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Editorial Note

The editorial team of the NJEL is glad to announce the publication of the first issue of 2022. This issue covers a variety of timely topics in European law. Henrik Wenander has examined the role of and the relation between EU requirements in EU administrative law and the Nordic legal traditions in order to provide insights to the impact of EU regulation in these countries. Lena Enqvist and Yana Litins'ka's article studies and provides new conclusions on the privacy in employee health data with a focus on both the ECHR and EU rights. Christian Bergqvist sheds new light on the debate on the definition of anticompetitive restriction under Article 101(1) TFEU, in particular, the debate between object and effect restrictions in light of recent case law. The issue also contains a reflection note by Helle Krunke and Sune Klinge analysing the populist crisis in the EU from a geographical angle, with focus on the Nordic countries generally and Denmark specifically.

A larger focus of the issue is on the rule of law crisis in the EU. Today, the European project witnesses not only the internal challenges of the 'rule-of-law backsliding' saga, but also, since the 24th of February 2022, an acute external threat which has implications and repercussions for the current rule-of-law crisis and its political management by the European Commission.[1] Replacing the rule of the iron fist with the rule of law was fundamental to the creation of the EU as a community.[2] All available tools must be employed to ensure that commitment to this EU value remains unscathed in the current situation and that the spirit of solidarity is strengthened rather than undermined. From a legal perspective, many doubts have been raised as to the *per se* justiciability of the rule of law as a value enshrined in Article 2 TEU. In this issue of the Nordic Journal of European Law, we address once again the legal challenges raised by the backsliding of the rule of law in EU law through two articles and a case note. The case note and one of the articles discuss in detail the *Budget Conditionality Cases*',[3] (C-156/21[4] and C-157/21 *Poland* v *EP and Council* and *Hungary* v *EP and Council*), delivered in 2022 by the Court of Justice of the European Union, that are crucial not only to understand the operational functionality of rule of law and Article 2 TEU, but also crown the principle of solidarity as a principle of constitutional and legal relevance. We consider in this issue of the Nordic Journal of European Law that there is a shift in the perception of the operational functionality of foundational values of the EU, establishing that the rule of law is a founding value of the Union which represents a legal norm and imposes an obligation on the Member States to comply with its constituent elements.[5] In addition, the *Budget Conditionality Cases* appear to be crucial since they also establish the solidarity principle as a

[1] Dimitry Kochenov and Petra Bard, 'War as a Pretext to Wave the Rule of law Goodbye? The Case for An EU Constitutional Awakening', European Law Journal, 2022.

[2] Commission 'White Paper on the Future of Europe. Reflections and Scenarios for the EU27 by 2025' COM (2017) 2025 6.

[3] Case C-157/21 *Republic of Poland v European Parliament and Council of the European Union* ECLI:EU:C:2022:98.

[4] Case C-156/21 *Hungary v European Parliament and Council of the European Union* ECLI:EU:C:2022:97.

[5] For an excellent case note on *Budget Conditionality Cases,* see Andi Hoxhaj, 'The CJEU Validates in C-156/21 and C-157/21 The Rule of law Conditionality Regulation Regime to Protect EU Budget', 5 (1) Nordic Journal of European Law (in this issue).

principle of constitutional and legal relevance. In fact, solidarity should also be understood as a proper foundational principle of EU law, similarly to the rule of law, and in light of Article 2 TEU. In other words, these recent cases open up the possibility for the principle of solidarity, an acknowledged fundamental principle of EU law, to be transformed into a *founding* principle.

Such an interpretation of the Court of Justice of the European Union, however, raises a few questions about the possibility of adjudicating the foundational values enshrined in Article 2 TEU and their extended role in the EU constitutional framework. Given the latest developments in the Court's case law, can *all* the foundational values under Article 2 TEU then acquire the status of legal norms and become 'foundational' or 'founding' principles? Does the attainment of this status happen automatically, or does a value need to fulfil specific criteria in order to obtain the necessary normativity, that would in turn make it enforceable? And how will the answer to that question affect our understanding of the role and function of the Court in EU law adjudication? In the contributions related to tie *Budget Conditionality Cases,* we are going to attempt to address these very questions in detail. Furthermore, this issue of the Nordic Journal of European Law adds an article on the symbiosis between the jurisprudence of the Court of Justice of the European Union and the European Court of Human Rights when it comes to defining the criteria of impartiality and independence of European judges. This piece is of interests since it takes both a comparative and historical perspectives. The author of this text, Martin Sunnqvist, studied the meaning of the phrase 'an independent and impartial tribunal established by law', which has developed in case law. He analyses how the European Court of Human Rights and the Court of Justice of the European Union have developed these brief statements into more detailed criteria. The approach is historical, that is, he analyses how law has developed, and he bases his analysis on older sources where independence and impartiality have developed.[6]

[6] See Martin Sunnqvist, 'Impartiality and Independence of Judges: The Development in European Case Law', 5 (1) Nordic Journal of European law (in this issue).

Editorial Note for the Special Section on Competition Law & Sustainability

Ayse Gizem Yasar*

This collection of articles is part of a broader European effort, led by NGOs, fellow academics, and practitioners, to integrate sustainability issues into competition law. I was included in this endeavour by Tomaso Ferrando (University of Antwerp) in 2018. At the time, the debate was in its infancy among academics and practitioners. Building on Tomaso Ferrando's work with Claudio Lombardi (Aberdeen School of Law)[7], and with support from the Fair Trade Advocacy Office (FTAO), Fairtrade Foundation, Fairtrade Germany, Commerce Équitable and Fairtrade Max Havelaar France, Tomaso and I organised a conference for students and early-career academics at Sciences Po in 2019. This issue brings together articles by four speakers.

The organisers' ambition was to generate original and thought-provoking work at the intersection of sustainability and competition policy. The outcome surpassed our expectations, in part thanks to the focus of the conference on student and early-career research. Miriam Imarhiagbe's article on the right-to-repair movement (R2R) and EU competition law, a rare foray into the topic, provides a detailed analysis of the status quo and suggests avenues for EU competition policy to support R2R. Kalpana Tyagi provides an analysis of three (in)famous mergers in the agrochemical sector and connects sustainability considerations to innovation. Kamil Bulakowski's article provides an overview of public interest considerations in merger control regimes of EU Member States and studies their strengths and shortcomings vis-à-vis socio-environmental goals. Julian Nowag's article distils and builds on his far-reaching scholarship on EU competition law and environmental sustainability. Among other considerations, it provides a systematic approach to the assessment of sustainability concerns in competition law enforcement against the backdrop of the EU's constitutional framework.

If recent EU initiatives to integrate sustainability into competition policy are anything to go by, our efforts have proven timely. Yet I have come to believe that competition policy is the symptom of a broken system, not the cause. Addressing climate change in earnest and reducing global inequalities will require fundamental changes in our sociotechnical systems and ways of living. But this should still not stop us from improving the current system where we can, until viable alternatives are worked out.

This collection would not have been possible without the support of the FTAO. My biggest thanks go to their team, especially Sergi Corbalán and Jorge Conesa. My friend and co-editor Teodora Groza stepped in at a crucial moment to ensure this issue sees the light of day. Simon Holmes has been a very supportive mentor -- not merely for our conference and this issue, but for aspiring scholars everywhere who are committed to furthering the debate on competition law and sustainability. The Nordic Journal of European Law is edited

* Lecturer, Sciences Po.

7 Fair Trade Advocacy Office, EU Competition Law and Sustainability in Food Systems: Addressing the Broken Links, February 2019, Brussels.

entirely by students and helps give resonance to the voices of junior scholars. As such, it was the ideal venue for the publication of these articles. My warm thanks go to its editors, especially to Max Hjärtström, and my final thanks go to the authors, who stuck by us until the end.

FOUNDATIONAL PRINCIPLES AND THE RULE OF LAW IN THE EUROPEAN UNION: HOW TO ADJUDICATE IN A RULE-OF-LAW CRISIS, AND WHY SOLIDARITY IS ESSENTIAL

XAVIER GROUSSOT*, ANNA ZEMSKOVA† & KATARINA BUNGERFELDT‡

In the seminal cases C-156/21 and C-157/21 ('Budget Conditionality Cases') the Court of Justice of the European Union demonstrated a shift in the perception of the operational functionality of foundational values of the EU, establishing that the rule of law is a founding value of the Union which represents a legal norm and imposes an obligation on the Member States to comply with its constituent elements. Such an interpretation of the CJEU, however, raises a few questions about the possibility of adjudicating the foundational values enshrined in Article 2 TEU and their extended role in the EU constitutional framework. Given the latest developments in the Court's case law, can all the foundational values under Article 2 TEU then acquire the status of legal norms and become 'foundational' or 'founding' principles? Does the attainment of this status happen automatically, or does a value need to fulfil specific criteria in order to obtain the necessary normativity, that would in turn make it enforceable? And how will the answer to that question affect our understanding of the role and function of the Court in EU law adjudication? In our contribution, we are going to attempt to address these very questions on the basis of four different premises. In Part I, the first premise – the possibility of the values of the EU becoming normative principles – will be discussed though theoretical and practical prisms. In Part II, the notion of 'foundational (or 'founding') principles and their relation to values will be explicated in light of the Budget Conditionality Cases and as EU principles of the highest constitutional rank. In Part III, and still in light of the Budget Conditionality Cases, the principle of solidarity will be analysed and presented as a foundational and legal principle of EU law. In Part IV, the idea of the CJEU as a 'deontic' Court will be outlined and then challenged on its grounds. This will be followed by some concluding remarks.

1 INTRODUCTION

The rule-of-law debate remains to be one of the topical issues permeating the discussions about the current and future functioning of the European integration.

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Today, the European project witnesses not only the internal challenges of the 'rule-of-law backsliding'[1] saga, but also, since the 24th of February 2022, an acute external threat which has implications and repercussions for the current rule-of-law crisis and its political management by the European Commission.[2] Replacing the rule of the iron fist with the rule of law was fundamental to the creation of the EU as a community.[3] All available tools must be employed to ensure that commitment to this EU value remains unscathed in the current situation and that the spirit of solidarity is strengthened rather than undermined. From a legal perspective, many doubts have been raised as to the *per se* justiciability of the rule of law as a value enshrined in Article 2 TEU.

Given the shortcomings in the assessment of compliance with the Copenhagen criteria in the 2004 pre-accession process and the adherence of the candidates to the values, enshrined in Article 2 TEU,[4] together with the zero functionality of the EU's 'nuclear option',[5] one might think that the battle for the rule of law as a constitutional and *per se* justiciable value might have been lost. However, the recent case law of the Court of Justice of the European Union (CJEU), namely the seminal cases C-156/21[6] and C-157/21 ('*Budget Conditionality Cases*'),[7] demonstrates a shift in the perception of the operational functionality of foundational values of the EU, establishing that the rule of law is a founding value of the Union which represents a legal norm and imposes an obligation on the Member States to comply with its constituent elements.[8] In addition, the *Budget Conditionality Cases* appear to be crucial since they also crown the principle of solidarity as a principle of constitutional and legal relevance, one we think should also be understood as a proper foundational principle of EU law, similarly to the rule of law, and in light of Article 2 TEU.[9] In other words, these cases open up the possibility for the principle of solidarity, an acknowledged fundamental principle of EU law, to be transformed into a *founding* principle.

Such an interpretation of the CJEU, however, raises a few questions about the possibility of adjudicating the foundational values enshrined in Article 2 TEU and their extended role in the EU constitutional framework. Given the latest developments in the Court's case law, can *all* the foundational values under Article 2 TEU then acquire the status of legal norms and become 'foundational' or 'founding' principles? Does the attainment of this status happen automatically, or does a value need to fulfil specific criteria in order to obtain the necessary normativity, that would in turn make it enforceable? And how will the

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[1] Laurent Pech and Kim Lane Scheppele, 'Illiberalism Within: Rule of law Backsliding in the EU' (2017) 19 Cambridge Yearbook of European Legal Studies 3.

[2] Dimitry Kochenov and Petra Bard, 'War as a Pretext to Wave the Rule of law Goodbye? The Case for An EU Constitutional Awakening', European Law Journal, 2022.

[3] Commission 'White Paper on the Future of Europe. Reflections and Scenarios for the EU27 by 2025' COM (2017) 2025 6.

[4] Jan Wouters, 'Revisiting Art. 2 TEU: A True Union of Values?' (2020) 2020 5 European Papers - A Journal on Law and Integration 255, 266.

[5] Laurent Pech and Kim Scheppele, 'Is Article 7 Really the EU's "Nuclear Option"?' [2018] Verfassungsblog: On Matters Constitutional <https://intr2dok.vifa-recht.de/receive/mir_mods_00003246> accessed 5 July 2022.

[6] Case C-156/21 *Hungary v European Parliament and Council of the European Union* EU:C:2022:97.

[7] Case C-157/21 *Republic of Poland v European Parliament and Council of the European Union* EU:C:2022:98.

[8] *Hungary v European Parliament and Council of the European Union* (n 6), para 231.

[9] For an excellent case note on *Budget Conditionality Cases,* see Andi Hoxhaj, 'The CJEU Validates in C-156/21 and C-157/21 The Rule of law Conditionality Regulation Regime to Protect EU Budget', 5 (1) Nordic Journal of European Law (forthcoming).

answer to that question affect our understanding of the role and function of the Court in EU law adjudication? In our contribution, we are going to attempt to address these very questions on the basis of four different premises. In Part I, the first premise – the possibility of the values of the EU becoming normative principles – will be discussed though theoretical and practical prisms. In Part II, the notion of 'foundational (or 'founding') principles and their relation to values will be explicated in light of the *Budget Conditionality Cases* and as EU principles of the highest constitutional rank. In Part III, and still in light of the *Budget Conditionality Cases*, the principle of solidarity will be analysed and presented as a foundational and legal principle of EU law. In Part IV, the idea of the CJEU as a 'deontic' Court will be outlined and then challenged on its grounds. This will be followed by some concluding remarks.

2 VALUES AND ADJUDICATION IN MOTIONS

From a legal perspective, the design of the EU constitutional framework might be thought to suffer from a disturbing paradox regarding the practical enforceability of EU values, since the Treaty of Lisbon brought some confusion[10] to the categorisation of the rule of law in the EU legal universe by referring to it both as a value[11] and a principle.[12] That cast some doubt on Article 2 TEU's ability to produce 'justiciable legal effects' for the values, contained therein.[13] Whereas different opinions have been expressed in this regard,[14] the complexity, imbedded in the legal notion of a 'value' in the European context, has been even deepened by the construction of Article 2 TEU itself, which could be read as vesting the values listed in two separate sentences in Article 2 TEU with different legal statuses.[15] The confusion is deepened by the preamble to the Charter of Fundamental Rights, which, while stating that 'the Union is founded on [certain] indivisible, universal values', textually contrasts these with the 'principles' of democracy and the rule of law.[16] Although it is common practice to use

[10] Dimitry Kochenov states that when Article 2 TEU speaks of 'values' it means 'principles', Dimitry Kochenov, *The Acquis and Its Principles*, vol 1 (Oxford University Press 2017) <https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780198746560.001.0001/acprof-9780198746560-chapter-2> accessed 9 June 2022.

[11] Preamble and Article 2 TEU.

[12] Preamble and Article 21 TEU.

[13] Armin von Bogdandy and Luke Dimitrios Spieker, 'Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges' (2019) 15 European Constitutional Law Review 391, 409.

[14] ibid 410; as Thomas von Danwitz puts it: 'the repeated recognition of the common values of the Union are much more than abstract references without any practical importance', Thomas Von Danwitz, 'Values and the Rule of Law: Foundations of the European Union – An Inside Perspective from the ECJ' (2018) 21 Potchefstroom Electronic Law Journal 1, 17.

[15] The status of the values under Article 2 TEU has been interpreted differently by different scholars, see, for example, Wouters (n 4) 258; as Nicolosi states 'following the paradigm outlined by the defunct European Constitution, the Lisbon Treaty does not assign a merely rhetorical bearing to the values enshrined in Article 2 TEU', Salvatore Fabio Nicolosi, 'The Contribution of the Court of Justice to the Codification of the Founding Values of the European Union' [2015] Revista de Derecho Comunitario Europeo 613, 637; see in relation to solidarity, Dagmar Schiek, 'Solidarity in the Case Law of the European Court of Justice - Opportunities Missed' in Helle Krunke, Hanne Petersen and Ian Manners, *Transnational Solidarity: Concept, Challenges and Opportunities* (Cambridge University Press 2020).

[16] Preamble in Charter of Fundamental Rights of the European Union; the same type of confusion resides in the preamble of the TEU.

these notions interchangeably,[17] there is a fundamental difference between them that creates a legal conundrum.

