over the proceedings to which the requested person will be subject"[91]. Next, the executing authority must determine whether "having regard to his or her personal situation, to the nature of the offence for which he or she is being prosecuted and the factual context in which that arrest warrant was issued, and in the light of any information provided by that Member State pursuant to Article 15(2) of the [FD EAW], there are substantial grounds for believing that that person will run such a risk if he or she is surrendered to that Member State"[92].

In line with the Opinion of the AG, the Court also underlined that the implementation of the FD EAW may be suspended only "in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 2 TEU, including that of the rule of law, determined by the European Council pursuant to Article 7(2) TEU, with the consequences set out in Article 7(3) TEU"[93]. Until such decision has been adopted, no

[86] Joined Cases C-354/20 and C-412/20 *L and P* EU:C:2020:1033, para 49.
[87] ibid, para 51.
[88] ibid, paras 52-64.
[89] ibid, para 56.
[90] ibid, para 54.
[91] ibid, para 55.
[92] ibid.
[93] ibid, para 57.

automatic refusal to execute an EAW, and thus a "de facto suspension of the [EAW] mechanism"[94], from a rule of law backsliding Member State is possible.[95] This also applies in a situation when there are indications of increased systemic or generalised deficiencies concerning the independence of the judiciary of the issuing Member State. In the event of further deterioration of the respect for the rule of law in the issuing court, the Court found that the executing authority must "*exercise vigilance*"[96] in its examination of the issuing authority, but "it cannot, however, rely on that finding alone in order to refrain from carrying out the second step of the examination"[97]. In this context, the Court also highlighted the objective of the mechanism of the EAW that "is in particular to combat the impunity of a requested person who is present in territory other than that in which he or she has allegedly committed an offence"[98], which also precludes an interpretation of Article 1(3) of the FD EAW that opens up for refusal to execute an EAW on solely presumptions of the risk of a breach of the fundamental right to a fair trial.[99]

4.3 RELEVANT TIME FOR THE EXAMINATION

Concerning the question whether the executing judicial authority should take account of systemic or generalised deficiencies regarding the independence of the courts in the issuing country which have occurred *after* the issue of an EAW, the Court started by recalling that an arrest warrant may be issued "both for the purposes of conducting a criminal prosecution and for the purposes of executing a custodial sentence or detention order"[100]. On account of the purpose of the EAW, the relevant time for when the deficiencies in the judiciary emerged differ.

In a situation when an EAW is issued for the purposes of conducting a criminal prosecution, such as in the main proceedings in *L*, the executing judicial authority must, "in order to assess specifically and precisely whether in the particular circumstances of the case there are substantial grounds for believing that following that surrender that person will run a real risk of breach of his or her fundamental right to a fair trial, examine in particular to what extent the systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary are liable to have an impact at the level of that Member State's courts with jurisdiction over the proceedings to which that person will be subject"[101]. The assessment therefore also "involves taking into consideration the impact of such deficiencies which may have arisen *after* the issue of the [EAW] concerned"[102], and not only the deficiencies existing at the time for issuing of the EAW.

This is also the case when an EAW is issued for the purposes of executing a custodial sentence or detention order, as in *P*, when the requested person "following his or her possible surrender, *he or she will be subject to new court proceedings*, on account of the bringing of an action

[94] ibid, para 59.
[95] ibid.
[96] ibid, para 60, italics added.
[97] ibid.
[98] ibid, para 62.
[99] ibid, paras 62-64.
[100] ibid, para 65.
[101] ibid, para 66.
[102] ibid, italics added.

relating to the execution of that custodial sentence or that detention order or of an appeal against the judicial decision the execution of which is the subject of that [EAW], as the case may be"[103]. In this second situation, the executing judicial authority "must also examine to what extent the systemic or generalised deficiencies which existed in the issuing Member State at the time of issue of the [EAW] have, in the particular circumstances of the case, affected the independence of the court of that Member State which imposed the custodial sentence or detention order the execution of which is the subject of that [EAW]"[104]. In other words, when executing an EAW for the purposes of custodial sentence or detention order, the independence of the issuing authority, as well as the competent court of the eventual new court proceedings, has to be examined, but *also* the court of the original judgment which forms the basis for the EAW has to be assessed *if* that judgment was issued at a time when the systemic or generalised deficiencies in the issuing country already existed.

5 ANALYSIS OF THE CASE

5.1 CONSTITUTIONAL PERSPECTIVE: UPHOLDING THE *LM*-PRECEDENT

The Court's judgment in the joined cases *L and P* sends a clear message that a circumvention of the *LM*-established two-pronged test, constituting an exception from the Member States' main rule to execute an EAW, is not an option. A thorough examination of each step must be executed, regardless of how depraved the respect for the rule of law in the issuing Member State may be. The political stalemate within the Article 7 procedure, a situation which by now is clearly demonstrated[105], does not either have any effect on the earlier case-law.

According to the rationale of the AG and the ECJ, the question is not how 'bad' the situation concerning the independence of judiciary of the issuing country may be, but rather the *nature* of the body which adopts a decision that in practice would result in a "de facto suspension of the (EAW) mechanism"[106] for the actual Member State.[107] The justification of the Court's conclusion is Recital 10 of the FD EAW, stating that a decision pursuant to Article 7(2), and sanctions within Article 7(3), must have been adopted by the Council to enable the suspension of the cooperation mechanism. In the view of Pech, Wachowiec and Mazur, the logic in the Court's reasoning would in practice result in that albeit Poland would turn into a formal dictatorship, and no unanimously decision pursuant to Article 7 TEU is adopted by the Council, the national courts would still have to assess every EAW issued by Poland on a case-by-case basis.[108]

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[103] ibid, para 67, italics added.
[104] ibid, para 68.
[105] Dimitry Kochenov, 'Article 7: A Commentary on a Much Talked-About 'Dead' Provision' in Armin von Bogdandy et al (eds) *Defending Checks and Balances in EU Member States: Taking Stock of Europe's Actions.* (Springer, 2021), 127-154, 148.
[106] Joined Cases C-354/20 and C-412/20 *L and P* EU:C:2020:1033, para 59.
[107] ibid.; Opinion of Advocate General Campos Sánchez-Bordona delivered on 12 November 2020 in Joined Cases C-354/20 PPU and C-412/20 PPU *L and P* EU:C:2020:295, para 41.
[108] Laurent Pech, Patryk Wachowiec and Dariusz Mazur, '1825 Days Later: The End of the Rule of Law in Poland (Part II)', (*VerfBlog* 18 January 2021) <https://verfassungsblog.de/1825-days-later-the-end-of-the-rule-of-law-in-poland-part-ii/> accessed 19 May 2021.

Similar reasoning was rendered by the Court in *LM*, which have been heavily criticised by prominent legal scholars.[109] The critique has targeted inter alia the misconception of the FD EAW in relation to the 'new' Article 7(1) TEU[110], and the fact that the ECJ gives secondary EU law precedence over primary law.[111] Furthermore, the Court's high level of protection of the principles of mutual trust and recognition, prior to the maintenance of the rule of law, has been highly questioned.[112] At the same time, opinions supporting the Court's reasoning in *LM* have been expressed[113], implicating inter alia that a solution in which an errant Member State had been excluded from the EAW mechanism would have been incompatible with the EU principles of conferral of powers, Article 5(1-2) TEU, and sincere cooperation, Article 4(3) TEU.[114] This view may be legitimatised from a broader rule of law-perspective: the maintenance of the internal Union rule of law should not take place at the expense of the rule of law, which might be the case if the ECJ ruled against what is explicitly stated in the FD EAW and the fundamental principles of conferral and cooperation. Still, within the Common European Asylum System in the AFSJ, the ECJ has accepted non-statutory exceptions from the main rule of transferring pursuant to 'Dublin' on account of either systematic deficiencies in the asylum system[115], or due to personal circumstances in the individual case[116]. As noticed by Vandamme, the ECJ in the *L and P* judgment once more confirms the different treatment of international protection seekers vs. the surrender of suspected criminals in EU law, where in the latter category crime fighting seems to take precedence over fundamental rights concerns.[117] At the same time, the Union objective to combat impunity is of substantial importance within the AFSJ[118] and should not be overlooked.[119]

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[109] See e.g. Von Bogdandy et al. (n 105) 385-401; Stanislaw Biernat and Pawel Filipek 'The Assessment of Judicial Independence Following the CJEU Ruling in C-216/18 LM' in Armin von Bogdandy et al (eds) *Defending Checks and Balances in EU Member States: Taking Stock of Europe's Actions.* (Springer, 2021) 403-430; Agnieszka Frąckowiak-Adamska, Agnieszka, 'Drawing Red Lines with No (Significant) Bites: Why an Individual Test Is Not Appropriate in the LM Case' in von Bogdandy (n 105) 443-454; Pech and Kochenov (n 25) 119-130; Wouter Van Ballegooij and Petra Bárd, 'The CJEU in the Celmer case: One step forward, two steps back for upholding the rule of law within the EU' (*VerfBlog* 29 July 2018) <https://verfassungsblog.de/the-cjeu-in-the-celmer-case-one-step-forward-two-steps-back-for-upholding-the-rule-of-law-within-the-eu/> accessed 19 May 2021.