According to Article 2 TEU, the rule of law constitutes one of the foundational values of the EU, along with democracy and respect for human rights. However, the operability of values is extremely circumscribed since values are not properly normative[18] until they are transformed into *legal* norms.[19] Without such a legal conception, values remain too broad to be legally binding. In combination with the mismatch between the proclamation of the values under Article 2 TEU and the Union's competences to enact them,[20] the scope of application of the values is limited to Article 2 TEU and 7 TEU only.[21]

Whereas the academic discourse on the concept of values is extremely rich and developed, the notion of EU values as normative principles requires further exploration. The traditional understanding presupposes that a value is a difficult concept[22] that serves as a bridge between morality and law.[23] In order to become full-fledged legal norms they need to be converted into valid laws.[24] Indeed, the usual lack of unified definitions for the concepts in Article 2 TEU as well as their unspecified scope[25] makes it extremely controversial to endow values with legal force. In reality, though, the Court has officially acknowledged the normativity of one of the EU values, namely, the rule of law, thereby assigning a new status to the EU values and highlighting the specific nature of the principles contained in Article 2 TEU.

In this respect Daniel Overgaauw's recent work, while providing a great overview of the framework, within which the EU principles function, draws our attention to a separate category of principles, 'founding values' or 'founding principles',[26] which are non-amendable principles of the highest rank within the polyarchy of principles in EU law.[27] The explanation of the Court's position on EU values (contained in Article 2 TEU) through the concept of 'founding principles' sheds some light on the reasoning of the Court and provides a theoretical framework for understanding the transformation of an EU value into an operable norm of EU law.

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[17] Daniël Overgaauw, 'A Polyphony of Principles: The Application and Classification of the Principles of European Union Law' (University of Groningen 2022) 42 <http://hdl.handle.net/11370/7884336a-2e1b-43d4-8c23-31752a328a5f> accessed 3 June 2022; Wouters (n 4) 260.

[18] Hermeren however distinguishes between empirical and normative concepts of value, Göran Hermerén, 'European Values, Ethics and Law.' (2006) 11 Jahrbuch für Wissenschaft und Ethik 9 <https://www.degruyter.com/document/doi/10.1515/9783110186406.5/html> accessed 8 June 2022.

[19] Overgaauw (n 17) 41.

[20] Wouters (n 4) 260.

[21] Sasha Garben has underlined this problematic aspect through the prism of the 'competence creep' argument at the Panel Discussion on the Rule of law Conditionality on the 24th of February 2022, available at <https://www.youtube.com/watch?v=NjuLR1gn9TU>, accessed 9 June 2022.

[22] Hermerén (n 18) 8.

[23] Markus Frischhut, *The Ethical Spirit of EU Law* (Springer Open 2019) 134.

[24] Giulio Itzcovich, *On the Legal Enforcement of Values. The Importance of the Institutional Context*, vol 1 (Oxford University Press 2017) 28–29 <https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780198746560.001.0001/acprof-9780198746560-chapter-3> accessed 8 June 2022.

[25] Scarce attention to these aspects has been pointed out by Nicolosi in Nicolosi (n 14).

[26] See elaborations on the nature of founding principles and their correlation with EU values under Article 2 TEU in Armin Von Bogdandy, 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch' (2010) 16 European Law Journal 95.

[27] Overgaauw (n 17) 172–173.

Back in *Kadi* the CJEU underlined the impossibility of any derogations from 'the principles that form part of the very foundations of the Community legal order',[28] whereas in Opinion 2/13 the Court reminded us of the *sui generis* nature of the EU, an entity with 'its own constitutional framework and founding principles'.[29] Such language suggests that the concepts, constituting the *ground* for the European legal order are different from other legal concepts within the EU constitutional framework, the conceptualisation that was further explicated in the *Budget Conditionality Cases,* C-156/21 and C-157/21,[30] where the Court vests the principle of the rule of law with an obligational nature.

3 THE BUDGET CONDITIONALITY CASES – THE RULE OF LAW AS FOUNDATIONAL VALUE

The *Budget Conditionality* judgements have had great significance both on the micro and the macro levels of the EU constitutional framework. On the micro level, the Court confirmed the validity of the Budget Conditionality Regulation; on the macro level, it paved a way for ensuring the adherence to the foundational values of the Union, by putting an end to the era of Member States' merely 'declaratory' compliance with the Union's values after their accession to the Union.[31] The impact of the judgements can be perceived as being two-fold. While the long-awaited outcome of the judgements on the micro level has been welcomed, the concessions, which affect the operational potential of the Budget Conditionality Instrument, require further comment.

The major concession is the limited scope of the Regulation's applicability, which stems from that compromise between the Member States without which the Regulation could not have been adopted.[32] While noting that the Regulation is a complement to the other instruments in the EU's *Rule of Law Toolbox*,[33] the Court underlined that the mechanism is only to be applied for the protection of the Union budget[34] – only such an interpretation would justify the legal basis of the adopted regulation. The Court pointed out that the Budget Conditionality Regulation allows EU institutions to review a Member State's respect for the fundamental principles of the rule of law *only* with regard to the sound implementation of

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[28] Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* EU:C:2008:461, paras 303-304.

[29] Opinion 2/13, para 158.

[30] In these cases the validity of the Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a General Regime of Conditionality for the Protection of the Union Budget OJ L 433I was challenged; hereafter the Budget Conditionality Regulation.

[31] Anna Zemskova, 'Rule of Law Conditionality: A Long-Desired Victory or a Modest Step Forward?: Hungary v Parliament and Council (C-156/21) and Poland v Parliament and Council (C-157/21)' <https://rgdoi.net/10.13140/RG.2.2.14189.46562> accessed 9 March 2022; Anna Zemskova, 'En (del)seger för rättsstatsprincipen' (*Europakommentaren*, 9 March 2022) <europakommentaren.eu/2022/03/09/en-delseger-for-rattsstatsprincipen/> accessed 18 May 2022; in regard to EU values in general Jean-Claude Piris, *The Lisbon Treaty : A Legal and Political Analysis* (Cambridge University Press 2010) 71 <http://ludwig.lub.lu.se/login?url=https://search.ebscohost.com/login.aspx?direct=true&db=nlebk&AN=344655&site=eds-live&scope=site>.

[32] Antonia Baraggia and Matteo Bonelli, 'Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges' (2022) 23 German Law Journal 131, 139–141.

[33] *Hungary v European Parliament and Council of the European Union* (n 6), paras 154-163; *Republic of Poland v European Parliament and Council of the European Union* (n 7), paras 191-199.

[34] *Hungary v European Parliament and Council of the European Union* (n 6), para 117; *Republic of Poland v European Parliament and Council of the European Union* (n 7), para 131 with a reference to recital 14 of the Budget Conditionality Regulation.

the Union budget, meaning that measures undertaken with that purpose fall within the scope of EU law.[35] Moreover, the Court recalled the strict requirements, that need to be fulfilled in order to invoke the conditionality[36] mechanism against a Member State: there must be reasonable grounds to believe firstly, that a breach of the principles of rule of law has occurred within the Member State; and secondly, that the breach may affect or seriously risk affecting the EU budget or the Union's financial interests in a sufficiently direct way.[37] The criterion of a 'sufficiently direct link' effectively circumscribes the scope of the Regulation by prohibiting application of the Budget Conditionality Regulation in situations unrelated to the implementation of the Union budget.[38] In Case C-157/21 the Court clarified that while all the situations in Article 4(2) of the Conditionality Regulation may potentially be *relevant* to the sound implementation of the Union budget, this does not mean that the EU institutions may invoke the conditionality mechanism *automatically*, whenever a breach of the principles of the rule of law occurs.[39] The Commission would have to prove that the link to the budget is genuine,[40] complying with the requirements provided by the Regulation.[41]

The CJEU identified the distinguishing features of Article 7 TEU and the Budget Conditionality Instrument in light of their differentiated purposes,[42] scope,[43] nature,[44] and conditions for enactment,[45] confirming that the contested conditionality mechanism is not parallel to the procedure in Article 7 TEU.[46] As we have seen, the Achilles' heel of the protection of the rule of law as an EU value on a micro level is the limited scope of the Budget Conditionality Regulation, which dims the prospects of victory of the principle.[47]

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[35] *Hungary v European Parliament and Council of the European Union* (n 6), para 164; *Republic of Poland v European Parliament and Council of the European Union* (n 7), para 267.

[36] Conditionality is described as a 'nexus between solidarity and responsibility' in Baraggia and Bonelli (n 26) 155.

[37] *Hungary v European Parliament and Council of the European Union* (n 6), para 111; *Republic of Poland v European Parliament and Council of the European Union* (n 7), para 125.

[38] *Hungary v European Parliament and Council of the European Union* (n 6), paras 142-144.

[39] *Republic of Poland v European Parliament and Council of the European Union* (n 7), paras 179-180.

[40] Ibid, paras 178-180. It is worth drawing attention to footnote 96 of the Opinion where the AG indicates awareness of the heavy burden on the Commission to prove the presence of the conditions, that would trigger the application of the Budgetary Conditionality Instrument referred to as a 'probatio diabolica' in the Editorial in European Papers 2020, No 5, 1101-1104, in Case C-156/21 *Hungary v European Parliament and Council of the European Union* EU:C:2021:974, Opinion of Advocate General Campos Sánchez-Bordona,. Enzo Cannizzaro, 'Neither Representation nor Values? Or, "Europe's Moment" - Part II' (2021) 2020 5 European Papers - A Journal on Law and Integration 1101.

[41] Recitals 16 and 26, Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a General Regime of Conditionality for the Protection of the Union Budget OJ L 433I, *Republic of Poland v European Parliament and Council of the European Union* (n 7), para 284.

[42] The non-punitive purpose of the Budget Conditionality Instrument is reflected in the judgements, *Hungary v European Parliament and Council of the European Union* (n 6), paras 115, 170, 172; *Republic of Poland v European Parliament and Council of the European Union* (n 7), paras 209-210 and in Case C-156/21 *Hungary v European Parliament and Council of the European Union* EU:C:2021:974, Opinion of Advocate General Campos Sánchez-Bordona, points 179, 186.

[43] *Hungary v European Parliament and Council of the European Union* (n 6), paras 173-174; *Republic of Poland v European Parliament and Council of the European Union* (n 7), paras 212-213.

[44] *Hungary v European Parliament and Council of the European Union* (n 6), paras 171, 177; *Republic of Poland v European Parliament and Council of the European Union* (n 7), paras 210, 216.

[45] *Hungary v European Parliament and Council of the European Union* (n 6), paras 175-176, 178; *Republic of Poland v European Parliament and Council of the European Union* (n 7), paras 214-215, 217.

[46] *Hungary v European Parliament and Council of the European Union* (n 6), paras 179-180; *Republic of Poland v European Parliament and Council of the European Union* (n 7), paras 218-219.

[47] Zemskova, 'Rule of Law Conditionality' (n 31); Zemskova, 'En (del)seger för rättsstatsprincipen' (n 31).

However, if the impact of the *Budget Conditionality* judgements on the macro level is taken into consideration, the achievements in the field of ensuring adherence to the EU values can be described as positively far-reaching and even revolutionary.

The *Budget Conditionality Cases* have demonstrated how the foundational values of the Union under Article 2 TEU can successfully become normative principles. Indeed, before the adoption of the Budget Conditionality Regulation and the subsequent judgements that confirmed its validity, the rule of law, whose position, although strengthened throughout the years, had been an invisible caveat of the constitutional design of the EU, whose protection through the primary existing mechanism under Article 7 TEU has not turned out to be successful. The only more or less effective tool for safeguarding the rule of law was the Court's active engagement in the attempts to resolve the internal rule-of-law crisis, by means of ruling in either infringement proceedings, initiated by the Commission,[48] or preliminary reference procedures.[49]

Moreover, the CJEU, while adjudicating on the protection of the rule of law, referred to the constituent elements of the principle, which were anchored in different provisions of both primary and secondary law. Thus the Court, applying a value-oriented interpretation,[50] took recourse to provisions of the Treaties other than Article 2 TEU.[51] This allowed it to concretise the principle,[52] and potentially empower its protection on a broader scale (as was the case in *Portuguese Judges)*. The value expressed in Article 2 TEU became normative through Article 19 TEU that contains a specific obligation for the Member States.[53] But if, in the case *Portuguese Judges*, the Court did not find a violation of judicial independence, and hence did not demonstrate the judicial applicability of the values under Article 2 TEU in practice in that very case, in *Commission v. Poland*[54] the Court proved its readiness to apply 'a new, ground-breaking rationale' in its quest to ensure that the Union values under Article 2 TEU are respected.[55]

In *Kadi*,[56] the Court had left its understanding of EU constitutional identity implicit. In the *Budget Conditionality* judgements, by contrast, it explicitly channelled the essence of that identity through the values of Article 2 TEU, specifically through the founding principle of

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[48] Case C-619/18 *Commission v Poland* EU:C:2019:531; C-192/18 *Commission v Poland* EU:C:2019:924.
[49] Case C-824/18 *A.B. and Others v Krajowa Rada Sądownictwa and Others* EU:C:2021:153.
[50] von Bogdandy and Spieker (n 13) 413.
[51] The combination of Articles 2, 4 (3) and 19 (1) TEU in Case C-64/16 *Associação Sindical Dos Juízes Portugueses v Tribunal de Contas* EU:C:2018:117. The use of Article 2 TEU on combination with other Treaty provisions has also been suggested by scholars, see ibid 410.
[52] *Associação Sindical Dos Juízes Portugueses v Tribunal de Contas* (n 51), para 32: "Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals (see, to that effect, Opinion 1/09 (Agreement creating a Unified Patent Litigation System), of 8 March 2011, EU:C:2011:123, paragraph 66; judgments of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P EU:C:2013:625, paragraph 90, and of 28 April 2015, *T & L Sugars and Sidul Açúcares v Commission*, C-456/13 P EU:C:2015:284, paragraph 45)."
[53] von Bogdandy and Spieker (n 13) 416.
[54] *Commission v Poland* (n 48).
[55] Luke Dimitrios Spieker, 'Commission v. Poland: A Stepping Stone Towards a Strong "Union of Values"?' [2019] Verfassungsblog: On Matters Constitutional <https://intr2dok.vifa-recht.de/receive/mir_mods_00007487> accessed 9 June 2022.
[56] Pekka Pohjankovski pointed that out during the Panel Discussion on the Rule of law Conditionality on the 24th of February 2022, available at https://www.youtube.com/watch?v=NjuLR1gn9TU, accessed 9 June 2022.

the rule of law,[57] presented as an unchangeable core of the Treaties.[58] Referring to its case law, the Court reiterated that the rule of law is a foundational value of the EU and a common value, shared by all the Member States.[59] In acceding to the Union, a state joins 'a legal structure that is based on the *fundamental premise* that each Member State shares with all the other Member States, and recognises that they share with it, the common values contained in Article 2 TEU, on which the European Union is founded.'[60] Furthermore, referring to case *Repubblika,*[61] the Court confirmed that respect for the rule of law is a prerequisite for a Member State's enjoyment of Treaty rights, and that a Member State cannot disregard this duty post-accession,[62] in practice resolving the 'Copenhagen criteria' conundrum[63] that has tormented the European project for years. The Court has also managed to curtail attempts by some Member States to justify divergent understandings of the Union values by playing the 'national identity card',[64] stating that although the Member States do enjoy a degree of discretion when implementing the principles of the rule of law in their domestic constitutional orders, the practical results which are to be achieved cannot be allowed to differ between them.[65] The duty to respect the Member States' national identities, found in Article 4(2) TEU, does not yield a different conclusion, as the rule of law is stipulated as a *common* value of all EU Member States.[66] As is demonstrated by both the continuous work

[57] *Hungary v European Parliament and Council of the European Union* (n 6), para 232. Pekka Sakari Pohjankoski, 'The Unveiling of EU's Constitutional Identity: Judgments in C-156/21, Hungary v. Parliament and Council and C-157/21, Poland v. Parliament and Council', (2022) Weekend Edition 91 EU Law Live, 4 < https://eulawlive.com/weekend-edition/weekend-edition-no91/> accessed 6 July 2022.

[58] Ibid para 234: "Whilst they have separate national identities, inherent in their fundamental structures, political and constitutional, which the European Union respects, the Member States adhere to a concept of "the rule of law" which they share, as a value common to their own constitutional traditions, and which they have undertaken to respect at all times."

[59] Ibid para 124, *Republic of Poland v European Parliament and Council of the European Union* (n 7), para 142 referring to Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 *Criminal Proceedings against PM and Others* EU:C:2021:1034, paras 160-161 that in its turn refers to Case C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *Asociația "Forumul Judecătorilor Din România" and Others* EU:C:2021:39, paras 160-161 that cites Case C-896/19 *Repubblika v Il-Prim Ministru* EU:C:2021:311, paras 61-62 citing *Associação Sindical Dos Juízes Portugueses v Tribunal de Contas* (n 51), para 30.

[60] *Hungary v European Parliament and Council of the European Union* (n 6), para 125; *Republic of Poland v European Parliament and Council of the European Union* (n 7), para 143 citing both *Associação Sindical Dos Juízes Portugueses v Tribunal de Contas* (n 51), para 30 and *Repubblika v Il-Prim Ministru (*n 59), para 62.