[110] Van Ballegooij and Bárd (n 109)

[111] Pech and Kochenov (n 25) 127.

[112] Van Ballegooij and Bárd (n 109).

[113] See e.g. Konstadinides, 'Judicial independence and the Rule of Law in the context of non-execution of European Arrest Warrant: *LM*' (n 21) 764; Valsamis Mitsilegas (2019), 'The European Model of Judicial Cooperation in Criminal Matters: Towards Effectiveness Based on Earned Trust', Revista Brasileira de Direito Processual Penal, vol. 5, no. 2 (2019), 565-596, 584.

[114] See Theodore Konstadinides, 'Judicial independence and the Rule of Law in the context of non-execution of European Arrest Warrant: *LM*' (n 21) 764.

[115] Joined Cases C-411/10 and C-493/10 *NS* EU:C:2011:865.

[116] Case C-578/16 PPU *CK* EU:C:2017:127.

[117] See Thomas Vandamme '"The two-step can't be the quick step': The CJEU reaffirms its case law on the European Arrest Warrant and the rule of law backsliding', (*European Law Blog* 10 February 2021) <https://europeanlawblog.eu/2021/02/10/the-two-step-cant-be-the-quick-step-the-cjeu-reaffirms-its-case-law-on-the-european-arrest-warrant-and-the-rule-of-law-backsliding/> accessed 19 May 2021.

[118] Article 3(2) TEU and Article 67 TFEU.

[119] Referred to in Opinion of Advocate General Campos Sánchez-Bordona delivered in Joined Cases C-354/20 PPU and C-412/20 PPU *L and P* EU:C:2020:295, para 52 and in the Court's judgment, Joined Cases C-354/20 and C-412/20 *L and P* EU:C:2020:1033, paras 62-64.

Anyhow, the fact that the Court did not extend the scope of its findings in the *Prosecutors' Cases* to also apply courts within the Union ought to be a sound deduction. Given the circumstance that it is not possible to separate the notion of 'judicial authority' within the EAW mechanism, and the general concept of 'court' in the EU law would result in the Polish courts being punished twice: the loss of their status as 'judicial authority' would also deny them the status of 'court' or 'tribunal' in the context of preliminary ruling procedures pursuant to Article 267.[120] The Polish judges had thus been subject to severe threats against their independence at home and, at the same time, lost their opportunity to seek external support through the ECJ.[121]

5.2 NATIONAL PERSPECTIVE: HORIZONTAL RULE OF LAW DIALOGUE

Despite the above-mentioned approaches of the legal scholars concerning the Court's reasoning in *LM* being diverse, most of them seem to have one thing in common: the practical enforcement of the two-step test concerning the judiciary's independence of the issuing country is complex and difficult for the national courts to navigate.[122] The following analysis comments some key findings in the *L and P* case concerning the horizontal dialogue between the executing and issuing courts.

It is worth noting that the horizontal dialogue between the judicial authorities within the EAW mechanism is not in itself a new phenomenon. Article 15(2) of the FD EAW has since the establishment of the European system on extradition provided the executing judicial authority the opportunity to request supplementary information in the context of its decision on surrender. At an early stage within the AFSJ, the ECJ established in *Advocaten voor de Wereld*[123] the need for dialogue and submissions between the domestic courts in the context of the EAW mechanism. The Court subsequently left considerable room for the national authorities' discretion.[124] However, what is new with the horizontal rule of law dialogue, originated in *LM* and confirmed in *L and P*, is that the conferred discretionary power now shall be applied within a complex assessment regarding the independence of the executing judicial authority's European counterpart. Contrary to *Aranyosi and Căldăraru*, which concerned shortcomings of the conditions in prisons, the issuing court in the situation at hand in *LM* and *L and P* is required to answer questions about itself and the potential shortcomings of its own functions, not a separate branch within the administration of criminal justice.[125]

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[120] See e.g. Case C-54/94 *Dorsch Consult* EU:C:2008:461 concerning the concept of 'court' and 'tribunal' within EU law.

[121] See also Vandamme (n 117).

[122] Pech and Kochenov (n 25) 126-129; Petra Bárd and John Morijn, 'Luxembourg's Unworkable Test to Protect the Rule of Law in the EU (Part I)' (*VerfBlog*, 18 April 2020) <https://verfassungsblog.de/luxembourgs-unworkable-test-to-protect-the-rule-of-law-in-the-eu/> accessed 19 May 2021; Konstadinides, 'Judicial independence and the Rule of Law in the context of non-execution of European Arrest Warrant: *LM*' (n 21) 767.

[123] Case C-303/05 *Advocaten voor de Wereld* EU:C:2007:261.

[124] Daniel Sarmiento 'European Union: The European Arrest Warrant and the quest for constitutional coherence', International Journal of Constitutional Law, Vol. 6, Issue 1 (2008) 171-183, 171.

[125] In the context of Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* EU:C:2016:198, the issuing Court shall answer questions about the correctional treatment system – a totally separate branch within the law enforcement system; Biernat and Filipek (n 109) 423.

Moreover, the decentralisation of the examination of judicial independence to the national courts ought to result in a multitude of contradictory decisions.[126] The aforementioned is not only alien to the general understanding of EU law, with the Court proclaiming uniform application of the Union legal sources[127], but ought also to result in an erosion of the principle of mutual trust between the Member States, rather than strengthening the principle within the judicial cooperation.[128] Following the Court's judgment in *LM* in 2018, several domestic courts have applied the two-pronged test with varying result.[129] In general, the questions hitherto asked by the executing authorities vary significantly regarding the substance and the level of detail between different countries, as well as different courts.[130] Furthermore, Filipek and Biernat found that the answers from the Polish courts implies that they are only to a limited extent willing to cooperate in the context of the dialogue.[131] Most answers merely include a brief presentation of general rules of the Polish judiciary, such as excerpts from the Polish constitution or extracts from public data. Occasionally, the answers contain vague ascertainments like "[i]n Poland, legal norms exclude threats to the independence of judges"[132]. According to Filipek and Biernat, only a few Polish courts, or rather judges, have expressed critical opinions vis-à-vis its independence from the executive. In this regard, the information has primarily concerned previous disciplinary procedures against judges. The strong influence from the Minister of Justice regarding the court's administration, as well as arbitrary appointments or dismissals of Presidents of the Courts, have also been reported.[133] Additionally, the horizontal dialogue has resulted in disputes between the Member States: the District Court in Warsaw, as an immediate response on the Dutch reference for a preliminary ruling in *L and P*, denied the execution of a Dutch EAW on account of, pursuant to the Warsaw court, inter alia the politician interference in judicial appointments in the Netherlands.[134]

As noted by the Court of Justice, as well as the Advocate General, in the light of increased systemic or generalised deficiencies in the issuing Member State, the executing authority has to "exercise vigilance"[135] throughout an "even more rigorous examination"[136] of the issuing authority. However, the exact procedure for the horizontal dialogue remains,