[61] *Repubblika v Il-Prim Ministru (*n 59).

[62] *Hungary v European Parliament and Council of the European Union* (n 6), para 126; *Republic of Poland v European Parliament and Council of the European Union* (n 7), para 144 referring to *Repubblika v Il-Prim Ministru (*n 59), paras 63-64; *Asociația "Forumul Judecătorilor Din România" and Others* (n 59), para 162; *Criminal Proceedings against PM and Others* (n 59), para 162.

[63] A constituent element of the 'double hurdle' of Article 2 TEU, Luke Dimitrios Spieker, 'From Moral Values to Legal Obligations – On How to Activate the Union's Common Values in the EU Rule of Law Crisis' [2018] SSRN Electronic Journal 3 <https://www.ssrn.com/abstract=3249021> accessed 9 June 2022.

[64] Such a development has been foreseen by scholars, that warned about a possible 'massive power shift to the Union....to the detriment of national autonomy, identity, and diversity', von Bogdandy and Spieker (n 13) 421.

[65] *Hungary v European Parliament and Council of the European Union* (n 6), paras 232-233; *Republic of Poland v European Parliament and Council of the European Union* (n 7), paras 264-265.

[66] *Hungary v European Parliament and Council of the European Union* (n 6), para 234; *Republic of Poland v European Parliament and Council of the European Union* (n 7), para 266.

of the Commission[67] and the adjudication of the Court, the rule of law is one of the European values that are regarded as 'common denominators'[68] for the Members of the Union.

Since the values in Article 2 TEU are defining features of the EU legal order, the Court stated that the EU must be allowed to defend these values, albeit within the limits set by the Treaties.[69] While acknowledging the common values as the basis for the principle of mutual trust between the Member States, the Court introduces a new link, namely, the principle of solidarity. The appeal to this fundamental principle together with the language of EU values is far away from accidental. A new source of inspiration was needed as the doctrine of mutual trust did not live up to its expectations when it came to tackling threats to the rule of law.

4 BUDGET CONDITIONALITY CASES II – SOLIDARITY AS A LEGAL AND FOUNDATIONAL PRINCIPLE

The principle of solidarity is a contested notion within EU law even though it is both a core value and an objective of the EU Treaties, and has its historical roots in the Schuman Declaration of 9 May 1950.[70] The concept is mentioned throughout the Treaties,[71] but lacks any clear definition.[72] Moreover, although solidarity is enshrined in the second sentence of Article 2 TEU, and thus can be understood as a foundational value of the Union,[73] its legal status remains uncertain. Early case law of the Court[74] mentions the principle of solidarity and links it to the principle of loyalty – which later became the principle of sincere cooperation found in Article 4(3) TEU – but solidarity is never used as basis to create any legal effects.[75] The recent jurisprudence of the Court characterises solidarity as one of the fundamental principles of EU law.[76] In the Grand Chamber case *Germany* v *Poland*, the CJEU

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[67] Commission, 'A New EU Framework to Strengthen the Rule of Law' COM (2014) 158; Commission, 'Further Strengthening the Rule of Law within the Union. State of Play and Possible Next Steps' COM (2019) 163; Commission 'Strengthening the Rule of Law within the Union A Blueprint for Action' COM (2019) 343 final; Commission '2020 Rule of Law Report. The Rule of Law Situation in the European Union' COM (2020) 580; Commission '2021 Rule of Law Report. The Rule of Law Situation in the European Union' COM(2021) 700 final.

[68] Hermerén (n 18) 29.

[69] *Hungary v European Parliament and Council of the European Union* (n 6), para 127; *Republic of Poland v European Parliament and Council of the European Union* (n 7), para 145.

[70] See Schuman Declaration of 9 May 1950 ('discours de l'horloge'), available at , accessed on the 5th of July 2022. See also Jean Monnet, *Mémoires* (Fayard 1976), mentioning the concept of solidarity in relation to the 'États unis d'Europe'; see also Rostane Mehdi, Preface, in Estelle Brosset, Rostane Mehdi and Nathalie Rubio (eds), *Solidarité et droit de l'Union européenne: un principe à l'épreuve* (DICE Éditions 2021) <http://books.openedition.org/dice/2737> accessed 4 July 2022 where Mehdi qualifies the cardinal principle of the European identity.

[71] See eg Article 2 TEU, Article 3(3) TEU and Articles 67(2), 80, 122(1), 192 TFEU and 222(1) TFEU. It is also mentioned in the preambles to the TEU and the Charter.

[72] Hermeren points out in his contribution that solidarity has 'several meanings', Hermerén (n 18) 20; Sanggiovanni states that "Yet, despite such prolific use of 'solidarity', there is very little analysis of what the nature of solidarity [is]…", A Sangiovanni, 'Solidarity in the European Union' (2013) 33 Oxford Journal of Legal Studies 213, 215.

[73] See in general, the discussion in Dagmar Schiek, 'Solidarity in the Case Law of the European Court of Justice - Opportunities Missed' in Krunke, Petersen and Manners (n 15).

[74] See eg Case 6 & 11/69 *Commission v France* EU:C:1969:68, para 16; Case 39/72 *Commission v Italy* EU:C:1973:13, para 24; Case 39/72 *Commission v Italy* EU:C:1973:13, para 25; Case 128/78 *Commission v the UK* EU:C:1979:32. However, for a modern example, see Case C-105/03 *Pupino* EU:C:2004:712 , para 41.

[75] Esin Küçük, 'Solidarity in EU Law: An Elusive Political Statement or a Legal Principle with Substance?' (2016) 23 Maastricht Journal of European and Comparative Law 965, 966–967 and 974–975.

[76] Case C-848/19 P *Germany v Poland* EU:C:2021:598, para 38.

is very didactic in showing the legal implications and the broad scope of the 'spirit of solidarity'.[77] While the CJEU highlighted the exceptional relevance of solidarity in extraordinary situations,[78] it also indicated that the application of the principle of solidarity is not limited to emergency occurrences, but 'serves as the thread that brings them [the objectives of the EU in a specific policy, in this case, energy policy] together and gives them coherence'.[79] The link with the principles of loyalty and solidarity is emphasised as an appeal to the State's responsibility for respecting its obligations under EU law, which flow from Article 192 TFEU read in conjunction with Article 4(3) TEU.[80] The CJEU made clear that the principle of solidarity is not an abstract concept unable to produce legal effects. [81]

This recent jurisprudential development contrasts sharply with the cautious approach usually taken by the CJEU. Indeed, solidarity is generally considered to be a political concept, which guides the 'horizontal' relationship between the EU Member States, not the 'vertical' relationship between the Member States and the Union.[82] In a recent text comparing the principles of loyalty and solidarity, Klämert argues that the principle of solidarity is not a general principle of EU law and has not been decisive in developing EU constitutional law and its scope.[83] For him, the only area in which the principle has shown any strength is in 'energy solidarity'.[84] The principle remains weak in the sense that the principle is not self-standing and, like the principle of loyalty, does not boast direct effect.[85]

As already mentioned above, the close link between loyalty and solidarity has been much rehearsed in the EU literature, as has their interplay when, in crises and emergencies, they are relied upon in order to identify specific legal duties.[86] Here, solidarity seems to have managed to acquire a certain 'legal solidity' and 'legal core'.[87] When linked to loyalty, the

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[77] Ibid. paras 41-46.
[78] Such as Articles 67 (2), 122 (1) and 222 TFEU, *Germany v Poland* (n 76).
[79] *Germany v Poland* (n 76), para 43.
[80] Ibid, para 52. Thus, the principle of energy solidarity, read in conjunction with the principle of sincere cooperation, requires that the Commission verify whether there is a danger for gas supply on the markets of the Member States, when adopting a decision on the basis of Article 36 of Directive 2009/73.
[81] Responding to the argument of the state.
[82]Marcus Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press 2014) 40 <https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780199683123.001.0001/acprof-9780199683123> accessed 4 July 2022; Malcolm Ross, 'Solidarity—A New Constitutional Paradigm for the EU?' in Malcolm Ross and Yuri Borgmann-Prebil (eds), *Promoting Solidarity in the European Union* (Oxford University Press 2010) <https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780199583188.001.0001/acprof-9780199583188-chapter-2> accessed 4 July 2022.
[83] Klamert (ibid) 128.
[84] ibid 129.
[85] ibid 134.
[86] See Federico Casolari, 'EU Loyalty and the Protection of Member States' National Interests' in Marton Varju (ed), *Between Compliance and Particularism: Member State Interests and European Union Law* (Springer International Publishing 2019) 67–68 <https://doi.org/10.1007/978-3-030-05782-4_3>; Marc Blanquet, 'L'Union européenne en tant que système de solidarité: la notion de solidarité européenne' in Maryvonne Hecquard-Théron (ed), *Solidarité(s) : Perspectives juridiques* (Presses de l'Université Toulouse 1 Capitole 2009) <http://books.openedition.org/putc/232> accessed 4 July 2022; See also Karine Abderemane, 'Le « mot » solidarité en droit de l'Union européenne' Brosset, Mehdi and Rubio (n 70) 31 It is also worth noting that the first time that the principle of 'solidarity' was relied on by the CJEU was in a case concerning the steel industry crisis (see *Commission v. France* [n 74]).
[87] See case law previous (n 74).

principle of solidarity seems to acquire a 'vertical dimension' akin to EU law obligations in contrasts with the 'horizontal nature' of the concept of solidarity.[88]

The 'interplay logic' between loyalty and solidarity also appears to be present in the *Budget Conditionality Cases* in the context of the rule of law crisis in the EU, in relation to the principle of mutual trust. Indeed, bringing the principle of solidarity into the 'rule of law and mutual trust' equation is an extremely important aspect of the *Budget Conditionality* judgements and protection of the Union budget in regard to the principle of the rule of law. The Union budget functions as a projection of the principle of solidarity which rests on the mutual trust between the Member States. That trust, in its turn, stems from the commitments of each Member State to comply with its obligations under EU law (the duty of loyalty), which includes compliance with the values of Article 2 TEU, among which one finds the rule of law. [89]

In essence, the Court established that without sufficient respect for the rule of law, there can be no mutual trust among the EU Member States ,[90] and no solidarity in the implementation of the EU budget. In other words, the Court created a link of interdependence between two EU values under Article 2 (solidarity and the rule of law) with the help of the principle of mutual trust: if an EU Member State does not respect the fundamental principles of the rule of law, the mutual trust among the EU Member States is undercut, and the solidarity among them is eroded. A logical consequence of this line of reasoning is that these two values must be perceived as mutually reinforcing: if there is no respect for the rule of law, there can be no solidarity among EU Member States and vice versa.

By introducing a causal link between the rule of law and solidarity, the CJEU effectively elevates the status of the latter, so that the principle of solidarity becomes *en parité* with the rule of law.[91] This endorsement of a broader view of Article 2 TEU is an anticipated development, the necessity of the implementation of which has been advocated for previously.[92] In this respect the Court clarified that solidarity is a fundamental principle, with distinct judicial enforceability, which may be invoked when the rule of law and the principle of mutual trust are at stake. This broadens enormously the interpretation of the CJEU relied on in *Germany* v *Poland*, which was limited to energy solidarity and Article 192 TFEU. This constitutes a radical shift in EU constitutional law.[93]

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[88] For a horizontal understanding of the concept of solidarity, see Pierre Musso, 'La Solidarité : Généalogie d'un Concept Sociologique:', *La Solidarité* (Odile Jacob 2015) 107 <https://www.cairn.info/solidarite-2015--9782738131430-page-93.htm?ref=doi> accessed 4 July 2022; Pierre Musso qualifies the concept of solidarity as not 'institutionalisant'.

[89] *Hungary v European Parliament and Council of the European Union* (n 6), para 129; *Republic of Poland v European Parliament and Council of the European Union* (n 7), para 147.

[90] *Hungary v European Parliament and Council of the European Union* (n 6), para 129; *Republic of Poland v European Parliament and Council of the European Union* (n 7), para 147.

[91] Some scholars consider though that 'there is no hierarchy in such a system of values: they are not distinct from one another, as they rather represent a consistent code providing the EU with a genuine constitutional identity, which is a common heritage to all Member States', Nicolosi (n 15) 642.

[92] Wouters (n 4).

[93] Compare Küçük (n 75); Klamert (n 82).

The confirmation of the legality of defining the rule of law on the EU level, despite the high contestability of the notion,[94] is also of crucial significance. While acknowledging that the rule of law is 'an abstract legal notion', the CJEU stated that abstractness does not preclude the EU legislator from adopting laws related to the rule of law.[95] The Court added that the principles listed in Article 2(a) of the Conditionality Regulation[96] are not meant to constitute an exhaustive definition of the concept of the rule of law, but include the principles which are most important for implementing the Union budget,[97] whereas the notion itself should be considered synonymous with the value expressed in Article 2 TEU.[98]

The introduction of the unified, though non-exhaustive definition of a Union value is welcome, as any specification of the conditions to be fulfilled by the Member States facilitates adherence to them, and, by the same token, makes compliance easier to monitor that projects transparency and strengthens accountability of Union actors in such proceedings. Establishing the content of a Union value might be in that sense a prerequisite for enforceability. Therefore, the essence of solidarity[99] may have to be spelled out before the scope of the application of the *Budget Conditionality* judgements can be expanded to other Union values.

It clearly follows from the *Budget Conditionality Cases* that solidarity constitutes a legal principle and not only a political concept, just as EU law doctrine often insists. Alain Supiot's edited collection of interdisciplinary inquiries into the legal nature of the principle of solidarity makes it difficult to deny that solidarity is a legal principle.[100] His book traces the legal roots of the principle from Roman to French law[101] in the context of collective creditor's responsibility; then describes the strong impact of Durkheimian sociology[102] on the public law theory of *État social*, which has marked French jurisprudence for generations.[103] Solidarity

[94] Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (In Florida)?' (2002) 21 Law and Philosophy 137; Jeremy Waldron, 'The Rule of Law as an Essentially Contested Concept' in Jens Meierhenrich and Martin Loughlin (eds), *The Cambridge Companion to the Rule of law* (Cambridge University Press 2021) <https://www.cambridge.org/core/books/cambridge-companion-to-the-rule-of-law/rule-of-law-as-an-essentially-contested-concept/66DF80FFCD91CBE9B0044CA82F2AB207>.

[95] *Hungary v European Parliament and Council of the European Union* (n 6), para 224; *Republic of Poland v European Parliament and Council of the European Union* (n 7), para 320 with reference to Case C-206/16 *Marco Tronchetti Provera and Others* [2017] EU:C:2017:572, paras 39-40 (by analogy).

[96] *Hungary v European Parliament and Council of the European Union* (n 6), paras 236 and 242.

[97] *Hungary v European Parliament and Council of the European Union* (n 6), para 227; *Republic of Poland v European Parliament and Council of the European Union* (n 7), para 323.

[98] *Hungary v European Parliament and Council of the European Union* (n 6), para 228.

[99] On the differentiated understanding of the concept of solidarity in economic emergency measures see Anna Zemskova, 'Guest Note on the Impact of the COVID-19 Outbreak on EU Law' (2020) 3 Nordic Journal of European Law III, VIII.

[100] See in general Alain Supiot (ed), *La Solidarité: Enquête Sur Un Principe Juridique* (Odile Jacob 2015).

[101] ibid 8, eg Article 1797 and following of the French Civil code (incorporated in 1804).

[102] See Musso, who traces the development of the concept of solidarity from its origins with August Comte in 1842 in Musso (n 88); see Émile Durkheim, *De la division du travail social* (Presses Universitaires de France 2013) <http://www.cairn.info/de-la-division-du-travail-social--9782130619574.htm> accessed 4 July 2022. See Musso (n 88) 96–100, where he describes the theory of Durkheim as a reaction to liberalism.

[103] Alain Supiot, 'Introduction' in Supiot (n 100).

has always had a special place in the 'Republican feeling'[104] of the 'French hexagon'.[105] Yet it has only recently been recognised as a general principle of law, first at the national level and then the EU level. According to Supiot, the CJEU and the EU Charter of Fundamental Rights[106] have been central to this development.[107] Interestingly, he makes reference to an anecdote of Guy Braibant – the French member of the Convention drafting the EU Charter – that reported that the English delegate considered that the notion of solidarity in its continental sense was in fact unknown in the UK.[108]

In our view, the drafting of the EU Charter of Fundamental Rights and its recognition in 2000 (though as a non-binding instrument) is key to understanding solidarity as a true foundational principle of EU law since it is the only instrument of EU primary law that explicitly recognises it as such.[109] It is worth noting here that this is not the case with Article 2 TEU and Article 3 TEU which do, however, mention solidarity as both a value (though indirectly)[110] and an objective. Marc Blanquet in his study of solidarity in EU law highlights that the principle has often been described in the literature as 'existential', 'ontological' or 'structural' and should be viewed as a foundational principle of EU law.[111] In the wake of the proclamation of the EU Charter, solidarity became a very trendy word during the negotiations of the Constitutional Treaty. The EU Commission in 2002 even proposed that the motto of the EU should be 'Peace, Liberty and Solidarity'.[112] As we all know, the Constitutional Treaty and the Lisbon Treaty included another motto in the Treaties: 'United in Diversity'. Looking at the recent historical evolution, the first motto would have been more apt for the European Union in its present state: more divided than ever and hit by a 'poly-crisis'. Our view in this article is that solidarity in the Lisbon Treaty became an explicit

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104 Accordingly, Durkheimian sociology aimed at 'de-christianising' the concept of solidarity by relying on biosociology. See Pierre Musso Musso (n 88); Karine Abderemane, 'Le mot solidarité en droit de l'Union européenne' in Brosset, Mehdi and Rubio (n 70) 19. Karine Abderemane discusses in detail the papal origin of the concept of solidarity. Interestingly she refers to a papal decree of 19 June 2021 that ascribes to Robert Schuman the heroic status of 'serf de Dieu'; for a discussion on the Christian roots of the concept, see also Eleni Karageorgiou, 'Rethinking Solidarity in European Asylum Law: a Critical Reading of the Key Concept in Contemporary Refugee Policy' (Lund University 2018).

105 Alain Supiot, 'Introduction' in Supiot (n 100) 7,8; see also Michel Borgetto, 'La Notion de Fraternité en droit public francais: le passé, le présent et l'avenir de la solidarité' in Driss Basri, Michel Rousset and Georges Vedel (eds), *Trente Années de Vie Constitutionnelle Au Maroc* (Libr générale de droit et de jurisprudence 1993); Michel Borgetto, 'Fraternité et Solidarité : un couple indissociable ?' in Maryvonne Hecquard-Théron (ed), *Solidarité(s) : Perspectives juridiques* (Presses de l'Université Toulouse 1 Capitole 2009) <http://books.openedition.org/putc/216> accessed 5 July 2022; see also Robert Lafore, 'Solidarité et doctrine publiciste. Le "solidarisme juridique" hier et aujourd'hui' in Maryvonne Hecquard-Théron (ed), *Solidarité(s) : Perspectives juridiques* (Presses de l'Université Toulouse 1 Capitole 2009) <http://books.openedition.org/putc/220> accessed 5 July 2022; see also Karageorgiou (n 104) 114–118, linking solidarity to the Aristotelean notion of friendship and also discussing the concept of fraternity in French law (p. 225).

106 Supiot (n 100) 9. In international instruments, solidarity can be traced back to the African Charter of Human Rights and People from 1981.

107 Supiot (n 100).

108 ibid.

109 See EU Charter of Fundamental Rights, recital 1: "The Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law."

110 Solidarity is mentioned in the second sentence of Article 2 TEU.

111 Blanquet (n 86).

112 *Commission 'On the Institutional Architecture,* For the European Union: Peace, Freedom, Solidarity' COM (2002) 0728 final, available at < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52002DC0728>, accessed 5 July 2022.

foundational principle of EU primary law as the EU Charter entered into force. Yet a few years later, this foundational principle was weakened and came under attack, notably by the Visegrad group[113] which argued for the application of a flexible notion of solidarity in EU law.[114] It is in light of this evolution that the decision in the *Budget Conditionality Cases* should be analysed and understood. And it is in that sense that solidarity should be explicitly recognised as a foundational principle of EU law (and not merely as a 'fundamental' principle – the term used by the CJEU in the *Budget Conditionality Cases*). In fact, this ruling shows and confirms that solidarity is a legal and foundational principle of EU law and that its weakening is fully contrary to EU law. Solidarity is now clearly anchored in the EU constitutional legal order as an existential principle that is non-regressive and absolute (non-flexible) in its meaning.

5 THE CJEU AS A DEONTIC AND LIBERAL COURT – AND WHY IT SHOULD NOT BE ONLY SO

By adjudicating the values enshrined in Article 2 TEU as judicial and foundational principles of EU law, the CJEU acted (in the *Budget Conditionality Cases*) as a deontic court that requires the EU Member States to respect their duties and obligations which stem from the very existence of the EU values (understood here as moral obligations by the CJEU). These *values* may thus become (judicial) *norms* if recognised as such by the CJEU, as was the case with the rule of law in the *Budget Conditionality Cases*.[115] In addition, the CJEU's deontic reasoning is strongly articulated through the concept of principles ('founding' or 'foundational' or even 'fundamental' principles) which arguably situates the case-law on values in a Dworkinian model of adjudication.[116] Furthermore, the recognition of the Article 2 values as founding principles also has the effect of fostering a liberal approach to EU law.[117] In this last section, and in light of the *Budget Conditionality Cases* as well as the previous section on the principle of solidarity, we address two questions which are essential for understanding and challenging the logic of the CJEU in the *Budget Conditionality Cases*. First, why should the CJEU be perceived as a deontic court by relying on the foundational principle, or value, of the rule of law and, more importantly, what is the significance and range of those principles? Secondly, what more should the CJEU do in future adjudication? In that respect, the adjudication of the founding principle of solidarity in EU law may offer a path to mitigating the deontic and liberal approaches. This path is not only highly dependent on how the CJEU judges will

[113] Poland, Hungary, Czech Republic and Slovakia are part of the so-called 'Visegrad group'.
[114] See Karine Abderemane, 'Le mot solidarité en droit de l'Union européenne' Brosset, Mehdi and Rubio (n 70) 21. She discusses the threats posed to solidarity after the entry into force of the Lisbon Treaty making reference to the statements of the Visegrad group on 13 October 2016 and 18 November 2017.
[115] On the transformation of values into norm, see Overgaauw (n 17). For him, democracy has for instance not been transformed into a norm by the CJEU. He also considers solidarity a systemic principle and not a founding principle.
[116]For an elaboration on the Dworkinian model, see Xavier Groussot and Johan Lindholm, 'General Principles: Taking Rights Seriously and Waving the EU Rule of Law' Katja S Ziegler, Päivi J Neuvonen and Violeta Moreno-Lax (eds), *Research Handbook on General Principles in EU Law: Constructing Legal Orders in Europe* (Edward Elgar Publishing 2022); see also, for the use of deontic reasoning in relation to natural law, John Finnis, *Natural Law and Natural Rights* (Clarendon P 1980); for a seemingly approach specific to EU law, see eg the Kantian approach of Armin Von Bogdandy Von Bogdandy (n 26).
[117] See the discussion in ibid Groussot and Lindholm in Ziegler, Neuvonen and Moreno-Lax (n 116).

adjudicate on the principle of solidarity in the near future but also shows the potential importance of the *Budget Conditionality Cases* in influencing EU integration through law.

Concerning the first issue, about the scope and range of foundational principles,[118] Daniel Overgaauw has recently argued that 'the founding principles are not always referred to as norms (i.e. principles), but also as values'.[119] He uses the example of democracy to show that a recognised founding principle does not necessarily have any normative weight.[120] Certain founding values 'remain devoid of the deontological character of true founding principles'.[121] In his view, the founding principles that are recognised as norms are superior to Treaty norms; they are the highest class of principles in the polyarchy of principles.[122] Notably, Overgaauw considers the principle of solidarity is not a founding principle but a 'systemic' one.[123] This position enters in our view in conflict with the logic of the *Budget Conditionality Cases*, which recognise both the rule of law and (indirectly) solidarity as founding principles with normative force. It is true that solidarity is not mentioned as a founding principle in, for example, ex Article 6 EU or even in the *Budget Conditionality Cases* themselves. But it is expressly called a 'Founding Principle' by the preamble of the EU Charter of Fundamental Rights.[124] The *Budget Conditionality Cases* confirm the normativity of the principle of solidarity aside from the normativity of the rule of law and thus create legal obligations to be respected by the EU Member States. This is the reason why the CJEU acts as a deontic

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[118]See Overgaauw (n 17).

[119] ibid 123.

[120] Overgaauw (n 17), where he makes reference to Case C-138/79 *Roquette Frère* EU:C:1980:213, para 33.

[121] ibid 125.

[122] ibid 172. This argument is based on *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* (n 28), paras 303-304, where it is stated that Treaty provisions cannot derogate from founding principles.

[123] ibid 124, which shows the difficulty of finding a dividing line. Using the examples of Fundamental Rights as both founding principles and general principles, at ibid 177, solidarity is considered a systematic principle like direct effect, primacy, loyalty, institutional balance or subsidiarity, laying the foundation for the institutional structure; Overgaauw presents a limited definition of 'founding principle' based on ex Article 6 EU on 'Founding principles' ibid 122.

[124] For a classification of solidarity in pre-Lisbon Treaty see eg Xavier Groussot, *Creation, Development and Impact of the General Principles of Community Law: Towards a Jus Commune Europaeum?* (Faculty of Law, Lund Univ 2005); Henry G Schermers, *Judicial Protection in the European Communities* (Kluwer 1976); Rebecca-Emmanuela Papadopoulou, *Princip généraux du droit et droit communautaire: origines et concrétisation* (Sakkoulas 1996); Jean Boulouis and Jean Boulouis, *Droit Institutionnel de l'Union Européenne* (6. éd, Montchrestien 1997); and Bruno de Witte, 'General Principles of Institutional Law' in Ulf Bernitz and others (eds), *General Principles of European Community Law: Reports from a Conference in Malmö, 27-28, August 1999: Organised by the Swedish Network for European Legal Studies and the Faculty of Law, University of Lund* (Kluwer Law International 2000). For instance, Groussot considers solidarity to be a regulative principle. Indeed, those principles, arising as they do from the special nature of a particular legal order, seems to perfectly match their function - to govern the relation between the Member States and the institutions or between the institutions themselves or Member States themselves. In general terms, the regulative principles are not necessarily enforceable. Consequently, the principles deduced from the nature of the Community (Boulouis), are similar to the indigenous principles (Schermers), the structural principles (Papadopoulou), and institutional principles (De Witte). According to Papadopoulou, '[t]he structural principles express the objectives of the particular judicial order to which they belong. They are deduced from the very nature and characteristics of the system. The principles include, for instance, the principle of solidarity and the principle of institutional balance ruling the communitarian construction and permitting the judge to ensure the functioning of the judicial order from which those belong' (my translation), at 8-9. De Witte considers the 'non-traditional principles' or 'general principles of institutional law' to be defined as *"not serving to protect the position of the individual, but rather to regulate the relations between the institutions"*. De Witte further follows a two-fold classification of horizontal institutional principles (between the institutions of the Community) and vertical institutional principles (between the Community and the Member States institutions).

court in the *Budget Conditionality Cases*, a *plenum* case where the twenty-seven judges of the CJEU were sitting and ruling.

The next question to deal with is whether the principle of solidarity may help to mitigate the approach of the CJEU in creating and developing founding principles of a liberal nature such as the rule of law principles. In that respect, the reliance on (or crowning of) the principle of solidarity in the *Budget Conditionality Cases* may help us to develop a more balanced approach in EU law by taking into consideration its social dimension. This approach is not infeasible if one takes the example of France and its long use of the principle of solidarity in adjudication.[125] It is well-known that, in the French doctrine, Durkheim's sociological approach and its reaction towards liberalism has been a source of inspiration.[126] The 'solidarity approach' was powerfully enshrined in the public law tradition of 'État social' as founded in the theories of both Duguit and Hauriou.[127] According to Diane Roman, although the Second Republic (1848 – 1852) saw the birth of solidarity as a political concept, it was the III Republic (1870 – 1940) that affirmed the omnipotence of solidarity in its judicial meaning, where the social function takes priority over the concept of subjective or liberal rights in the legal order and where liberty is regarded as *serving the cause of solidarity* (*'mise au service de la solidarité'*). Nowadays, liberalism – and responsibility as its corollary[128] – has taken priority over *solidarisme*; solidarity 'must follow, liberty leads'.[129]

EU law could well be considered to provide and foster only a liberal vision.[130] Taken to its extreme, liberalism and its ideology may in fact hamper if not eliminate the application of the principle of solidarity.[131] To counter such a probable evolution, Supiot has invited the CJEU to securely anchor the principle of solidarity in EU constitutional law.[132] Karine Adberemane has also rightly noted that the manifold crises lead to a decrease in social liberties and to growing of inequalities that call for a reinforcement of the principle of solidarity in EU law.[133] Are the *Budget Conditionality Cases* a step in that direction? Certainly, as we have seen, the CJEU there explicitly calls solidarity a fundamental principle with normative force. Are the constitutional tools therefore available and ready for use if needed by the Kirchberg judges? The principle of solidarity would be particularly useful for the

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125 Karageorgiou (n 104) 231. The Chapter 7 of her dissertation offers an excellent discussion on the 'immense importance' of French solidarism for understanding the principle of solidarity in EU law.

126 See Musso (n 88) 100. Musso summarised the Durkheimian conceptual evolution of solidarity in four words: society-altruism-solidarity-morality. According to him, solidarity has become a 'Bio-socio-moral' concept 107.

127 See for a development on Duguit and the social State Diane Roman, 'L'État social, entre solidarité et liberté' in Maryvonne Hecquard-Théron (ed), *Solidarité(s) : Perspectives juridiques* (Presses de l'Université Toulouse 1 Capitole 2009) <http://books.openedition.org/putc/248> accessed 5 July 2022; see also Karageorgiou (n 104) 226–227.

128 Roman (n 127); see also Karageorgiou (n 104) 228–232, where she discusses the influence of Léon Bourgeois and his attempt to transplant the French principle of solidarity to the international level. Léon Bourgeois became Minister of Foreign Affairs in 1906.

129 Roman (n 127).

130 See Supiot (n 100).

131 ibid; see also Karine Abderemane, 'Le mot solidarité en droit de l'Union européenne' in Brosset, Mehdi and Rubio (n 70) 38.

132 Karine Abderemane, 'Le mot solidarité en droit de l'Union européenne' in Brosset, Mehdi and Rubio (n 70). Karine Abderemane makes reference to Supiot (Alain Supiot, Homo juridicus, Essai sur la fonction anthropologique du droit, Le seuil, 2005) which also discusses the role of dignity (an integral part of Kantian philosophy) in abstracting from social realities by relying on ethics.

133 Karine Abderemane, 'Le mot solidarité en droit de l'Union européenne' in ibid.

application of the social rights enshrined in the EU Charter in its Chapter IV entitled 'Solidarity'. It is no secret that the CJEU's interpretation of this Chapter has so far been quite limited and shy, and the CJEU has often prioritised economic rights over social ones.[134] Hopefully, the recent placement of the solidarity principle at the apex of the EU constitutional law hierarchy may help rebalance the EU legal order (through adjudication) towards a more Durkheimian understanding of EU society and widen the perspective of EU law from its current narrow focus on liberty. Solidarity is now regarded as a 'primordial principle'[135] of EU law and the duty of solidarity is without doubt a 'hidden but essential part of the (economic and social) rights of the second generation'.[136] It is in that sense that it can be used in EU law adjudication as a tool of recalibration and *equilibrium*.

To conclude, let us underline that the EU concept of solidarity encapsulates three essential markers or invariants when compared to national law (and French law more specifically) – a comparison that is in our view important to keep in mind when dealing with solidarity from a judicial perspective. First of all, solidarity is an itinerant or 'nomadic'[137] concept. Indeed, it is often described in the French literature as circulating from one discipline to another.[138] The same is also true in EU law where solidarity is present and articulated in a multitude of areas of EU law[139] and in many different provisions in the TEU,[140] TFEU[141] and the EU Charter.[142] It is often described as an *insaisissable* (elusive) principle both in French and EU law.[143] Secondly, the principle of solidarity is 'federative'. Solidarity has the ability to organise a community that shares one destiny.[144] In that sense, it may also be viewed at the international level not only as a 'federative' but also as a true *federal* principle, as expressed clearly in the doctrine of Georges Scelle.[145] In addition, as Pierre Musso puts it, solidarity has the potential to bring extremes and thereby bridge the gap between liberalism and contrary values which actively promote social functions instead of

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134 See eg Xavier Groussot, Gunnar Thor Pétursson and Justin Pierce, 'Weak Right, Strong Court – the Freedom to Conduct Business and the EU Charter of Fundamental Rights' in Sionaidh Douglas-Scott and Nicholas Hatzis, *Research Handbook on EU Law and Human Rights* (Edward Elgar Publishing 2017) <https://www.elgaronline.com/view/9781782546399.00025.xml> accessed 5 July 2022.

135 Allan Rosas and Lorna Armati, *EU Constitutional Law: An Introduction* (Hart 2018) 52.

136 Supiot (n 100) 21, quoting M Borgetto and R Lafore Droit de l'aide et de l'action sociale, (Montchrestien, 6e éd), p. 52.

137 Musso (n 88) 106.

138Musso (n 88).

139 See Blanquet (n 86) for an in-depth analysis of the case law of the CJEU on solidarity in relation to the various provisions of the EU Treaties.