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126 Pech and Kochenov (n 25) 131.
127 Jörgen Hettne and Ida Otken Eriksson *EU-rättslig metod: teori och genomslag i svensk rättstillämpning* (Norstedts Juridik: 2011), 21-22.
128 Pech and Kochenov (n 25) 131.
129 Petra Bárd and John Morijn, 'Domestic Courts Pushing for a Workable Test to Protect the Rule of Law in the EU (Part II)' (*VerfBlog* 19 April 2020): <https://verfassungsblog.de/domestic-courts-pushing-for-a-workable-test-to-protect-the-rule-of-law-in-the-eu/> accessed 19 May 2021; Biernat and Filipek (n 109) 421.
130 See e.g. Decision of 10 Februari 2021 by Rechbank Amsterdam, ECLI:NL:RBAMS:2021420; Decision of 31 October 2021 by Oberlandesgericht Karlsruhe, Ausl 301 AR 95/18.
131 Biernat and Filipek (n 109) 421.
132 ibid.; Regional Court in Warsaw (Letter of 26 September 2018) <http://bip.warszawa.so.gov.pl/attachments/download/7511> accessed 19 May 2021.
133 Biernat and Filipek (n 109) 421-422.
134 Ruleoflaw.pl 'District Court in Warsaw judge accuses a Dutch court of obstruction in the European Arrest Warrant cases <https://ruleoflaw.pl/district-court-in-warsaw-european-arrest-warrant/> accessed 19 May 2021; Reuters 'Polish deputy minister questions independence of Dutch judges' <https://www.reuters.com/article/uk-poland-netherlands-extradition-idUKKCN26C2TX> accessed 19 May 2021.
135 Joined Cases C-354/20 and C-412/20 *L and P* EU:C:2020:1033, para 60.
136 Opinion of Advocate General Campos Sánchez-Bordona delivered in Joined Cases C-354/20 PPU and C-412/20 PPU *L and P* EU:C:2020:295, para 76.

as noted above, open for the issuing court to decide. Some comments on the different steps are presented below.

5.2[a] The Factual Background of the Dispute

The concrete risk for a breach of the requested person's right to a fair trial, in the context of the examination within the second, individual, step is the part of the national assessment which has been subject for the majority of the critique against the horizontal rule of law dialogue established in *LM*. As put by Biernat and Filipek, the entire test may be complex – but the degree of complexity increases by each step of the examination.[137] The scrutiny of the systemic or generalised deficiencies may indeed be problematic for the executing authority to prove in a situation where no comprehensive and/or up-to-date documents are available from objective parties concerning the systemic dismantling of the rule of law in the actual country.[138] However, this is not the case in the situation at hand regarding the Polish judiciary. Within the current situation, there are multiple reports from the Commission, as well as the Venice Commission, and significant case-law from the CJEU supporting the examination within the first step. The systemic or generalised deficiencies shall be determined upon "objective, reliable, specific and properly updated material indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter".[139] The reasoned proposal of the Commission adopted pursuant to Article 7(1) TEU is identified as an appropriate example of such material.[140] The material ought to originate from an objective third party, such as the Commission, the Council of Europe, the CJEU or the ECHR. In the context of the first step, the intention from the ECJ ought not to be that the executing court asks questions about the *general* situation in the issuing country. Thus, the horizontal dialogue should focus on the second step presented below.[141]

Regardless of how severe the systemic or generalised deficiencies concerning the independence of the judiciary in the issuing Member State may be, the Court has explicitly emphasised that it is *not* possible for the executing authority to presume that these deficiencies result in a concrete risk in the individual case at hand.[142] The potential deterioration of the deficiencies can only result in the executing authority having to "exercise vigilance"[143] within its examination. A thorough examination pursuant to the second step is consequently obligatory for the executing authority, thus avoiding breaching the Union law laid down by the Court.[144]

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137 Biernat and Filipek (n 109) 415.
138 ibid, 403-430, 415-17; Konstadinides, 'Judicial independence and the Rule of Law in the context of non-execution of European Arrest Warrant: *LM*' (n 21) 752.
139 Case C-216/18 PPU *LM* EU:C:2018:586, para 61; Joined Cases C-354/20 and C-412/20 *L and P* EU:C:2020:1033, para 54.
140 Joined Cases C-354/20 and C-412/20 *L and P* EU:C:2020:1033, para 52.
141 Case C-216/18 PPU *LM* EU:C:2018:586, para 76; Joined Cases C-354/20 and C-412/20 *L and P* EU:C:2020:1033 para 61.
142 Joined Cases C-354/20 and C-412/20 *L and P* EU:C:2020:1033 para 59.
143 ibid, para 60.
144 ibid; Håkan Friman, Ulf Wallentheim and Joakim Zetterstedt *Överlämnande enligt en europeisk eller nordisk arresteringsorder – en kommentar* (Wolters Kluwer, 2016), 40-41.

5.2[b] The Individual Assessment

The second step within the rule of law-test actually contains two different examinations within the individual situation for the requested person.[145] *Firstly*, the executing authority must determine to what extent the above-mentioned systemic and generalised deficiencies, found within the first step, affect the courts which have jurisdiction over the proceedings that the requested individual might be subject for.[146] *Secondly*, the executing authority shall assess the situation in relation to the specific case and the individual person being prosecuted. It is not until the last ultimate test has been answered, i.e. whether there is a real risk of a breach of the fundamental right to a fair trial of the person subject of the EAW, that the executing authority can refuse to execute the EAW at hand.[147] A vital issue for the executing authority to take into consideration in the context of the individual assessment is specifically who in the issuing country should answer the questions within the horizontal dialogue. The Court's reasoning does not in neither *LM* nor *L and P* clarify if the additional information should be communicated by e.g. the judge issuing the EAW, or the President of the issuing court in general. In practice, questions from a foreign court are normally answered by either the President of the Court or the manager of the department for international cooperation.[148] On request from the executing authority it occurs that individual judges reply. When the information originates from the President or the responsible manager, the answers tend to be brief and/or generic. Consequently, there is limited usage for the information within the executing authority's decision of surrender. Contrary to when the answers originate from an individual judge issuing the EAW, the information tend to be comprehensive and straight-forward.[149]

The intermediate stage concerning the forthcoming competent courts, which did not exist in the *Aranyosi & Căldăraru* case, is legitimised by the subject-matter which differ from the examination of e.g. conditions in prisons.[150] In the context of the scrutiny of the competent courts, the executing authority must first identify the courts in the issuing Member State which have jurisdiction to rule on the matters in question. This will either require that the executing authority applies the rules of criminal procedure of that state, or through asking questions to the issuing authority within the horizontal dialogue pursuant to Article 15(2) of the FD EAW.[151] The latter was implemented by the Rechtbank Amsterdam in the national procedures in both *L* and *P*.[152] Following the identification of the competent courts, the executing authority must determine if, and if so, to what extent these courts independence are subject to jeopardy from the executive. The risks shall be interconnected with the systemic or generalised deficiencies in the issuing country's judiciary. To determine the aforementioned, there is no predetermined 'check-list' for the executing court to 'tick off', but instead the assessment differ from case-to-case. The questions asked by Rechtbank

[145] See also Biernat and Filipek (n 109) 403-430, which divided the examination into three different steps.
[146] Case C-216/18 PPU *LM* EU:C:2018:586, para 74; Joined Cases C-354/20 and C-412/20 *L and P* EU:C:2020:1033, para 66.
[147] Biernat and Filipek (n 109) 413-414.
[148] ibid, 424-425.
[149] ibid.
[150] ibid, 413-414.
[151] ibid, 416-417.
[152] Request for a preliminary ruling in Case C-354-20 PPU *L*, para 9.