140 Articles 2, 3, 21 TEU, 24 TEU.

141 Articles 67 TFEU, 80, 192 and 222 TFEU.

142 Recital 1 of the EU Charter and solidarity Chapter.

143 Musso (n 88); see also Rostane Mehdi in Brosset, Mehdi and Rubio (n 70) which compares solidarity to Leonardo Di Caprio who played the main character in the Hollywood movie *Catch Me If You Can*.

144See Karine Abderemane, 'Le mot solidarité en droit de l'Union européenne' in Brosset, Mehdi and Rubio (n 70) 28.

145 For a discussion on the relationship between Georges Scelle's theory on solidarity and EU law, see Karageorgiou (n 104), 231-238 where she says that the theory of Scelle has a great potential for explaining the project of the European Union. The argument is based on a text of Antonio Cassese, 'Remarks on Scelle's Theory of 'Role Splitting' (dédoublement fonctionnel) in International Law' (1990) 1 EJIL 210. Going further, it can also be said that his work is of interest for a discussion on the principle of solidarity in EU since his theory if founded on the concept of 'objective law' (which derives from 'social reality' and must be distinguished from natural law). See in that respect, Hubert Thierry, 'The Thought of Georges Scelle' in The European Tradition in International Law: Georges Scelle, 1 EJIL (1990) 193.

individual freedoms.[146] That is also a reason why solidarity can play a decisive role in a crisis, by closing the gap between the 'normal' and the 'exceptional'.[147] In EU law, solidarity is often conceived as the glue of the Union at both the political[148] and the judicial levels.[149] Solidarity – as a founding principle – would make EU law more equalitarian, simply by counterbalancing an extreme version of liberalism.[150] Thirdly, solidarity is an organic and therefore dynamic concept: a concept that allows for mutations and transformations. It indicates both a fact[151] and an effect – *un être et un devoir-d'être*.[152] In EU law, this translates to the definition of solidarity as both a value of the EU under Article 2 TEU (a presupposed fact) and an objective of EU law (a desired effect). The organic nature of the principles is also an argument for the explicit recognition of solidarity as a foundational value or foundational principle in EU law. In relation to the EU poly-crisis, solidarity is both the problem (lack of solidarity) and the solution (need for solidarity).[153] In a nutshell, solidarity is a narrative and normative concept that may deeply transform the ideological and value-laden orientation of a legal order. Now, particularly after the *Budget Conditionality Cases*, the principle of solidarity has become part of the narrative in EU law. Going forward, recognising the normativity of the principle in EU law could forcefully impact the future of EU integration, lending itself as a tool for recalibrating the EU values through law. This is the reason why solidarity is so essential in the *Budget Conditionality Cases* and why, in its wake, it should be understood as a foundational principle of EU law.

6 CONCLUSION

The *Budget Conditionality Cases* could not have been delivered at a more appropriate time: the Union is facing both internal and external challenges and needs to ensure that its foundational values are properly protected. The shift, demonstrated by the CJEU in these cases, is, beyond any doubt, seminal. By vesting the rule of law with an obligational nature, the Court confirmed that value's operational functionality as a founding principle, one that is normative in its essence and judicially independent. Whereas the full impact of the *Budget Conditionality Cases* is yet to be seen, several implications can already be drawn out now. Firstly, the foundational values of the Union are capable of acquiring a normative nature and being transformed into normative principles, justiciable and enforceable under EU law. Secondly, the *Budget Conditionality Cases* illustrate such a transformation in the case of the principle of

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147 The spirit of solidarity is perhaps best encapsulated in this quote of Martin Luther King touching upon the 'spirit of solidarity': "we must learn to live together as brothers or we will die together as fools".

148 See eg Jean-Claude Junker, State of the Union Speech 2016: "Solidarity is the glue that keeps our Union together …".

149 See eg Opinion of AG Sharpston in Joined Cases C-715/17 *Commission v Poland,* C-718/17 *Commission v Hungary* and C-719/17 *Commission v Czech Republic* EU:C:2019:917.

150 See in that respect Raymond Saleilles, De la déclaration de volonté Paris, 1901, p. 351, quoted in Roman (n 127): "les juristes veulent pouvoir dire: "cela est juste parce que cela a été voulu". Il faut désormais que l'on dise: "cela doit être voulu parce que cela est juste".

151See Schuman Declaration of 9 May 1950 ('discours de l'horloge'), available at <https://european-union.europa.eu/principles-countries-history/history-eu/1945-59/schuman-declaration-may-1950_en>, accessed 5 July 2022, referring to *de facto* solidarity.

152 See Musso (n 88); Roman (n 127) and and Abderemane (n 70).

153 Musso (n 88); see on solidarity and crisis in EU law, Rostane Mehdi, 'préface' in Brosset, Mehdi and Rubio (n 70) where he calls the EU crisis "totale, continue et essentielle".

the rule of law and explicate the interplay between foundational values and principles in the EU constitutional framework. Thirdly – and what is most important, perhaps even revolutionary –the Court elevates solidarity to the status of a legal, fundamental principle of EU law, constituting a crucial element in both the rule of law and Article 2 'equations'. Fourth, as we have argued, solidarity possesses a great potential to become a truly foundational principle of the EU: the principle, that, thanks to its 'Scellian' mode of functioning[154] and its crisis-related nature, might become an effective tool for resolving the future challenges, caused by extraordinary occurrences. Smoothly recalibrating EU law through adjudication, it can counterbalance the liberal and deontic tendencies in an endeavour to achieve the long-desired equilibrium of values necessary for a more sustainable European integration, where market and social objectives are balanced.[155]

[154] See, in that respect, Cassese and Karageorgiou (n 145).
[155] On 'sustainable integration', see Antonina Bakardjieva Engelbrekt and Xavier Groussot (eds), *The Future of Europe: Political and Legal Integration Beyond Brexit* (Hart Publishing 2019).

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ADMINISTRATIVE INDEPENDENCE IN THE NORDIC STATES – EU LAW REQUIREMENTS AND NATIONAL TRADITIONS

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EU law increasingly requires that the Member States establish independent administrative bodies in various fields. Examples include market supervision, non-discrimination, and data protection. This article addresses the realisation of such requirements in the five Nordic states. The West Nordic systems of Denmark, Iceland, and Norway feature a traditional hierarchic organisation of the administrative authorities under the relevant ministries, albeit with examples of independent administrative bodies. Contrastingly, the East Nordic systems of Finland and Sweden have a long-standing constitutional tradition of organising the entire state administration with a considerable degree of independence from the governmental level. The study of the constitutional frameworks and traditions contributes to understanding the impact of EU law requirements on independence in different national systems. The relatively uncritical reception of requirements on administrative independence in the Nordic states may be explained by both the practical orientation of Nordic legal thinking and the long-standing existence of arrangements of independent authorities in the legal systems. This attitude is contrasted with the sceptical views on administrative independence in continental Europe, especially Germany, as exemplified by Case C-518/07 Commission v Germany (on independent national data protection authorities). Also the Nordic experiences, however, highlight the tension between the ideals of total independence and the needs for the authorities to be linked to, and funded by, the public sector. The legal comparison may help to understand the impact of EU law and reveal the various 'Europeanisations' of general administrative law, given the national preconditions.

1 INTRODUCTION

During the last few decades, the concept of administrative independence has gained interest in European administrative legal discourse.[1] Inspired in part by long-standing practices in US law, provisions in the EU Treaties and secondary law in certain limited fields require that the Member States establish independent administrative bodies for supervision.[2] Examples include such varying matters as market supervision for railways, enforcement of competition

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[1] Matthias Ruffert, *Law of Administrative Organization of the EU. A Comparative Approach* (Elgar 2020) 97; Roberto Caranta, Mads Andenas, and Duncan Fairgrieve (eds), *Independent Administrative Authorities* (British Institute of International and Comparative Law 2004).
[2] Matthias Ruffert, 'National Executives and Bureaucracies' in Peter Cane, Herwig CH Hofmann, Eric C Ip, and Peter L Lindseth (eds), *The Oxford Handbook of Comparative Administrative Law* (OUP 2021) 523 on the US concept of independence.

law, the promotion of non-discrimination, and compliance with the rules for data protection. Concerning this last field, the ECJ has clarified the scope of independence requirements in the seminal cases *Commission v Germany*[3] and *Commission v Austria*[4].This article addresses the realisation of such requirements on the five Nordic states of Denmark, Finland, Iceland, Norway, and Sweden. Being well-established democracies and highly ranked concerning the rule of law, these legal systems may provide insights into the operation of administrative independence under EU law in the Member States.[5] These states are also interesting from a general point of view, given their varying affiliation with EU law, either directly as EU member states (Denmark, Finland, and Sweden) or via the EEA Agreement (Norway and Iceland).

The point of departure for discussions on administrative independence in the EU setting is that the opposite of independence applies: in Europe and as a rule, public administration is organised as part of the executive in the separation-of-powers scheme.[6] Theoretically, administrative decision-making is democratically legitimised through the governmental ministers, who are accountable to parliament and delegate power to the administrative level.[7] Independence, then, entails an exception to this chain of democratic legitimacy. From this perspective, the use of independent authorities may give rise to problems in relation to constitutional values such as democratically founded governance, rule of law, and accountability in decision-making.[8] However, already at the outset it should be mentioned that the ideal of a clear-cut distinction along those lines has never quite been fulfilled in the actual design of European administrative systems.[9] Still, the tripartite conceptualisation of the state structure as consisting of a legislative, an executive, and a judicial branch is an important feature in most European states, and can serve as a point of departure for the discussion.

EU law has traditionally relied on the idea that each Member State may freely organise its public administration responsible for applying EU law, be it in the form of indirect administration or as a part of composite administrative structures.[10] The same point of

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[3] Case C-518/07 *Commission v Germany* EU:C:2010:125.

[4] Case C-614/10 *Commission v Austria* EU:C:2012:631.

[5] Ran Hirschl, 'The Nordic Counternarrative' (2011) 9 ICON 449, 469, concludes that that 'the Nordic countries' unique constitutional scenery is a largely unexplored paradise for theory building in the field of comparative constitutional law and politics'; cf, however, Graham Butler, 'The European Rule of Law Standard, the Nordic States, and EU Law' in Antonina Bakardjieva Engelbrekt, Andreas Moberg, and Joakim Nergelius (eds), *Rule of Law in the EU: 30 Years After the Fall of the Berlin Wall* (Hart 2021) 263, referring to factors in 'the constitutional and institutional features of the Nordic states that leave them susceptible to rule of law slippages'.

[6] Giovanni Biaggini, 'Legal Conceptions of Statehood' in Armin von Bogdandy, Peter M Huber, and Sabino Cassese (eds), *The Max Planck Handbooks in European Public Law. The Administrative State. Volume 1* (OUP 2017) 571.

[7] Paul Craig, *EU Administrative Law* (OUP 2018) 151 f.

[8] cf Daniel Halberstam, 'The promise of comparative administrative law: a constitutional perspective on independent agencies' in Susan Rose-Ackerman, Peter L Lindseth, and Blake Emerson, *Comparative Administrative Law* (2nd edn, Elgar 2017) 139 f.

[9] Ruffert (n 2) 518 ff with historical examples from Germany, the UK, and France; Biaggini (n 6) 570 fn 81 with references to country reports; see also Bruce Ackerman, 'Good-bye Montesquieu' in Susan Rose-Ackerman, Peter L Lindseth, and Blake Emerson, *Comparative Administrative Law* (2nd edn, Elgar 2017)

[10] Case 97/81 *Commission v Netherlands* EU:C:1982:193, para 12: 'It is true that each Member State is free to delegate powers to its domestic authorities as it considers fit […]'; Case 51–54/71 *International Fruit Company* EU:C:1971:128, para 4: '[…] when provisions of the Treaty or of regulations confer power or impose obligations upon the States for the purposes of the implementation of Community law the question of how

departure applies to EEA law.[11] From a practical point of view, this is understandable: given the constitutional and historical differences, it would be an immense task to replace the existing national administrative structures in various fields. Furthermore, the reliance on national administrative structures may be linked to the character of the EU as a cooperation among sovereign states.[12]

The principle of institutional autonomy is well established in EU law as a parallel to the principle of procedural autonomy.[13] The principle implies that in the absence of provisions in EU law, Member States may themselves decide which bodies will be responsible for implementing and applying EU law, unless there are provisions in Union law stating otherwise. Furthermore, the selected national form of organisation shall not be less favourable to the individual relying on EU law than similar national provisions (the principle of equivalence) and the form shall not make it impossible or excessively difficult in practice to exercise rights under EU law (the principle of effectiveness).[14] In EEA law, the EFTA Court has similarly held that the national administrative proceedings 'must be conducted in a manner that does not impair the individual rights flowing from the EEA Agreement'.[15]

As is indicated by the reference to provisions in EU law in the definition set out above, the institutional autonomy is not to be understood as a principle *stricto sensu,* limiting the EU legislator.[16] Rather, under the 'principle', there may be provisions in primary or secondary law prescribing the kind of national institutions that shall exist to handle matters relating to

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the exercise of such powers and the fulfilment of such obligations may be entrusted by Member States to specific national bodies is solely a matter for the constitutional system of each State'; Herwig Hofmann, Gerard C Rowe, and Alexander Türk, *Administrative Law and Policy of the European Union* (OUP 2011) 99 f.

[11] Case E-1/04 *Fokus Bank* [2004] EFTA Ct Rep 11, para 41.

[12] Stéphanie De Somer, *Autonomous Public Bodies and the Law. A European Perspective* (Elgar 2017) 25; cf art 4(2) TEU with its reference to 'national identities, inherent in their fundamental structures'; cf Case 205–215/82 *Deutsche Milchkontor* EU:C:1983:233, para 17: 'According to the general principles on which the institutional system of the Community is based and which govern the relations between the Community and the Member States, it is for the Member States, by virtue of Article 5 of the Treaty [now art 4(3) TEU], to ensure that Community regulations, particularly those concerning the common agricultural policy, are implemented within their territory. In so far as Community law, including its general principles, does not include common rules to this effect, the national authorities when implementing Community regulations act in accordance with the procedural and substantive rules of their own national law …'.

[13] Case C-82/07 *Comisión del Mercado de las Telecomunicaciones* EU:C:2008:143, para 24, referring to this autonomy: 'Although the Member States enjoy institutional autonomy as regards the organisation and the structuring of their regulatory authorities […]'

[14] Case 33/76 *Rewe* EU:C:1976:188, para 13; JH Jans, S Prechal, and RJGM Widdershoven, *Europeanisation of Public Law* (2nd edn, Europa Law Publishing 2015) 19; Saskia Lavjrissen and Annetje Ottow, 'The Legality of Independent Regulatory Authorities' in Leonard Besselink, Frans Pennings, and Sacha Prechal (eds), *The Eclipse of the Legality Principle in the European Union* (Kluwer Law 2011) 73; Koen Lenaerts, Piet van Nuffel, and Tim Corthaut, *EU Constitutional Law* (OUP 2021) paras 5.049, 23.018, and 12.067.

[15] Case E-1/04 *Fokus Bank* [2004] EFTA Ct Rep 11, para 41.

[16] Case C-82/07 *Comisión del Mercado de las Telecomunicaciones* EU:C:2008:143, para 24: 'Although the Member States enjoy institutional autonomy as regards the organisation and the structuring of their regulatory authorities within the meaning of Article 2(g) of the Framework Directive [Directive 2002/21 on a common regulatory framework for electronic communications networks and services], that autonomy may be exercised only in accordance with the objectives and obligations laid down in that directive'; Malte Kröger and Arne Pilniok, 'Unabhängigkeit zählt: Amtliche Statistik zwischen Politik, Verwaltung und Wissenschaft' in Malte Kröger and Arne Pilniok (eds), *Unabhängiges Verwalten in der Europäischen Union* (Mohr Siebeck 2016) 148; cf Michal Bobek, 'Why there is no Principle of "Procedural Autonomy" of the Member States' in Hans-W Micklitz and Bruno De Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia 2012) 320.

EU law in various fields. Requirements of independent national administrative authorities is one such example.

The main question for this article is how EU law requirements for administrative independence have been realised in the five Nordic states of Denmark, Finland, Iceland, Norway, and Sweden. The ambition is thus to shed light on the interplay between EU law and national constitutional and administrative law when it comes to the institutional setting for applying EU law on the national level.

The article focuses on the independence of administrative bodies on the national level as required by EU law. As an important background to this, it may be noted that ideas of administrative independence are not limited to the EU Member State (or EFTA-EEA state) level. The organisation of the EU itself entails such features. Under Article 17(3) TEU the Commission shall be 'completely independent', and its members 'shall neither seek nor take instructions from any Government or other institution, body, office or entity'. This provision is mirrored in Article 245 TFEU, which requires the Member States to respect the independence of the Members of the Commission.[17] The European Central Bank may not 'seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body' (Article 130 TFEU). Furthermore, Article 298 TFEU refers to 'an open, efficient and independent European administration', indicating at least some degree of independence of EU agencies and other bodies.[18] Finally, looking beyond EU law, international law may require or recommend the establishment of independent administrative bodies on the national level.[19]

The study examines national bodies formally organised within the public organisation under the national constitutional system. Given the special character of these bodies, which does not necessarily qualify as 'administrative' in either EU or in national law, the national central banks are not covered.

As will be seen, the central problem in the field is not whether a certain body is administrative in character, but whether it is independent. There is no generally accepted definition of administrative independence in EU law, and requirements may be framed differently in different legal acts, as elaborated below. The terminology used in legal scholarship reflects the conceptual uncertainty surrounding the field, discussing both 'autonomous public bodies', 'independent agencies', and 'independent administrative authorities'.[20] Given that the EU treaties and legal acts generally use the latter term, this article does the same. As a point of departure for discussions on the concept of independence, the conclusions of the ECJ in *Commission v. Poland* can be reiterated. Because the relevant

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[17] Lenaerts, van Nuffel, and Corthaut (n 14), para 12.067; Wouter Wils, 'Independence of Competition Authorities' (2019) 42 World Competition 149, 151 f

[18] Lenaerts, van Nuffel, and Corthaut (n 14), para 13.043 ff; Ruffert (n 1) 97 f. notes that this provision was suggested by Sweden in the Constitutional Convention.

[19] Eg, GA Resolution 48/134, 'Principles relating to the Status of National Institutions (The Paris Principles)' 20 December 1993; Council of Europe, Recommendation Rec R(2000)23 of the Committee of Ministers to member states on the independence and functions of regulatory authorities for the broadcasting sector; see for further examples Mads Andenas, 'Independent Administrative Authorities in Comparative Law: Scandinavian Models' in Roberto Caranta, Mads Andenas, and Duncan Fairgrieve (eds), *Independent Administrative Authorities* (British Institute of International and Comparative Law 2004) 246 ff.

[20] De Somer (n 12) 5 ff discusses the 'terminological chaos' and uses the term 'Autonomous Public Bodies' as an umbrella term for the purposes of her study.

secondary law did not define 'independence', the Court held that the concept should be 'construed in its usual meaning'. As to this 'usual meaning', the Court concluded:

> Thus, as regards public bodies, independence usually refers to a status that ensures that the body in question is able to act completely freely in relation to those bodies in respect of which its independence is to be ensured, shielded from any instructions or pressure.[21]

This contribution aims at deepening understanding of this kind of requirements under EU law by examining the reactions of Nordic legal systems. As this is a group of European states with similar basic values regarding democracy, the rule of law, and transparency in their legal systems, but different traditions when it comes to administrative organisation (see Section 2), this comparative study may provide new insights of general interest for EU law and constitutional law. Previous research, including the important monograph by De Somer, has examined only to a limited extent the Nordic experiences concerning independent authorities.[22] The addition of the Nordic legal systems with their special features may add an important dimension to the European debate in this field. The comparative approach may illustrate the plurality (the different 'Europeanisations') stemming from different realisations of the European goals and standards affecting the administrative systems.[23] Furthermore, the comparative study may also contribute to the scholarly debates in the Nordic countries by highlighting features that are not apparent when the national systems are studied separately. In this way, the comparison in relation to the impact of EU law may deepen the understanding of the national legal systems.

2 THE CONSTITUTIONAL FRAMEWORK IN THE NORDIC STATES

In order to understand the impact of EU requirements of independent authorities, it is necessary to give a brief background to the constitutional framework in the Nordic states when it comes to the position of administrative authorities.[24] As a point of departure, the five states are joined by historical, linguistic, and legal bonds linked to historical unions among the countries.[25] In traditional groupings of 'legal families' and the like, the Nordic systems are often treated as a distinct group.[26] A common denominator among the countries is the emphasis put on the role of the democratically legitimate national parliament as the primary legal actor, with the judiciary taking a deferential role. Linked to this, legislative

[21] Case C-530/16 *Commission v Poland* EU:C:2018:430, para 67.
[22] See, for an important overview, Andenas (n 19); cf De Somer (n 12), which focuses on examples from Belgium (Flanders), France, the Netherlands, and the United Kingdom.
[23] Biaggini (n 6) 578.
[24] See, generally, Halberstam (n 8) 140 underlining the need for exploring the national constitutional architecture in comparative administrative studies of independent agencies.
[25] Uwe Kischel, *Comparative Law* (OUP 2019) 544 ff; Markku Suksi, 'Common Roots of Nordic Constitutional Law? Some Observations on Legal-Historical Development and Relations between the Constitutional Systems of Five Nordic Countries' in Helle Krunke and Björg Thorarensen (eds), *The Nordic Constitutions: A Comparative and Contextual Study* (Hart 2018) 40 ff.
[26] Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (3rd edn OUP 1998) 273; Michael Bogdan, *Concise Introduction to Comparative Law* (Europa Law Publishing 2013) 76.

materials play an important role for legal argumentation.[27] None of the countries features a constitutional court.[28] Comparative legal research often highlights a certain degree of practically oriented legal thinking as typical for the Nordics ('Nordic pragmatism'), as opposed to the alleged conceptualised and formalistic thinking of continental Europe.[29] All Nordic states are either members of the EU or parties to the EEA Agreement. Concerning the latter, the secondary law applicable to the EFTA states applying the EEA Agreement shall be interpreted in the same way as under EU law.[30] Below, references to EU law include the EEA dimension, where applicable.

In contrast to the commonalities among the Nordic constitutional systems concerning basic principles and ideals, there are important differences on the more detailed level, not least concerning the position of administrative authorities. Nordic states feature two distinct systems for administrative organisation, viz the West Nordic (Denmark, Iceland, and Norway) and the East Nordic (Finland and Sweden) models.[31] Below, the constitutional framework for the position of administrative authorities, especially more independent such bodies, is outlined for the West and East Nordic states respectively.

In Denmark, the 1953 Constitution establishes a separation of powers. The legislative power lies with the Folketing (Parliament) and the King (ie the Government) jointly, the executive power lies with the King, and the judicial power lies with the courts. This continues the tradition from its predecessor, the 1849 Constitution, through which absolute monarchy was abolished.[32] Under the current 1953 Constitution, which largely follows the structure established in 1849, the executive is organised under the ministries. These are headed by ministers (formally appointed by the King or reigning Queen , in practice the Prime Minister under the principles of parliamentarianism) who are under a political leadership of the Prime Minister, but individually responsible for making decisions in their ministries. The central state authorities are organised within the ministries, with hierarchical chains of command from the minister to the civil servant. The minister may thus engage in individual matters and give directions or even take over the decision-making competence.[33] Apart from these central state authorities, the Folketing may also establish independent administrative authorities such as councils (*råd*) and boards (*nævn*), which operate outside the ministerial hierarchies. As a rule, the minister may not give instructions to such bodies.[34] A few special

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[27] Jaakko Husa, 'Constitutional Mentality' in Pia Letto-Vanamo, Ditlev Tamm, and Bent-Ole Gram Mortensen (eds), *Nordic Law in European Context* (Springer 2019) 58.
[28] Helle Krunke and Björg Thorarensen, 'Concluding Thoughts' in Helle Krunke and Björg Thorarensen (eds), *The Nordic Constitutions. A Comparative and Contextual Study* (Hart 2018) 206 f.
[29] Helle Krunke and Björg Thorarensen, 'Introduction', in Helle Krunke and Björg Thorarensen (eds), *The Nordic* Constitutions. A Comparative and Contextual Study (Hart 2018) 1, 7 f; Markku Suksi, 'Markers of Nordic Constitutional Identity', (2014) 36 Retfærd 66, 88.
[30] Dag Wernø Holter, 'Legislative Homogeneity' in Carl Baudenbacher (ed*), The Fundamental Principles of EEA Law. EEA-ities* (Springer 2017).
[31] Henrik Wenander, 'Public Agencies in International Cooperation under National Legal Frameworks. Legitimacy and Accountability in Internationalised Nordic Public Law' in Maria Grahn-Farley, Jane Reichel, and Mauro Zamboni (eds), *Governing with Public Agencies – The Development of a Global Administrative Space and the Creation of a New Role for Public Agencies* (Stockholm University 2022) 176 ff.
[32] Constitution of the Kingdom of Denmark 1953, art 3; Helle Krunke, 'Constitutional identity – seen through a Danish lens' (2014) 37 Retfærd 24, 28 ff.
[33] Constitution of the Kingdom of Denmark 1953, arts 12–14; Søren H Mørup et al, *Forvaltningsret. Almindelige emner* (7th edn DJØF 2022) 22, 39 ff.
[34] Sten Bønsing, *Almindelig forvaltningsret* (4th edn, DJØF 2018) 80; Mørup et al (n 33) 54.

bodies are organised under the Folketing, such as the Parliamentary Ombudsman and the audit organ Rigsrevisionen.[35]

In Iceland, the constitutional system is very similar to that of Denmark: the current 1944 Icelandic Constitution, its predecessors, and administrative structure were largely modelled on the Danish system.[36] Consequently, the constitutional structure comprises a tripartite separation of powers and a parliamentary system.[37] The President appoints governmental ministers according to the majority in the parliament (*Alþingi*). They head their respective ministries and have individual responsibility over their respective fields of competence.[38] As in Danish constitutional law, administrative authorities as a rule are organised hierarchically within the ministry, with a low degree of autonomy for the civil servants.[39] However, like the Danish Folketing, the Alþingi may establish other, more independent forms of administrative bodies outside the ministerial hierarchies.[40]

The Norwegian constitution is based on a separation of powers, with the state administration as part of the executive.[41] To be sure, the state administrative bodies in Norway are generally described as being organised into separate entities ('*ytre etater*') outside the ministerial departments. Still, the state administration is organised hierarchically under the Government and its ministries. The Norwegian administrative system, therefore, and in a similar fashion as in Denmark and Iceland, is based on ministerial rule.[42] Apart from these bodies, a state audit body (*Riksrevisjonen*) and a parliamentary ombudsman (*Sivilombudet*) are appointed by the Storting (Parliament) as special organs.[43] The default position for Norwegian legislative policy, following a Storting decision in 1977, is that public administration shall be organised under the government and the ministries in order to promote governmental control, unless there are special reasons to do otherwise; however, there are no constitutional limitations to establishing independent administrative bodies.[44] The core aspect of this form of independence is that the scope for the government and ministries to give instructions is limited by explicit legislative provisions.[45] This form of independent administrative bodies is widely used in Norwegian law. A commission of inquiry concluded in 2019 that there were over 100 such bodies.[46] Among the reasons put forward

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35 Henrik Wenander, 'Förvaltningsorgan under parlamenten i Norden' in Sebastian Godenhjelm, Eija Mäkinen, and Matti Niemivuo (eds), *Förvaltning och rättssäkerhet i Norden. Utveckling, utmaningar och framtidutsikter* (Svenska litteratursällskapet i Finland – Appell 2022) 43 f.

36 Björg Thorarensen*, Stjórnskipunarréttur: Undirstöður og handhafar ríkisvalds* (Codex 2015) English summary.

37 Constitution of Iceland 1944, arts 1 and 2.

38 Constitution of Iceland 1944, arts 13–15; Indriði H Indriðason and Gunnar Helgi Kristinsson, 'The role of parliament under ministerial government' (2018) 14 Icelandic Review of Politics and Administration 149, 152.

39 Svanur Kristjánsson, 'Iceland: A Parliamentary Democracy with a Semi-presidential Constitution' in K Strøm, W C Müller, and T Bergman (eds), *Delegation and Accountability in Parliamentary Democracies* (OUP 2006) 410.

40 cf Gustaf Petrén, 'Government and Central Administration' in Erik Allardt et al (eds), *Nordic Democracy. Ideas, Issues, and Institutions in Politics, Economy, Education, Social and Cultural Affairs of Denmark, Finland, Iceland, Norway, and Sweden* (Det danske Selskab 1981) 177.

41 Constitution of Norway 1814, arts 3, 12, and 27 ff.

42 Eivind Smith, *Konstitusjonelt demokrati. Statsforfattningen i prinsipielt og komparativt lys* (5th edn, Fagbokforlaget 2021) 231 ff.

43 Constitution of Norway 1814, arts 75 k and l.

44 Parliamentary gazette *Stortingstidende* (1976-77) 4076; Eivind Smith, *Stat og ret. Artikler i utvalg 1980 – 2001* (Universitetforlaget 2002) 513 f.

45 Torstein Eckhoff and Eivind Smith, *Forvaltningsrett* (11th edn 2018) 157.

46 Commission of inquiry report NOU 2019: 5 *Ny forvaltningslov* 511 f.

for establishing such bodies are the need for the political (governmental) level to focus on general policy matters, separation of various functions (rule-making and supervision), and the need for expertise.[47] There is also a link to developments in administrative policy, including ideas of New Public Management. Notably, political scepticism has been directed towards establishing independent authorities in certain fields.[48] Norwegian legal discourse has remarked in this context that administrative independence never can be total, since all public bodies are dependent on legislation and the state budget.[49]

Whereas the West Nordic systems all show varieties of seeing administrative bodies as an integrated part of the executive by default, the East Nordic constitutional systems organise the state administrative bodies as separate entities within the state with a considerable degree of independence in decision-making in individual cases (see below).[50] This reflects a historical tradition dating back to the establishment of the constitutional and administrative structures in the Swedish Realm (of which Finland was a part until 1809) in the 17th and 18th centuries. In 1634, a number of collegiate bodies were established, whose formal hierarchical links to the Royal Council ('the Government' in today's terms) were eventually severed in 1719.[51]

The Constitution of Finland, in spite of its reference to a tripartite separation of powers and parliamentarianism, establishes that the state administrative authorities are organised separately from the Government.[52] In addition, they have an independent position in their decision-making. This may be explained by the historical developments. In the early 20th century, when Finland was a grand duchy under Russia and struggled for independence, Finnish legal scholarship established that the administrative authorities should be independent of the (Russian) political leadership, building on old traditions from the Swedish Realm.[53] Finnish legal discourse underlines the principle of legality as a general guarantee for administrative independence. Furthermore, an unwritten principle of independence in the use of discretion applies, meaning that a minister may not give directions as to the authority's application of law in an individual matter.[54] The ministries are responsible, however, 'for the appropriate functioning of administration' within their fields of competence.[55] As a rule, the government makes collective decisions, but the constitution also allows for ministers making individual decisions in certain matters of less importance.[56] Some parts of the administrative authorities, such as the leadership of the police forces, may be organised within the relevant

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47 Inge Lorange Backer, 'Uavhengige forvaltningsorganer i Norge' in Iris Nguyen Duy and others (eds), *Uten sammenligning. Festskrift til Eivind Smith 70 år* (Fagbogforlaget 2020) 40.
48 Commission of inquiry report NOU 2019: 5 *Ny forvaltningslov* 511 f.
49 Eckhoff and Smith (n 45) 155 f.
50 Shirin Ahlbäck Öberg and Helena Wockelberg, 'Nordic Administrative Heritages and Contemporary Institutional Design' in Carsten Greve, Per Lægreid, and Lise H Rykkja (eds), *Nordic Administrative Reforms: Lessons for Public Management* (Palgrave Mcmillan 2016) 63.
51 Patrik Hall, 'The Swedish Administrative Model' in Jon Pierre (ed), *The Oxford Handbook of Swedish Politics* (OUP 2015) 300 f.
52 Constitution of Finland 1999, art 119: 'In addition to the Government and the Ministries, the central administration of the State may consist of agencies, institutions and other bodies.'
53 Henrik Wenander, 'Den statliga förvaltningens konstitutionella ställning i Sverige och Finland - pragmatism och principer' (2019) 155 Tidskrift utgiven av Juridiska föreningen i Finland 103, 110.
54 Olli Mäenpää and Niels Fenger, 'Public Administration and Good Governance' in Pia Letto-Vanamo, Ditlev Tamm, and Bent Ole Gram Mortensen (eds), *Nordic Law in European Context* (Springer 2019) 164; Antero Jyränki and Jaakko Husa, *Konstitutionell rätt* (Talentum 2015) 209.
55 Constitution of Finland 1999, art 68.
56 Constitution of Finland 1999, art 67.

ministry but with the limitation on giving directions mentioned above.[57] The overall picture is that the legal relation between the ministries and the administrative authorities is complex and in part uncertain. One of the central textbooks of Finnish constitutional law concludes that the scope for governing the activities of the administrative authorities is 'one of today's major constitutional questions'.[58]A small number of separate administrative authorities are further organised under the Eduskunta/Riksdag (Parliament), including the Parliamentary Ombudsman and the National Audit Office.[59]

In political science, the constitutional-administrative system of Sweden is commonly described as a 'Swedish administrative model' based on a distinction between the Government level and the administrative authority level, concretised in separate and partly independent administrative authorities.[60] The constitutional structure of Sweden differs from the other Nordic states in that it is not based on the idea of separation of powers. The Swedish constitutional tradition, going back to previous constitutional acts in place since the 17th century, has not sharply distinguished between courts and administrative authorities.[61] Still, the constitutional theory of 'distribution of functions' includes the Government's function to govern the Realm, and the Parliament's legislative function, which in a practical perspective comes close to a separation of the executive and the legislative.[62] The Instrument of Government now establishes that the administrative authorities are organised as separate bodies under either the Riksdag (Parliament) or the Government.[63] The legal consequenses of this are elaborated below.