Amsterdam may illustrate some concerns that can be depicted. The Dutch court asked questions concerning changes in staffing, allocation and handling of cases, disciplinary cases or other measures and procedures to protect the right to an independent tribunal and on the 'extraordinary appeal'.[153]

Concerning the relevant time for when the systemic or generalised deficiencies stated in the first step emerged, the most important findings confirmed in *L and P* regard two main cases: (1) a review of the competent courts for the coming criminal procedure, thus relevant in both the surrender of an EAW for conduction of a criminal prosecution, and for the execution of a custodial sentence *if* the original judgment is to be reviewed in a new court procedure, and; (2) when executing an EAW on the grounds of the execution of a custodial sentence, the executing authority might need to examine the independence of the court that convicted the original sentence *if* that judgment was passed when the systemic or generalised deficiencies already existed. [154]

Following the determination of (1) systemic or generalised deficiencies concerning the independence of the judiciary of the issuing Member State, and (2) that these deficiencies affect the courts which have jurisdiction over the proceedings that the requested individual might be subject to, it is time for the ultimate question: whether there is a real risk of a breach of the fundamental right to a fair trial of the person subject of the EAW. Within this last assessment, the executing judicial authority must "assess specifically and precisely whether in the particular circumstances of the case there are substantial grounds for believing that following that surrender [the requested person] will run a real risk of breach of his or her fundamental right to a fair trial"[155].The examination shall be conducted with regard to "his or her personal situation, to the nature of the offence for which he or she is being prosecuted and the factual context in which that arrest warrant was issued, and in the light of any information provided by that Member State pursuant to Article 15(2) of the [FD EAW], there are substantial grounds for believing that that person will run such a risk if he or she is surrendered to that Member State"[156].

Whether there is a substantial ground for believing that following the surrender, there is a real and concrete risk for a breach of a fundamental right of the requested person is probably more feasible in a situation when the executing judicial authority is to examine a specific detention center. Thus, when the assessment is addressed to the overall judicial situation for the requested person it might not be near as practicable as in the *Aranyosi & Căldăraru* situation.[157] Thus, the logic in the two-pronged fundamental rights test, with high requirements on concrete evidence, ought to be a better method in the examination of concrete situations.

6 CONCLUDING REMARKS

In the *L and P* ruling, the Court of Justice establish that a national court always possesses the status of 'issuing judicial authority' in the context of the EAW mechanism; a conclusion

[153] ibid.
[154] Joined Cases C-354/20 and C-412/20 *L and P* EU:C:2020:1033, paras 65–69.
[155] ibid, para 66.
[156] ibid, para 55, italics added.
[157] Von Bogdandy et al. (2021) 'A Potential Constitutional Moment for the European Rule of Law: The Importance of Red Lines', in von Bogdandy et al. (n 105) 398-400.

which, in the view of the current case-law within the notion of 'court' in the general Union law (e.g. the possibility of reference for a preliminary ruling pursuant to Article 267 TFEU), is fairly reasonable. However, the position of the ECJ – "[i]n European Union law, the requirement that courts be independent precludes the possibility that they may be subject to a hierarchical constraint or subordinated to any other body and that they may take orders or instructions from any source whatsoever"[158] – may need some altering. This ideal of courts being inherently independent within the Member States does not reflect the current reality in the Union.

Furthermore, the joined cases in *L and P* firmly solidifies the ECJ's earlier case-law in *LM* concerning the two-step rule of law-test, which constitutes a possibility of refusal to surrender a requested person by an EAW. Henceforth, the two-step scrutiny shall be conducted by the executing judicial authority within a horizontal dialogue including multiple complex questions, such as whether its European counterpart is independent or not. Thus, a heavy burden is placed on the national executing court, and judges, as well as the issuing court and the judges answering the questions. In this regard, the plausible *chilling effect* in the Polish judiciary due to e.g. the current reforms and ongoing disciplinary procedures against Polish judges, cannot be overlooked.[159]

There are many indications that the Court's requirement on the executing court to state a real risk of a breach on the requested person's fundamental right to a fair trial, assessed on a case-by case-basis, is an inappropriate tool to tackle the rule of law-crisis in Poland. Since the Polish reforms hollow out the independence of the judiciary as a whole, there is no point in conducting an individual and specific assessment; within the current Polish situation, there is always a real risk of a person being subject for a court process which, in one way or another, is affected by the executive. Even though the individual judge in the specific case might not have been directly interfered by the executive, the chilling effect stemming from the imminent risk of external interference ought to entail that the adjudication cannot be perceived as independent.[160]

It remains to be seen whether the rule of law-scrutiny between the national courts will in practice result in an increased respect for the rule of law within the Member States. Unfortunately, there are many indications that the two-pronged test is nearly impossible to execute in reality. By contrast, something positive with the ECJ's rulings in *LM* and *L and P* is that the EU rule of law-crisis no longer is an issue only for the Council, Commission and CJEU to deal with it. The common respect for the rule of law is nowadays a question for *all* European courts, including the national, to monitor and uphold.

[158] Joined Cases C-354/20 and C-412/20 *L and P* EU:C:2020:1033, para 49.
[159] See e.g. Biernat and Filipek (n 109) 410.
[160] ibid.

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BOOK REVIEW

Emma Ahlm, *EU Law and Religion: a study of how the Court of Justice has adjudicated on religious matters in Union Law,* Uppsala University 2020, 343 pages, ISBN 978-91-506-2847-0

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In his famous lecture 'What is a Nation?' Ernest Renan affirms that "Every French citizen must have forgotten the St. Bartholomew massacre".[1] This massacre, in which thousands of protestant Huguenots were killed by the Catholic majority, was the bloody climax of the French Wars of Religion, that tore the Kingdom of France apart in the 16th century. Renan argues that the modern nation of France, and the identity of the French citizen, is necessarily linked to the conscious decision to overcome the theological disagreements that gave rise to these terrible events, and to find an accommodation that could allow all French citizens to live together despite their religious differences.

Renan's lecture reminds us that the identity - the very existence - of the modern European state is ineluctably tied to questions concerning the relationship between the Church and the state, and to questions concerning the tension between the freedom of the individual to follow the precepts of his or her religion and the prerogative of the sovereign to determine religious practice within the territory. These tensions and conflicts are reflected in the wide range of settlements which different European states have reached, through which religious freedom, and religious and secular authority have been accommodated in the national legal and political order.

Given the sensitivity of these settlements, and the profound significance that they have for the national identity of the member states, it was not surprising that the Fathers of the Treaties chose to leave religious questions entirely outside the scope of the original EEC Treaty. All matters concerning religion were considered to remain within the prerogative of the Member States. Nonetheless, as the scope of application of EU law widened, and EU law reached ever deeper into the national legal orders, religious matters began to fall into the ambit of EU law. With the introduction of EU measures dealing with religious discrimination in the workplace, and the coming into force of the Charter of Fundamental Rights, it was inevitable that the Court of Justice of the EU would eventually be asked to adjudicate on religious matters, including matters concerning the relationship between the Church and the state. In the past few years this has come to pass, and the Court of Justice has indeed adjudicated in a number of important and controversial cases involving EU law and religion.

Emma Ahlm's new book, *EU Law and Religion: A study of how the Court of Justice has Adjudicated on religious matters in Union law* provides an excellent guide to these developments.

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[1] "Ernest Renan 'Qu'est-ce qu'une nation?' Lecture delivered at the Sorbonne, 11 March 1882, at: <http://www.iheal.univ-paris3.fr/sites/www.iheal.univ-paris3.fr/files/Renan_-_Qu_est-ce_qu_une_Nation.pdf.>

It is the outcome of a doctoral dissertation from Uppsala University, defended in November 2020, and it focuses specifically on a number of cases handed down between 2017 and 2019.[2] The book provides a detailed analysis of these key cases, engaging both with the Judgments and with the Opinions of the Advocates General. The approach is mostly an internal, doctrinal approach, drawing on the methodology that the Court of Justice itself deploys in order to interpret and apply EU law.[3] This allows Ahlm to critically engage with the reasoning of the Court, by highlighting potential contradictions, pointing areas where the Court appears to deviate from normative principles underpinning the Union legal order. Ahlm is also able to place these legal developments in the broader context of the EU legal order, and to contrast the approach of the Court of Justice with the European Court of Human Rights. The aim of the study is to identify the principles and standards by which the Court of Justice adjudicates on religious matters, in particular concerning the relationship between the Union and the Member States.

The book consists of six substantive chapters, together with an introduction and a conclusion chapter.

Chapter 2 provides a historical framework with three key elements: the place of religion in the development of the modern European state, the transition from the principle that the sovereign determines religious matters within the state's territory to the requirement to guarantee individual religious freedom; and the embedding of religion within the legal framework of the Union. These are all huge topics, so they are dealt with in a necessarily abbreviated from – Ahlm is not a historian, and this chapter is merely scene setting for the legal analysis. Nonetheless, the Chapter does a good job of highlighting how "the dialectic between the territorial aspects of religion … and the secularity of the state … is a defining trait of a European State".[4] This helps the reader understand what is at stake when the Court of Justice makes determinations concerning religious matters in the member states' legal orders. The section on how religion came into EU law focuses very much on the textual changes to the legal materials, but there is some engagement with the political controversies which preceded the Constitutional Treaty, and the adoption of what is now Article 17 TFEU, which highlights how contested and controversial questions concerning the role of religion in the Union are.

Chapter 3 seeks to identify the place of religion within the structure and objectives of the EU. The focus of the chapter is fixed on legal questions[5] concerning the Union's competences in religious matters. It is here, however, that I consider the author goes slightly astray. The Union is presented as having *the objective* of combating religious discrimination – this is said to be stipulated in Article 2 TEU, which sets out the values on which the Union

[2] Ahlm provides a comprehensive overview of all cases where religious matters played a role, but there are four cases that receive particularly detailed analysis: C-157/15 *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV* [2017] EU:C:2017:203, C-188/15 *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA* [2017] EU:C:2017:204, C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.* [2018] EU:C:2018:257 and C-426/16 *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen, VZW and Others v Vlaams Gewest.* [2018] EU:C:2018:335.

[3] Ahlm provides the reader with an overview of the interpretative methods deployed by the Court of Justice, which guides her own approach (p. 24).

[4] P. 41.

[5] Ahlm avoids the charged questions on whether the European Union project is a reflection or embodiment of Christian values, which have resurfaced in the debate about the identity of the European Union (see e.g. Jonathan Chaplin and Gary Wilton *God and the EU: Faith in the European Project* (Routledge, 2016)).

is founded, which include human dignity, equality, non-discrimination and the respect of the rights of persons belonging to minorities, as well as certain provisions in Article 3. However, as von Bogdandy reminds, in EU law it is important to distinguish between, on the one hand, values or principles, and on the other objectives.[6] The former are about the 'how' of EU action – they guide and limit EU action. The latter "stipulate the intended effects in social reality"[7] – they are about the 'what' of EU action.

Combating religious discrimination is not specified as one of the objectives of the Union, under Article 3 TEU. It may be possible to argue that, even it is not so specified, it nonetheless should be considered such an objective. [8] But it may also be possible to argue that it is not, and Ahlm does not consider this possibility. This is significant, because the EU only has competence to act in order to achieve the objectives set out in the Treaties.[9] Furthermore, EU law has a strong teleological orientation,[10] which implies that all provisions of EU law must be interpreted in light of the objectives of the EU. This includes fundamental rights provisions, including the right not to be discriminated. As the Court pointed out, EU fundamental rights must be interpreted in light of the structure and objectives of the EU.[11]

The conclusion of Chapter 3 is that "religious matters are subjected to EU law *if* EU law applies". This is the correct conclusion, and it is a clear echo of the conclusions of the Court of Justice in respect of the scope of application of EU fundamental rights.[12] It is however, incomplete, because it does not answer the key question – when does EU law apply? The caselaw set out in Chapter 3 appears to indicate an answer: EU law applies to national measures where those national measures impact on the achievement of EU law objectives, in particular the functioning of the internal market[13] and of the area of freedom, security and justice.[14]

The case of *Monachos Eirinaios*[15] seems particularly relevant. The case concerned a Greek rule which stipulated that a person who held the status of a monk could not be registered as a lawyer. The applicant had qualified as a lawyer in Cyprus, and applied to the Athens Bar Association for recognition of his qualifications. The Bar Association refused on the grounds that the applicant had the status of a monk. The Court of Justice held that Directive 98/5 "harmonises fully the preconditions for exercise of the right of establishment conferred by that directive"., By imposing an extra condition on the exercise of the right of establishment of the applicant (that he not be a monk) the Greek state breached the obligations imposed on that Directive. The focus was entirely on whether the national measure undermined the Directive, and created an obstacle to the operation of the rules

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[6] Armin von Bogdandy 'Founding Principles' in von Bogdandy and Bast (eds) *Principles of European Constitutional Law* (2nd edn, Hart, 2009), p. 23.
[7] Ibid.
[8] Ahlm makes reference to provisions in Article 3 that would also include combating religious discrimination as an objective of the EU.
[9] A point which Ahlm herself emphasizes, by reference to Article 5 TEU (p. 72).
[A] Ahlm notes that the telelological approach is the characteristic interpretative method of the CJEU (p. 24).
[11] Opinion 2/13, para. 170.
[12] According to the Court "the applicability of European Union law entails applicability of [EU] fundamental rights" (C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] EU:C:2013:105, para. 21).
[13] Which was at the centre of the Court's reasoning in most of the cases presented in Chapter 3, such as *Steynmann*, *Van Duyn* and *Monachos Erinaios*, as well as the state aid cases.
[14] Which was relevant in the family law cases discussed in Chapter 3.
[15] C-431/17 *Monachos Eirinaios, v Dikigorikos Syllogos Athinon* [2019] ECLI:EU:C:2019:368, discussed at p. 97.

guaranteeing freedom of establishment. The question of whether or not the rule amounted to discrimination on grounds of religion was not considered at all, even though the rule appeared to directly discriminate against the applicant on the grounds of his status as a member of a religious order.

The caselaw presented in Chapter 3 does not appear to support the author's claim that the EU has the objective of combating religious discrimination. Rather, it seems to suggest that the reason why EU will interfere in national measures concerning religion is when such measures risk undermining the unity, primacy and effectiveness of EU law.[16]

In chapters 4, 5, 6 and 7 the book embarks on a close analysis of four distinct but interrelated issues: the extent to which EU law provides member states with a degree of autonomy in respect of the status which they grant to churches and religious organisations under their jurisdiction (chapter 4), the protection of religious freedom as an EU fundamental right (chapter 5), the prohibition of religious discrimination in EU law (chapter 6), and the extent to which religious organisations are exempt from EU anti-discrimination law (chapter 7).

These chapters provide an excellent resource for scholars interested in the place of religion in EU law. Chapter 4 and 7 are particularly relevant for those interested in the triangular relationship between Church, State and the EU, and it is here the Ahlm gives her most definite conclusions concerning what she terms 'the limits of the EU's secular jurisdiction'. As Ahlm notes, the EU maintains an apparently neutral stance in respect of the arrangements which member states have in place concerning the place of religious organisations. Indeed, this appears to be mandated by Article 17 TFEU. However, this does not prevent the court from engaging in quite close scrutiny of member states' measures. Ahlm observes that, in contrast to the ECtHR, the Court of Justice appears not to grant states member states a significant margin of discretion, and appears to seek to impose a uniform EU standard.[17]

Chapter 5 engages with religious freedom as an EU fundamental right, and entails a detailed comparison of corresponding ECHR right. Ahlm examines closely the general approach of the Court to the protection of fundamental rights, and reminds us that member states are free to uphold national standards of fundamental rights, including religious freedom if, and only if, the national standard "does not compromise the primacy, unity and effectiveness of EU law".[18]

Chapter 6 deals with one the most controversial and current issues concerning EU law and religion: religious equality in EU law. The chapter has the rather misleading title of 'The European Union's duty to combat religious discrimination', but the core of this chapter concerns the notorious cases of *Bouganoui* and *G4S*. Rather than being about the EU's duty to combat religious discrimination, these cases demonstrate how EU law can limit the ability of member state to keep in place rules designed to protect the position of religious minorities

[16] See *mutatis mutandis* C-206/13 *Cruciano Siragusa* v. *Regione Sicilia* EU:C:2014:126, where the court held that "the reason for pursuing that objective [of protecting fundamental rights in EU law] is the need to avoid a situation in which the level of protection of fundamental rights varies according to the national law involved in such a way as to undermine the unity, primacy and effectiveness of EU law" (para. 32). For an exploration of the instrumental nature of EU fundamental rights see Eduardo Gill-Pedro *EU Law, Fundamental Rights and National Democracy* (Routledge, 2019).