Clearly deviating from a strict separation of powers scheme, a small number of administrative authorities are thus organised under the Riksdag. This category includes bodies such as the *Riksbank* (Swedish Central Bank), the *Riksdagens ombudsmän* (Parliamentary Ombudsmen), and *Riksrevisionen* (the National Audit Office).[64] As is the case for similar administrative authorities under the parliaments in the other Nordic states, this form of organisation offers a special kind of independence to these Swedish administrative authorities because they are formally not linked to the Government and its ministers, and the Riksdag and its members lack both practical and formal means of steering these administrative authorities.[65]

The organisation under the Government, which applies to the vast majority of the Swedish administrative authorities, means that these must follow directions from the

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[57] Jyränki and Husa (n 54) 209.
[58] Jyränki and Husa (n 54) 209; the work is a Swedish translation of the same authors' *Valtiosääntöoikeus*.
[59] Ilkka Saraviita, 'Finland' in André Alen and David Haljan (eds), *IEL Constitutional Law* (Kluwer 2012) <kluwerlawonline.com/EncyclopediaChapter/IEL+Constitutional+Law/CONS20190017> accessed 24 May 2022 para 310 ff.
[60] Hall (n 51) 300 ff.
[61] Henrik Wenander, 'Administrative Constitutional Review in Sweden – Between Subordination and Independence' (2020) 26 EPL 987, 992; Jacques Ziller, 'The Continental System of Administrative Legality' in B Guy Peters and Jon Pierre (eds), *The SAGE Handbook of Public Administration* (Concise 2nd edn SAGE 2014) 285.
[62] Olle Nyman, 'The New Swedish Constitution' (1982) 26 Scandinavian Studies in Law 170, 176; Lena Enqvist and Markus Naarttijärvi, 'Administrative Independence under EU Law – Stuck between a Rock and Costanzo' (2021) 27 EPL 707, 711 f.
[63] Instrument of Government 1974, ch 12 art 1.
[64] Instrument of Government 1974, ch 9 art 13 and ch 13 arts 6 and 7.
[65] Wenander (n 35) 58.

Government, which decides as a collective.[66] The individual ministers therefore do not have an individual decision-making power regarding the activities of the authority. Because these ministers are responsible for the drafting of proposals, eg, on appointments to leadership roles of the authorities under their ministries (*Departement*), they still have considerable power over the authorities.

Furthermore, it is constitutionally established that the ministers or their representatives may maintain informal contacts with the leadership of the administrative authorities, among other things through recurrent meetings about current developments and the political objectives of the Government. The Committee on the Constitution of the Riksdag, which supervises the Government's activities, has underlined that such meetings are documented.[67] In addition, the appropriation directions (*regleringsbrev*), ie yearly documents setting the goals, priorities, and financial means available for an administrative authority are an important form for a constitutionally accepted governmental steering of the state authorities.[68]

However – and this is a point where Swedish law is unusual – the Government and its ministers, as well as the Riksdag, are constitutionally prohibited from determining how an administrative authority shall decide in a particular case 'relating to the exercise of public power vis-à-vis an individual or a local authority, or the application of an act of law'.[69] The introduction of this provision in the total revision of the central fundamental law (the Instrument of Government) in 1974 aimed at codifying legal principles that already applied. According to the legislative materials, the provision serves the interest of protecting legal certainty for individuals in more important matters, beyond the requirements of legal support for measures against individuals.[70]

This provision places a general limitation on the scope for formal and informal directions concerning the mentioned types of activities. In this way, all Swedish state administrative authorities are independent by default when it comes to individual decision-making. In relation to EU law, legal scholarship has regarded this general independent status as well suited for the role of national administrative authorities to promote the effective implementation of EU provisions ('administrative direct effect' or 'the *Costanzo* doctrine').[71] At the same time, Swedish law has encountered some difficulties in accommodating requirements of far-reaching administrative independence. In 1993, discussions arose about a proposal that the Swedish Agency for Government Employers (*Arbetsgivarverket*, the employer organisation for state authorities in the Swedish labour market system) should be organised as independently as possible from the Government, limiting Government steering to a minimum. The legal experts in the Council on Legislation (*Lagrådet*), advising the legislative process, held that the proposal was not in conformity with the constitutional rule that requires state administrative authorities to be organised under the Government. In the

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[66] Instrument of Government 1974, ch 7 art 3.

[67] Committee Report Bet 2012/13:KU10 *Granskning av statsrådens tjänsteutövning och regeringsärendenas handläggning* 100; on the role of this standing committee, see Thomas Bull, 'Institutions and Division of Powers' in Helle Krunke and Björg Thorarensen (eds), *The Nordic Constitutions: A Comparative and Contextual Study* (Hart 2018) 56 f.

[68] Vilhelm Persson, 'Regleringsbrev ur rättslig synvinkel' [2011] Förvaltningsrättslig tidskrift 635, 640 ff.

[69] Instrument of Government 1974, ch 12 art 1; quotation from the unofficial English language version available on <www.riksdagen.se> accessed 7 June 2022.

[70] Commission of inquiry report SOU 1972:15 *Ny regeringsform. Ny riksdagsordning* 195 f.; Government Bill Prop 1973:90 *med förslag till ny regeringsform och ny riksdagsordning m. m.* 397 f.; Nyman (n 62) 199.

[71] Wenander (n 35) 1007; Enqvist and Naarttijärvi (n 62) 717.

view of the Council on Legislation, the proposal compromised the role of the Government to 'govern the Realm'. The Government amended the proposal according to the criticism from the Council on Legislation.[72]

3 REQUIREMENTS OF ADMINISTRATIVE INDEPENDENCE IN EU LAW

Requirements of administrative independence follow from a number of EU provisions in either the EU Treaties or secondary law. This section aims at summarising the central legal content of these requirements, the reasons for requiring this form of organisation, and the central points of the criticism put forward regarding independent authorities under EU law.

Administrative independence constitutes an exception to the default position of Member State institutional autonomy. Whereas the judiciary has to be independent in European tradition, most European systems at the outset organise the state administration as a hierarchically subordinate part of the executive (see Section 1).[73] The concept of independence for the administrative bodies is not as clear as for the courts. As noted by the ECJ in *Commission v. Poland*, the meaning of independence for administrative bodies is dependent on the – fairly vague – general meaning of 'independence' etc, denoting the legal possibility to act 'completely freely' and to be 'shielded from any instructions or pressure'.[74] At least at the present stage of development, there is no single model for administrative independence under EU law.[75] The different realisations of this concept are therefore dependent on the specific provisions in the Treaties and in the various acts of secondary law. This means that there are degrees of authority independence under EU law, ranging from the requirement of 'complete independence' regarding data protection, to limited requirements of independence in other pieces of secondary legislation.[76] Although these differences may be explained in part by the different needs of different sectors, legal scholarship has argued that such differences in autonomy requirements create legal uncertainty.[77]

In spite of the uncertainties, it is possible to identify a number of recurrent features of administrative independence in the relevant legal provisions and the case law of the ECJ. In this way, legal scholarship has distinguished between requirements of institutional,

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[72] Government Bill Prop 1993/94:77 *En ombildning av arbetsgivarorganisationen för det statliga området* 19 ff, 33 ff; Erik Holmberg et al, *Grundlagarna: RF, SO, RO* (3 July 2019, Version 3 A, JUNO, <https://juno.nj.se>), Commentary to ch 12 art 1 of the Instrument of Government, under the heading 'Den statliga förvaltningsorganisationen'.

[73] Jörg Philipp Terhechte, 'Equal or Diverse?: Richterliche und exekutive Unabhängigkeit im Vergleich' in Malte Kröger and Arne Pilniok (eds), *Unabhängiges Verwalten in der Europäischen Union* (Mohr Siebeck 2016) 36 ff.

[74] Case C-530/16 *Commission v Poland* EU:C:2018:430, para 67.

[75] Edoardo Chiti, 'Towards a Model of Independent Exercise of Community Functions?' in Roberto Caranta, Mads Andenas, and Duncan Fairgrieve (eds), *Independent Administrative Authorities* (British Institute of International and Comparative Law 2004) 223; AG Bobek in Case C-530/16 *Commission v Poland* EU:C:2018:29, para 32.

[76] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (GDPR), art 52.

[77] De Somer (n 12) 247.

functional, personnel, and financial independence.[78] In a similar way, the Commission recommendation on standards for equality bodies establishes that

> [t]o guarantee the independence of the equality bodies in carrying out their tasks, Member States should consider such elements as the organisations of those bodies, their place in the overall administrative structure, the allocation of their budget, their procedures for handling resources, with particular focus on the procedures for appointing and dismissing staff, including persons holding leadership positions.[79]

Concerning the *institutional requirements*, several directives relating to market supervision require that the national regulatory body is 'legally distinct'.[80] This requirement relates to the formal organisation of the bodies. The focus of market-supervision bodies' independence has traditionally been on the relationship to the market actors that are to be supervised.[81] Increasingly, however, EU legislation has aimed at also securing independence from the governmental and ministerial level.[82] This latter aspect has direct implications for the organisation of the administrative bodies concerned. The exact requirements of EU law in this respect may vary between different sectors, reflecting the needs in the specific field.[83] Concerning supervision bodies, the ECJ has held that a requirement of independence does not exclude the organisation within a governmental ministry.[84] The ECJ has even held that a national legislature may act as a national regulatory body

> provided that, in the exercise of that function, it meets the requirements of competence, independence, impartiality and transparency laid down by [the relevant directives] and that its decisions in the exercise of that function can be made the object of an effective appeal to a body independent of the parties involved.[85]

In contrast, the reference to 'complete independence' as regards data protection is difficult to reconcile with the organisation of a data-protection body within a governmental ministry (see below on the question of functional independence). The requirement of 'complete

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[78] Miroslava Scholten, 'Independent, hence unaccountable? The Need for a Broader Debate on Accountability of the Executive' (2011) 4 REALaw 5, 10; Malte Kröger, 'Unabhängiges Verwalten in der Europäischen Union – eine Einführung' in Malte Kröger and Arne Pilniok (eds), *Unabhängiges Verwalten in der Europäischen Union* (Mohr Siebeck 2016) 5.

[79] Commission Recommendation (EU) 2018/951 of 22 June 2018 on standards for equality bodies.

[80] eg, Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code, art 6(1); Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU, art 57(4) (a); Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, art 39(4)(a).

[81] eg, Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, art 22: 'Each Member State shall designate one or more national regulatory authorities for the postal sector that are legally separate from and operationally independent of the postal operators.'

[82] Lavrijssen and Ottow (n 14) 81 ff.

[83] cf AG Bobek in Case C-530/16 *Commission v Poland* EU:C:2018:29, para 32.

[84] Case C-369/11 *Commission v Italy* EU:C:2013:636, para 64; Case C-530/16 *Commission v Poland* EU:C:2018:430, para 76.

[85] Case C-389/08 *Base* EU:C:2010:584, para 30.

independence' shall further be construed autonomously from the requirements on independent tribunals under Article 267 TFEU.[86]

The separation from the government or ministry is closely linked to *functional independence*, which aims at excluding influence over the actual decision-making. The administrative bodies responsible for supervision of markets or human rights may both make decisions in individual matters and adopt general, legally binding rules after legislative delegation, dependent on the national constitutional framework. This power may additionally include discretion to use coercive powers and administrative sanctions within the scope of the existing legislation.[87] Several directives prohibit seeking or taking instructions from the government or other public or private bodies.[88] This kind of requirement expresses the core of independent decision-making: the absence of steering from government.[89] In *Commission v Austria*, the ECJ held that the existing functional independence, barring direct influence through instructions to the authority, was not enough to constitute the complete independence required. It was also necessary to consider that the 'managing member' (being responsible for the day-to-day business) of the supervisory authority for data protection was subject to supervision, that the authority was integrated with the Federal Chancellery, and that the Federal Chancellor had an unconditional right to information on the work of the authority. Taken together, this meant that the authority did not fulfil the requirements of independence.[90] In other words, the complete independence for the supervisory authority required for data protection also calls for an assessment of the scope for indirect influence from the governmental level.

The requirements concerning *personnel* relate to the ability of the independent body to carry out its assigned tasks in practice.[91] The directives regulating market supervision bodies link the staffing and management of the regulatory bodies to independence.[92] In this way, the legislation seemingly presupposes that educated and experienced staff are less prone to undue influence. There are, furthermore, examples of provisions relating to both the recruiting and dismissal of staff that reduce the scope for indirect steering.[93] Concerning both market supervision and data protection, the ECJ has held that there are limitations to the

[86] Case C-614/10 *Commission v Austria* EU:C:2012:631, para 40.
[87] De Somer (n 12) 61 ff.
[88] eg, Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area, art 55(3); GDPR, art 52(2); 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, art 4(2)(b).
[89] Kröger (n 78) 5; Terhechte (n 73) 39.
[90] Case C-614/10 *Commission v Austria* EU:C:2012:631, para 66.
[91] eg, Council Directive 2009/71/Euratom of 25 June 2009 establishing a Community framework for the nuclear safety of nuclear installations, art 5(2): '… an appropriate number of staff with qualifications, experience and expertise necessary'.
[92] eg, Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area, art 55(3): 'Member States shall ensure that the regulatory body is staffed and managed in a way that guarantees its independence'.
[93] 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, art 4(4): 'Member States shall ensure that the members of the decision-making body of national administrative competition authorities are selected, recruited or appointed according to clear and transparent procedures laid down in advance in national law'.

dismissal of staff in connection with reorganisation of the national administrative authorities.[94]

Concerning the *financial dimension*, several of the directives call for the independent authorities to have separate budgets.[95] From the case law of the ECJ, however, this would not seem to be a necessary element for constituting independence if there is no such explicit requirement in secondary law. Still, it would seem that the sufficient funding of the activities of an authority is necessary for its independence, even though the authority does not have a separate budget.[96] The requirement of sufficient funding is sometimes explicitly stated in the legal acts.

Previous research has identified several reasons for requiring the establishment of independent authorities. This form of administrative organisation entails a kind of outsourcing – although still within the wider organisation of the state – of administrative activities.[97] Some of the central motives for requiring independent authorities are to provide preconditions that are stable for a long time beyond changes in Government (especially for market supervision), offer decision-making resting on expertise, and avoid conflicts of interest. The latter two motives are relevant for both market and human-rights supervision and have been described by De Somer as the primary motives.[98] Furthermore, the development of independent authorities on the national level is linked to the expansion of independent EU agencies. In *Commission v Germany*, the ECJ interpreted the requirements of administrative independence in the Data Protection Directive homogenously with the requirements on the EDPS under Regulation No 45/2001(both legal acts are now replaced with the GDPR).[99] In the words of Chiti, the national independent authorities, together with the union level bodies, form 'a European concert of regulators' allowing for complex decision-making and contacts both between the national and the EU authorities within the relevant field.[100] In this way, the autonomy of national administrative bodies simplifies the integration of the national level in European networks for market regulation led by the Commission.[101]

Reasons for introducing administrative independence in this way include the ambition to provide consistent, long-term, and predictable preconditions, especially for market regulation. Furthermore, the existence of independent authorities may be motivated when the state is among the actors in a market. For the protection of human rights and data protection, the interest in maintaining a distance between the supervision and the political representatives of the state has been highlighted in legal scholarship. De Somer has

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94 Case C-424/15 *Garai* EU:C:2016:780, para 47 ff; Case C-288/12 *Commission v Hungary* EU:C:2014:237, para 61 ff.
95 Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU, art 57(5) (c); Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, art 39(5); GDPR, art 52(6).
96 Case C-530/16 *Commission v Poland* EU:C:2018:430, para 100; Case C-614/10 *Commission v Austria* EU:C:2012:631, para 58; AG Bobek in Case C-530/16 *Commission v Poland* EU:C:2018:29, para 37.
97 Biaggini (n 6) 569.
98 De Somer (n 12) 74 ff and 99 f.
99 Case C-518/07 *Commission v Germany* EU:C:2010:125, para 26 ff.
100 Chiti (n 75) 213 ff.
101 De Somer (n 12) 81; Christoffer Conrad Eriksen and Halvard Haukeland Fredriksen, *Norges europeiske forvaltningsrett. EØS-avtalens krav til norske forvaltningsorganers organisering og saksbehandling* (Universitetsforlaget 2019) 201.

concluded that the general interest in basing administrative decisions on expertise and impartiality are the most central interests motivating requirements of independent authorities.[102]

French, Dutch, Belgian, and UK legal and political discourse have, with some variations relating to their constitutional traditions, identified risks relating to the principles of legality, political ministerial responsibility, the democratic control of the administration by the Parliament, and the central role of Parliament in a democracy.[103] Apart from considerations on administrative policy, these arguments also have clear constitutional dimension. In German legal scholarship, the judgment of the ECJ in *Commission v Germany* 'created uproar', because the Court rejected arguments relating to ministerial oversight for the administrative authorities. This German criticism of the EU requirements focused on the severing of the democracy and legitimacy link between the parliament, the minister, and the administrative authority.[104]

4 REALISATIONS OF ADMINISTRATIVE INDEPENDENCE IN THE NORDIC STATES

As in other European states, the administrative procedure in the Nordic states in part has had to be adapted to EU law.[105] Concerning the administrative organisation, EU law has had a limited impact in the five countries. However, on a very detailed level of internal organisation, the distribution of tasks within the Ministries and the lower administrative authorities has been adapted to fit the tasks related to drafting, implementing, and applying EU law.[106] In this way, the demands of the European cooperation have had an indirect impact on public law. This section examines the realisation of the direct requirements of administrative independence in the five countries.