[17] p. 279.

[18] p. 186.

in the workplace. This chapter provides us with a very detailed and sophisticated analysis of the judgments in particular of the Opinions of the Advocates General.[19] The differences of approach of the two Advocates General are presented as "a sign of the deep rift in Europe .. concerning public displays of religion in public in general, and the presence (and visibility) of Islam – through the wearing of hijab – in particular".[20]

In light of the developments set out in this book, it is clear that, as Ahlm argues in her conclusion, we can now talk of a 'EU law on religion'. The EU may present itself as 'neutral' in respect of the choices the member states make in accommodating religion in their legal orders. Nonetheless, EU law does indeed shape and constrain the way in which Member States deal with religious matters in their jurisdiction. It does so in a very wide range of areas, and it does so autonomously, both from the national law of the member states and from the ECHR.

It is less clear whether the book has succeeded in its stated objective of identifying the "principles and standards" which underpin EU law on religion. There are a number of themes that emerge in book and are presented in the Conclusion: The purported neutrality of the EU, the claim to centrality of religious equality, the drive to set a uniform standard of religious freedom and religious equality. However, there are many gaps and contradictions in the caselaw, and it is difficult to discern a coherent normative framework guiding these developments.

This is not a deficiency of the book – the caselaw presented is indeed inconsistent and sometimes contradictory, and the way the law has developed does not appear to reflect a coherent set of principles. What the book does provide is a very detailed and vivid picture of a quite recent[21] and very complex legal development, and present its different facets in the broader context of the EU legal order. Just like the cover painting (by the author herself), the meaning of the picture provided is not clear. But the reader is left in no doubt that the picture depicts something of profound importance – the European Union is actively engaging in something which lies at the heart of the socio-political arrangements that constitute the member states. We all need to reflect on the implications of this development, and this book provides excellent stimulus for such a reflection.

[19] AG Kokott wrote the Opinion in G4S and AG Sharpston in *Bouganouii.*

[20] p. 297.

[21] In her conclusion Ahlm signposts a number of cases that were pending at the time of publlication. Some of these have now been decided (see in particular C-804/18 and C-341/19.*IX and MH Müller Handels GmbH v WABE eV and MJ* [2021] EU:C:2021:594) and it is clear that the controversy has not abated (see P. Toynbee 'The European ruling on headscarves opens the way to rank discrimination' *The Guardian* 15 July 2021, at <https://www.theguardian.com/commentisfree/2021/jul/15/european-ruling-headscarves-discrimination-humanists-religious-identity).>

BOOK REVIEW

Alexandr Svetlicinii, *Chinese State Owned Enterprises and EU Merger Control*, Routledge 2020, 144 pages, ISBN: 9780367513207

Wei Yin*

The increasing presence of state-owned enterprises (SOEs) on the global markets has prompted challenges in the area of trade, investment and competition policy. SOEs can be found in many countries, with slightly different forms, playing dominant role in domestic market and serving public and social interests. However, the upsurge and high profile of SOEs foreign investment triggered protectionist sentiment, and fuel political backlash in several host States. The distinctive economic development model of China and the factor of state ownership places the Chinese SOEs in the spotlight. Their investments and cross-border mergers and acquisitions in the strategic sectors add an additional level of scrutiny, particularly in Western economies, and result in introducing additional or new regulatory regime to tackle relevant challenges posed by these SOEs. Concerns associated with SOEs conducts are usually rooted in two aspects: political, i.e. the national security threat; and economic, i.e. the market distortion effect. Reciprocity in market access and the 'level playing field' vis-à-vis Chinese companies are two main economic claims raised by the leading economies, i.e. the US and EU. Foreign investment review mechanism and competition law play critical roles in regulating these SOEs in pre-establishment and post-establishment phases respectively.

The regulatory challenges and issues with regard to SOEs have been raised by academic, practitioners and policy-makers. The core of SOE relevant problems lie in whether existing regulations can address issues posed by SOEs and whether new rules and mechanisms should be introduced to deal with it. One contribution which stands out from the literature is the book entitled *Chinese State Owned Enterprises and EU Merger Control*, written by Alexandr Svetlicinii. The book, with an EU regulation focused perspective, tries to illustrate the conceptual and regulatory challenges of applying EU merger control rules in cases involving Chinese SOEs' acquisitions by considering the feature of corporate governance of these entities and regulatory framework provided for their operation in China. The book also explores the difficulties of applying traditional merger assessment tools in the EU and the effectiveness of this regime to address possible anti-competitive distortion caused by SOEs acquisitions. The book ended with a discussion on the proposal for reforming the merger control regime, and EU foreign direct investment screening framework and the white paper for foreign subsidies.

The book is divided into four chapters with a short conclusion part. Svetlicinii provides an analysis of relevant concepts concerning possible concentration raised by SOEs'

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acquisitions under the EU merger control rule, i.e. 'undertaking' 'person' 'single economic unit' in its initial chapter. By assessing relevant SOEs cases in internal EU market, the book emphasises that 'SOEs do not have any specific regulatory treatment under the EUMR'. The book demonstrates numerous examples contains in the European Commission's merger assessment practice concerning substantive assessment of the notified concentrations involving SOEs and even non-controlling state shareholdings. Chapter 2 discusses the dominance of SOEs in the national economy of China and assesses two institutional ways through which the Chinese State can exercise 'control' over its SOEs, i.e. ownership-based control and political control. The author suggests in this chapter that China maintains firm stance on the separation of the State and its SOEs in international economic law and in its domestic legislation. The anti-monopoly law is no exception, under which SOEs are regarded as 'business operator', but the author finds that rare instance of antitrust investigations involving SOEs can be figured out, indicating a 'selective enforcement' of the law rather than the inapplicability of it. Chapter 1 and 2 provide readers the necessary background information regarding the EU merger control and Chinese SOEs. Chapter 3 analyses the application of EU merger control rules on economic concentrations of Chinese SOEs, addressing the question of whether the unique feature of Chinese SOEs, be it corporate governance or regulatory environment, can be dealt with by the exiting rules, as well as relevant challenges posed on the regime. The author argues that the Commission's assessment practice demonstrates that 'wait and see' flexible approach remains the Commission's preferred approach, despite the CGN decision as an exceptional case and its option for a 'worst case scenario' assessment rather than reaching a definitive conclusion concerning the independence of the SOEs. Chapter 4 contains the prominent regulatory proposals for the reform of the EU merger control regime to exert its efficiency in addressing the anti-competitive distortions triggered by the foreign SOEs on the EU internal market. The author emphasises in this chapter that the Commission did not accept proposals for reforming the existing EU merger control rules; instead, the Commission pursued the establishment of a coordinated and EU level foreign investment screening framework and seek to a distinct legal instrument (i.e. proposal on regulating foreign subsidies) to address the distortive effects of investment and acquisitions by foreign SOEs.

The book provides a concise and comprehensive overview for the reader on the current state of art of EU merger control regime applied on SOEs from member States and foreign countries. A significant advantage of the book lies in the extensive references to EU cases and academic papers concerning SOEs and EU merger control, which makes the content consistent with the theme of this book. This book is a good source for readers who are interested in conducting research on SOEs' overseas investment, especially in the EU market. From a stylistic perspective, this book is definitely a compelling read. The detailed outline in connection with a clear structure of each section, relatively short length and articulate sub-titles make the reader easily to follow and be able to catch up with the author's ideas. The writing style of the author makes the reading an enjoyable experience and makes the book an excellent reference guide. The reader can search through the book and find which part of it could be of help and support the reader's further research or practical work.

This book is a highly recommendable literature and reading materials. It would be benefit from providing an general introduction at the beginning for the reader to know the importance of the topic and discussing the rationale for topic selection as well as a certain

degree of theoretical exploration. These quite minor remarks cannot detract from the positive impression of this book, which is a highly up to date study, and a very substantial work of numerous useful references and cases. This book will be of interest, particularly to scholars and researchers in the field of international economic law, corporate governance, competition law; legal practitioners dealing with foreign investment and cross-border mergers and acquisitions; policymakers designing and considering high-quality regulation on market participants, either private companies or SOEs; investors, especially SOEs seeking better compliance programs in the host State. Due to the book's conclusive coverage of the developments of the case law and Commission's practices with respect to merger control involving SOEs, this book could also offer guidance to students learning EU law.

BOOK REVIEW

Mariagiulia Giuffré, *The Readmission of Asylum Seekers under International Law* (Hart Publishing 2020), 359 pages, ISBN 9781509902491 (hardback)

Eleni Karageorgiou*

The *Readmission of Asylum Seekers under International Law* is a major achievement in many respects. First, it dives into an opaque, policy-driven and technical subject matter, primarily researched so far by non-lawyers. It bridges disciplines and draws on a plethora of sources including renowned authors in the field, international, regional and national law, case law and policy, as well as non-English commentaries. It clarifies the meaning of and interplay between concepts -including 'readmission' itself, which have been widely used in the international plane and the EU parlance, albeit with partiality and a minimal degree of precision. Most importantly, the book brings international refugee law up to speed with recent developments in state practice (e.g. EU-Turkey Statement, Italy-Libya cooperation) as well as closer to human experience on the ground.

In the aftermath of 2015, it was made clear that the outsourcing of asylum through agreements with non-EU countries and practices of readmission will be a major priority for EU migration policy (see, amongst others, the European Agenda on Migration, the Valleta Summit Political Declaration, the 2016 Partnership Framework with third countries). In the more recent European Commission's Communication *on a New Pact on Migration and Asylum* COM(2020) 609 final, it is stated that '*A common EU system for returns is needed which combines stronger structures inside the EU with more effective cooperation with third countries on return and readmission. It should be developed building on the recast of the Return Directive and effective operational support including through Frontex.*'[1] These European developments seen together with similar practices overseas such as the asylum cooperation agreements between the US and Central American countries and Australia's offshore processing agreements with Malaysia, Papua New Guinea (PNG) and Nauru are examples of the kind of debates Giuffré's book is highly relevant to.

Although the question of readmission of asylum seekers may appear a rather specific and limited in scope topic, the breadth and depth of the book's content is revealed already in the first pages of the introductory chapter. As stated in the opening sentence of the book 'THIS BOOK LIES at the junction of migration control and refugee protection.' Unpacking readmission, as a concept and as a praxis, entails opening international refugee protection's pandoras box: questions of state sovereignty, sources of law, international responsibility, jurisdiction, human rights standards, governance -to name a few, arise and seek for firm

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[1] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM/2020/609 final p. 8.

answers -which are, indeed, delivered. The fact that the book zooms into the Council of Europe and European Union law adds to the complexity of the issues at hand, especially considering that EU asylum legislation does not regulate access to the territory, an issue primarily addressed by the EU legislation governing border control and irregular migration, complemented by ECtHR jurisprudence. This, coupled with the scarcity of previous legal analysis on the matter, makes Giuffré's endeavor courageous and commendable.

The *Readmission of Asylum Seekers* lies, also, at the junction of international relations and international law unraveling the untenability of the rigid doctrinal distinction between refugee law as public international law and European law on the one hand, and asylum in the context of national political decisions for durable solutions and transnational cooperation on the other.[2] The analysis in the book of readmission as a legal concept and as a practice reveals that refugee law scholarship may benefit from revisiting the notion that determining the definition of a refugee or the scope of the non-refoulement principle for instance, is deemed to be a technical legal task (associated with legal obligations and thus with formality, conceptual clarity, coherence), while interstate cooperative migration management remains a matter of diplomacy and political negotiations (associated with pragmatism, and thus with informality, discretion, focus on results, regionalism, and power relations).

The book essentially asks if and in what ways the implementation of readmission agreements may impact on the rights of those seeking protection in Europe. In order to do that, it first walks the reader through 'the basics' of international refugee law in a systematic and pedagogical manner: it clarifies the scope and content of the rights in question, namely the right to non-refoulement and the right to access asylum procedures before removal (Chapter two) and then it looks at the interplay between migration and border control measures, including readmission agreements and national decisions to return refugees to countries of origin or transit. Throughout this chapter, Giuffré, scrutinizes the evolution of the doctrine reconstructing aspects of refugee law, such as the principle of *non-refoulement* and access to protection, pulling together findings of various international bodies. Ironically, the chapter concludes with a remark on the fate of the two most widely discussed -at the moment- ECtHR cases concerned with border procedures, notably *Ilias and Ahmed v. Hungary* (2019, safe third country practices) and *N.D. and N.T. v Spain* (2020, pushbacks at the border). Giuffré is almost intuitively foreseeing that the reasoning of the majority of the judges in the *Khlaifia and Others v. Italy* case (2016) -where the mandatory nature of the procedural obligation to conduct personal interviews was disregarded, might shape the line of reasoning of subsequent decisions. As a result, migrants' rights will continue to depend on the discretion of police and border authorities, especially in times of crisis. What, perhaps, Giuffré could not tell at that time is that, arguments used to support dissenting views to the *Khlaifia* judgment will, in fact, be adopted later on by the majority (see Judge Dedov's 'own culpable conduct' claim[3] which was later on adopted by the Grand Chamber as the defining test in relation to Art. 4 Prot. 4 ECHR in *N.D. and N.T.* case).

Following the doctrinal analysis, the book delves into the technicalities of particular readmission agreements and investigates their compatibility with international human rights

[2] On this see David W Kennedy, 'International Refugee Protection' (1986) 8 Human Rights Quarterly 1.

[3] In his partly dissenting Opinion to *Khlaifia* Judgment, Judge Dedov argues that 'the applicants had put themselves in an unlawful situation, contrary to the presumption of the sovereign right of any State to control its borders'.

standards (Chapter three, four and five), as these have been established in the second chapter. In particular, the book identifies three categories of agreements linked to readmission drawing on the European experience of bilateral cooperation with third countries. Chapter three discusses the so-called *standard readmission agreements*, which regulate the transfer of persons between the contracting parties concluding that although the text of such agreements may not be *per se* contrary to international standards, their implementation may contribute to hampering access to protection.

Chapter four, looks into *diplomatic assurances* on the fair treatment of the deportees, as a tool casually used by European States to legitimize the removal of undesirable foreigners, considered to pose a threat to the host country. In what constitutes one of the boldest findings of the book, Giuffré challenges the reliability of diplomatic assurances, not only in terms of state compliance, but also as a matter of law. She shows how the exchange of assurances may affect the fairness of the procedures and influence the decision-making process upon arrival. In a nutshell, although assurances are legally permissible and likely to lower the risk of refoulement, they are proven ineffective in preventing ill-treatment, primarily, due to the way in which such ill-treatment is administered and takes place in practice. Strengthened monitoring mechanisms cannot, in fact, guarantee the detection of torture and the elimination of the personal risk for the deportee.

Finally, Chapter five, discusses *technical and police cooperation agreements* in the context of maritime migration control. Distinguishing between pre-arrival and post-arrival practices this chapter focuses on cooperation targeting individuals before setting foot on European soil, namely Italy-Libya pushbacks and Frontex maritime operations. Engaging with EU law, the law of the sea and law of international responsibility as well as drawing heavily on ECtHR and ICJ jurisprudence, this chapter demonstrates the relevance of readmission for migrants intercepted within the context of rescue operations at sea. The argument is that the more migration control is entrusted to a third country/partner the less chances exist for European states to control the fate of intercepted protection seekers.

The analysis of those three types of agreements against the backdrop of norms outlined in chapter two allows the author to, convincingly, explain the points where areas of law and policy considered to be distinct in terms of legal basis, objectives and temporality, do overlap; the intersection between refugees' access to territory and readmission in the context of extraterritorial migration control or the interplay between national and Union policy on readmission are two examples in this respect. Furthermore, Giuffré's methodological choice to systematize the bilateral agreements linked to readmission, instead of treating them as one body, offers the necessary nuance as to the way in which refugees' rights may be impacted and clarity as to the way forward.

The book answers its main question in the affirmative: the implementation of bilateral agreements linked to readmission can jeopardize protection, namely the right to *non-refoulement* and the right to access fair procedures and effective remedial mechanisms before removal. Giuffré contends, though, that the actual result (harm) is not uniform but rather takes varying degrees of intensity depending on the right breached, the agreement in question, and the context within which the agreement at hand is applied, including the time and space at which the encounter between the refugee and the State takes place.

The book ends with a section on suggestions for improvement revealing the authors view on the way forward. These suggestions are primarily concerned with the insertion in

the text of the various agreements, of specific clauses that would emphasize, whenever necessary, the need to distinguish between asylum seekers and migrants who do not fear persecution or the need to have procedural guarantees in place. The author, claims, that this will on the one hand enhance legal certainty and on the other hand 'make fundamental rights part of ordinary business and bilateral cooperation'. What is striking here, is that this argument may be at odds with the book's main contention, namely that looking at the text of an agreement is not the end of the story. Affection-clauses are to be welcomed yet, the question remains as to how this would make a difference in practice.

Where, I am convinced, the difference will be made is to the minds of international lawyers, EU lawyers, policy makers, and NGO groups who will read this book. These and all of us researching and teaching international and European refugee law should be grateful to Mariagiulia Giuffré for her valuable insights not only for the readmission of asylum seekers in international and European law but also for inviting us to rethink cooperation in international law through legal means.

BOOK REVIEW

Katarina Hyltén-Cavallius, *EU Citizenship at the Edges of Freedom of Movement*, Hart Publishing 2020, 198 pages, ISBN: 9781509937257

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The concept of EU citizenship, established in the Treaty of Maastricht, has been the subject of in-depth scholarly research from many disciplinary lenses. Despite the initial perception of EU citizenship as a declaratory status, its interpretation in the case law of the Court of Justice of the EU (CJEU) has prompted many theoretical reflections on the matter. Over the years, legal scholars have theorized on what EU citizenship is, what it was meant to become, the impetus the Court gave to it through its liberal case law, as well as the restrictive interpretations that appeared in the past decade.[1] This thick body of literature on EU citizenship has been theoretically rich and accounts for many innovative readings of the CJEU case law to this day.

In that context, it can be quite challenging to provide an original contribution that delivers new insights into the legal evolution of the EU citizenship. This is precisely what Katarina Hyltén-Cavallius tries to do in her book 'EU Citizenship at the Edges of Freedom of Movement'. The book is based on the PhD Thesis she defended in Copenhagen University in 2017 and provides an analysis of EU citizenship as a legal concept. Specifically, Hyltén-Cavallius looks at the interaction of EU citizenship with other EU legal norms in the CJEU case-law and suggests that EU citizenship develops in the Court's jurisprudence as a two-tiered legal concept: a fundamental status of the individual in some cases and a poor legal status in others.

This finding is based on the examination of how EU citizenship appears in relation to three specific free movement rights tied to it: the right to move and reside within the territory of Member States Article 21 TFEU, the right to equal treatment under Article 18 TFEU and the right to vote under Article 22. The analysis of EU citizenship rights whose enjoyment does not depend on the citizens' exercise of free movement or their residence within the Union territory (Articles 23 and 24 TFEU) is excluded from the book.

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[1] Indicatively Michelle Everson, 'The Legacy of the Market Citizen' in Jo Shaw and Gillian More (eds), *New legal dynamics of European Union* (Clarendon Press 1995); Dora Kostakopoulou, 'Ideas, Norms and European Citizenship: Explaining Institutional Change' (2005) 68 The Modern Law Review 233; Niamh Nic Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47 Common Market Law Review 1597; Niamh Nic Shuibhne, 'The Outer Limits of EU Citizenship: Displacing Economic Free Movement Rights?' and Jo Shaw, 'Citizenship and Enlargement: The Outer Limits of EU Political Citizenship' in Okeoghene Odudu and Catherine Barnard (eds), *The Outer Limits of European Union Law* (Hart Publishing 2009); Loïc Azoulai, 'The (mis)construction of the European individual : two essays on Union citizenship law' EUI LAW Working Paper 2014/14; Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017); Dimitry Kochenov, Nathan Cambien and Elise Muir (eds), *European Citizenship under Stress: Social Justice, Brexit and Other Challenges* (Brill Nijhoff 2020).

The book begins with an overview of the historical origin of EU citizenship and the scholarly analysis on the meaning and purpose of the concept, that followed each step of its evolution. This provides the reader with the broader background against which her analysis takes place. Then, the main body of the analysis develops in Chapters 3-7, in which Hyltén-Cavallius provides an extensive overview of the CJEU case-law in relation to different matters in order to demonstrate how EU citizenship appears in the case-law as a two-tiered legal concept.

In Chapter 3, she examines the interplay between Directive 2004/38 and the right to move and reside within the Union under Article 21 TFEU. In this Chapter, she highlights how EU citizenship is understood as a powerful legal concept when it comes to removing restrictions on the exercise of free movement by Member States. However, when it comes to the exercise of the right to residence, the CJEU has relied more on secondary law, which, according to her, points to a residual status for the EU citizenship.

In Chapter 4, she proceeds to the examination of residence and family reunification rights. She demonstrates that EU citizenship appears to be less strong when it comes to residence and family reunification rights based on Article 21 TFEU and tied to the exercise of free movement. This is not the case for rights based on Article 20 TFEU and the continued existence of the Union citizen within the Union's territory. As a result, legal landscape characterized by uncertainty is shaped for EU citizens.

Following, in Chapter 5, Hyltén-Cavallius examines the case-law related to the right to equal treatment. In this Chapter she presents the historical ties of non-discrimination with the case-law on free movement. Further, she shows that the potential of Article 18 TFEU has been narrowed by the emphasis of the Court on the provisions of Directive 2004/38 in relation to EU citizens' claims for equal treatment in the host Member State.

In Chapter 6, the focus is on the CJEU's case-law on political rights. After reviewing the relevant judgements delivered by the CJEU, Hyltén-Cavallius argues that, in the context of political rights, EU citizenship appears as a strong legal quality outside the edges of free movement, extending the scope of EU law in purely internal situations. However, she emphasizes that EU citizenship does not offer protection when it comes to disenfranchisement of EU citizens in national elections of the Member State of origin, as a result of the exercise of free movement rights.

Finally, in Chapter 7, Hyltén-Cavallius examines the relation of EU citizenship to the EU Charter of Fundamental Rights. Specifically, she elaborates on the interplay between Charter rights and EU citizenship rights and their relation to the jurisdictional scope and context of the Charter. In this Chapter, she finds that there exists an uneven and inconsistent application of EU fundamental rights standards by the CJEU depending on the nature of the citizens' claim.

Her case-law analysis throughout these Chapters frames her analytical finding, which is that EU citizenship develops in the CJEU jurisprudence as a two-tiered legal concept. It exists as the fundamental status of the individual, capable of producing tangible legal effects by enlarging the jurisdictional scope of EU law and triggering the application of the Charter and fundamental rights review. At the same time, however, it appears as a poor legal status, a residual personal category with lesser or no protection under EU law that pushes the individual out of the enjoyment of personal free movement rights, and beyond the applicability of the Charter.

The book provides a thorough overview of the CJEU case-law on EU citizenship. A more streamlined approach with focus on selected case-law could potentially assist in better framing Hyltén-Cavallius' argument. While she succeeds in highlighting the inconsistencies of the Court's case-law, the reader can get lost while going through all the case-law the Court has delivered on the matter and miss the point she is making. This is especially due to the complex nature of the jurisprudence on this matter, which has inherent overlaps, despite the chosen structure of presentation.

What is more, the finding of the EU Citizenship as a two-tiered concept is well suited to explain the inconsistent reality of the Court's jurisprudential evolution. This finding could be theoretically enriched. It would be interesting to see more analysis by Hyltén-Cavallius on what this means for the development of EU citizenship, to what extent the concept is destined to sit at the edges of freedom of movement in order to appear as a fundamental legal status and what legal implications (besides uncertainty) this brings about for EU citizens and EU law.

Overall, Hyltén-Cavallius' book is suggested for getting a concise and thorough overview of the jurisprudence of the Court on EU citizenship. It provides the reader with all the relevant legal material on the matter and sets the basis for further reflection on the EU citizenship concept.