In the West Nordic countries, with their tradition of ministerial rule, the independent functions of administrative bodies have had to be allocated to public bodies outside the hierarchies of the ministries. As described above (Section 2), this in itself is nothing new to Danish, Icelandic, or Norwegian law, as their legal systems have featured 'councils' etc of different kinds. In Denmark, the national legislation implementing the Single European Railway Directive with its provisions on independent supervision highlighted the independence of the supervisory body (the railway board, *Jernbanenævnet*).[107] The board is explicitly independent and not under the instruction power of the Minister of Transport. Furthermore, it shall be independent from other actors in the field in its composition, organisation, and activities.[108] In a similar manner, the Norwegian legislation on railways establishes that the supervisory authority cannot be given instructions, either generally or in an individual matter.[109] This technique of explicit requirements of independence and prohibition of

[102] De Somer (n 12) 74 ff, 99 f; see also Craig (n 7) 152.
[103] De Somer (n 12) 133–162; Emmanuel Slautsky, 'Independent Economic Regulators in Belgium' (2021) 14 REALaw 37.
[104] Matthias Ruffert (n 2) 522; see also on the Belgian legal resistance to the use of independent agencies relating to the economic, social, and political traditions Slautsky (n 103) 62 f.
[105] Henrik Wenander, 'Europeanisation of the Proportionality Principle in Denmark, Finland and Sweden' (2020) 13 REALaw 133, 143 ff; Eriksen and Fredriksen (n 101).
[106] Niels Fenger, *EU-rettens påvirkning af dansk forvaltningsret* (3rd edn DJØF 2018) 45; Jane Reichel and Henrik Wenander, *Europeisk förvaltningsrätt i Sverige* (Norstedts Juridik 2021) 109.
[107] Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area.
[108] Railway Act (Lov 686 af 27/05/2015, Jernbaneloven), s 103.
[109] The Railway Act 1993 (Lov om anlegg og drift av jernbane, herunder sporvei, tunnelbane og forstadsbane m.m., jernbaneloven, LOV-1993-06-11-100), s 11 a.

instructions from the minister has been used in several other fields in Denmark, Iceland, and Norway, such as supervision of energy markets and competition.[110]

In addition, the requirements of complete independence for data-protection authorities under the GDPR have been implemented by such explicit provisions on independence.[111] Concerning data-protection supervision, the EFTA Surveillance Agency (ESA) – the counterpart to the Commission within the EFTA system for non-EU Member States applying the EEA Agreement – opened cases against Iceland and Norway in 2015 regarding possible failures to ensure independence of the national data protection authorities.[112] The background was the development of the case law of the ECJ, notably *Commission v Germany* and *Commission v Austria*. Regarding Iceland, the focus of the ESA's investigation was whether the national data-protection authority (*Persónuvernd*) was sufficiently funded and staffed in relation to its tasks. After the Alþingi decided to increase funding to the authority, the ESA decided to close the case.[113]

In the case against Norway, the ESA examined whether Norway fulfilled the requirement of 'complete independence' as set out in the Data Protection Directive (now the GDPR). The legal framework at the time meant that the national Data Protection Authority in some respects was subordinate to the ministry, and that the annual grant letters from the Ministry laid down specific aims and priorities for the authority. After Norway, among other things, updated the employment contract for the Data Protection Commissioner and amended the grant letter to the Data Protection Authority so that it should have less specific aims, and focus more on financial aspects, the ESA closed the case.[114]

Especially Norwegian legal discourse has highlighted the developments towards a greater use of independent administrative authorities. This discussion has focused primarily on the establishment of such bodies by choice of the national legislator, but has also included obligations under EEA law. Legal scholarship has concluded that these bodies are established and organised in a disparate way, seemingly without a common concept of independence.[115] This could be linked to the vagueness of the concept of administrative independence in Norwegian law. As mentioned, this problem of vaguenessis also present on the European level (see Section 3). The 2019 proposal for a new Norwegian Administrative Procedure Act included rules on independent administrative authorities, aiming at establishing a unified concept.[116] In relation to obligations under EEA law, however, Norwegian legal discourse has concluded that national legislation of this kind would not necessarily solve the problems associated with requirements of independence, since EU law requirements may differ from the Norwegian definitions of administrative independence. The same legal scholars have

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[110] The Danish Act on the Utility Regulator (Lov om Forsyningstilsynet, lov nr 690 af 08/06/2018), s 2; the Icelandic Act on the National Energy Authority (Lög um Orkustofnun Nr. 87/2003), s 1; the Norwegian Energy Act (Lov om produksjon, omforming, overføring, omsetning, fordeling og bruk av energi m.m. (energiloven) LOV-1990-06-29-50), s 2-3; the Danish Competition Act (Konkurrencelov, lov nr 384 af 10/06/1997), s 14 a; the Norwegian Competition Act (Konkurranselov LOV-2004-03-05 nr. 12), s 8; the Icelandic Competition Act (Samkeppnislög) 44/2005, s 5 (without an explicit prohibition of instructions from the minister).

[111] In Denmark, the Data Protection Act 2018 (Lov om supplerende bestemmelser til forordning om beskyttelse af fysiske personer i forbindelse med behandling af personoplysninger og om fri udveksling af sådanne oplysninger (databeskyttelsesloven) 2018 nr 502), s 27; in Norway, the Personal Data Act 2018 (Lov om behandling av personopplysninger (personopplysningsloven) 2018 nr 38), s 20; in Iceland, the Data Protection Act 2018 (Lög um persónuvernd og meðferð persónuupplýsinga, 90/2018), s 36.

[112] Halvard Haukeland Fredriksen and Gjermund Mathisen, *EØS-rett* (4th edn Fagbokforlaget 2022) 259.

[113] ESA Decision No 025/19/COL of 2 April 2019 in Case 76950.

[114] ESA Decision No 026/19/COL of 2 April 2019 in Case 77105.

[115] Eivind Smith, 'Uavhengig myndighetsutøvelse. Statlige forvaltningsorganers rettslige status og posisjon overfor ledelsen av den utøvende makt (Kongen og departementet)', annex to report 2012:7 *Uavhengig eller bare uavklart? Organisering av statlig myndighetsutøvelse* (Difi, Direktoratet for forvaltning og IKT 2012) 78 f.

[116] Commission of inquiry report NOU 2019: 5 *Ny forvaltningslov*, ch 32.

further concluded that it is very likely that the (sometimes vague) independence requirements under EU law result in over-implementation in Norwegian law.[117]

In the East Nordic legal systems of Finland and Sweden, Finland has opted to a considerable extent for similar solutions as have the West Nordic states, ie to use references to the relevant supervisory body being independent. For example, the Act regulating the activities of the Non-discrimination Ombudsman explicitly states that the Ombudsman is organised under the auspices of the Ministry of Justice, but that the authority is 'autonomous and independent in its activities'. According to the legislative materials, this was motivated by the requirements of EU law.[118] Similarly, the Railway Traffic Act (implementing the Single European Railway Directive) establishes a regulatory body for the railway sector in connection with the Transport and Communications Agency (*Liikenne- ja viestintävirasto / Transport- och kommunikationsverket*, Traficom), which shall act as an independent authority in terms of organisation, function, hierarchy, and decision-making.[119] In contrast, the Finnish legislative process has at times concluded that the general independent position of a state authority is sufficient to fulfil requirements of independence for market-regulation authorities.[120]

Concerning the requirement of complete independence for data protection, Finnish legislation has explicit provisions on the Data Protection Ombudsman, who 'works under the auspices of the Ministry of Justice' but is 'is autonomous and independent in his or her activities'.[121] As was remarked in the legislative materials to the provision, the requirement of independence already follows from the directly applicable provision in Article 52 GDPR. Because the Data Protection Ombudsman also has other tasks not regulated by GDPR, the provisions on independence in the Act are motivated 'also for this reason'.[122] Whether this is a good reason or not, this is an example on how EU law requirements influence national arrangements on administrative independence.

Swedish legislative procedure has routinely referred to the constitutionally entrenched independence of administrative authorities when implementing EU legislation requiring administrative independence. An example of this kind of reasoning is found in the legislative materials for implementing the Single European Railway Directive, which also refers to the general rules and principles of constitutional and administrative law on objectivity, impartiality, disqualification, and public employment.[123] Similarly, the constitutionally founded independent role of the Non-Discrimination Ombudsman (*Diskrimineringsombudsmannen*) and the applicable general administrative law framework have been highlighted in legislative procedures implementing Directives in the field.[124] A further example of reference to the constitutional independence of administrative authorities is found in the legislative materials concerning the reinforced independence of national competition authorities.[125]

Sweden has also followed this pattern concerning the position of the national data-protection authority under the GDPR. In the legislative process leading up to the adoption of the Data Protection Act, complementing the GDPR, the appointed commission of inquiry concluded that the

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[117] Eriksen and Fredriksen (n 101) 204.
[118] Government Bill RP 19/2014 rd *med förslag till diskrimineringslag och vissa lagar som har samband med den* 113.
[119] Rail Traffic Act 2018 (Raideliikennelaki/Spårtrafiklagen, 1302/2018), s 147; Government Bill RP 105/2018 rd *med förslag till spårtrafiklag och lag om ändring av lagen om transportservice* 120; Government Bill RP 13/2015 rd *med förslag till lagar om ändring av järnvägslagen och banlagen* 42.
[120] Government Bill RP 20/2013 rd *med förslag till ändring av lagstiftningen om el- och naturgasmarknaden* 33 ff.
[121] Data Protection Act 2018 (Tietosuojalaki/Dataskyddslag, 1050/2018), s 8.
[122] Government Bill RP 9/2018 rd med förslag till lagstiftning som kompletterar EU:s allmänna dataskyddsförordning 95 f.
[123] Government Bill Prop 2014/15:120 *Ett gemensamt europeiskt järnvägsområde* 98 ff.
[124] Government Bill Prop 2002/03:65 *Ett utvidgat skydd mot diskriminering* 162; Government Bill Prop 2004/05:147 *Ett utvidgat skydd mot könsdiskriminering* 119; Government Bill Prop 2007/08:95 *Ett starkare skydd mot diskriminering* 369.
[125] Ministry Report Ds 2020:3 *Konkurrensverkets befogenheter* 84.

Swedish model provides strong guarantees for independent decision-making by administrative authorities under the government. In the view of this commission of inquiry, the requirements of independence under the legal acts were 'without doubt fulfilled under the Swedish system. [126] The development of case law by the ECJ, notably in the cases *Commission v Germany* and *Commission v Austria*, has not provoked any more general discussion on the limits of the administrative independence under the Swedish Instrument of Government 1974.[127]

5 CONCLUSION

Requirements of administrative independence for national administrative authorities limit the scope for the Member States to arrange their public administration according to their political choices and constitutional and administrative traditions (the 'institutional autonomy'). Still, study of the Nordic realisations of administrative independence indicates that the national traditions are important for understanding the EU concept of independent authorities.

Administrative independence means a departure from the theoretical separation of powers. Although this is certainly a relevant perspective, the study indicated that public organisation in a legal system may be more complex than this schematic outline. As stated in Section 1, the clear-cut tripartite separation of powers has never quite been fulfilled in European legal systems, which means that EU requirements of administrative independence are not as alien to some legal systems as they may seem at first glance. In all the Nordic states, important parts or (in Finland and Sweden) the whole organisation of state authorities rest on ideas of organisational independence. Notably, the Swedish constitutional structure, although being fully democratic and based on the rule of law, as a matter of theoretical foundation does not even in constitutional theory rest on a formal, tripartite separation of power.

The Nordic legal systems are often described as being 'pragmatic', denoting a practically oriented state of mind, rather than having foundations in strict, pre-defined categorisations. The requirements of establishing independent authorities have not met the same kind of national restraint as in other European countries, especially Germany. This may be explained by both the practical orientation of legal thinking and the long-standing existence of arrangements of independent authorities in the legal systems. The more principled arguments in constitutional law against independent authorities found in German discourse have not had the same impact in the Nordic countries. As discussed, however, the Nordic legal systems are by no means identical when it comes to the details beyond the general commonalities. It should be noted that Norwegian constitutional discourse generally emphasises the concept of separation of powers, which may explain the critical discussion regarding the establishment of independent authorities. These discussions, however, have focused primarily on the establishment of independent authorities initiated on the national level, and not prescribed by EU law.

It may be noted that none of the countries has used the possibility to meet requirements of independent authorities by organising administrative bodies under the parliaments. Even though this form of organisation would create independence from

[126] Commission of inquiry report SOU 2016:65 *Anpassningar med anledning av EU:s dataskyddsreform* 146.
[127] cf, however, Reichel and Wenander (n 106) 111 f.

political actors (because the parliaments and their members cannot control the authorities in the same way as governments or ministers), this kind of organisation does not seem to be a viable option in practice for most administrative activities (see on the Swedish administrative authorities organised under the Riksdag in Section 2).

The various constitutional frameworks and traditions help one to understand the different impact of EU law requirements on independence in the legal systems discussed above. As mentioned, there are two major traditions of administrative law in the Nordic states, and this is also clear in this context. The West Nordic legal systems, with their default position of ministerial rule and hierarchical delegation from the ministry to the administrative authority, need to clarify the exceptional status of the independent authority. Explicit provisions barring the minister or department from engaging in the business of the supervisory authority are therefore necessary.

Somewhat surprisingly, there are also examples of such explicit provisions in Finnish law, even though the administrative authorities by default should be independent in their decision-making and use of discretion. This is an indication of the complex and uncertain status of the general administrative independence that is commonly assumed concerning Finnish constitutional law. Possibly, this form of explicit provisions may mean a kind of Europeanisation of how the administrative organisation is conceived in Finland in general.The clearly more typical East Nordic country in this context is Sweden, with its 'administrative model' codified in the written constitution, featuring independent organisation of administrative authorities and independent decision-making in more important matters. As shown above, Swedish legal discourse has routinely relied on this constitutional provision to guarantee administrative independence.

The concept of administrative independence has not been critically discussed in the Nordic legal systems to the same extent as in continental Europe. After all, the Nordic countries have all established independent authorities without EU requirements, and it seems the addition of such bodies has not raised any serious concerns. This may also be seen as a pragmatic position, as opposed to more principled views in continental Europe – especially in the German legal tradition.

However, this 'pragmatic' attitude is no guarantee that the implementation of EU requirements of administrative independence will always be unproblematic. Since the requirements of EU law do not follow one general concept of independence, it may be that the Nordic national implementation fails in one way or another to meet the requirements. As was observed in relation to the Norwegian proposal on regulating the concept of independent authorities in the new Administrative Procedure Act, a general national concept is especially vulnerable to deviating requirements under EU law. The same goes, of course, for the Swedish default recourse to the constitutionally founded administrative independence. The procedures initiated by the ESA against Iceland and Norway in 2015 illustrate that there may be tensions between the national legislative and budgetary choices and the requirements of EEA/EU law.

At the outset, the Swedish administrative model is especially well suited to fulfil the requirements of administrative independence, given its default position of independent administrative organisation and decision-making in more important matters. However, the scope for informal contacts inherent in the system could constitute a challenge in relation to the independent status of the Data Protection Authority, which could call for further

examination. In addition, the scope for budgetary steering through appropriation directions could in principle give rise to concerns about the independence of the Swedish Data Protection Authority, in a parallel to the ESA's investigation of Norway.

The EU Member States (and the EFTA-EEA States) need to adapt to the varying requirements and observe the differences between the requirements of mere independence in relation to market actors, independence of the market actors and the political level, and the complete independence of the GDPR. As has been observed in Norwegian legal discourse, there is an inherent risk of over-implementation of independence, as the national systems benefit from transparent structures that make it possible to navigate.

Both Nordic and other European legal discourses have highlighted the fact that the ambition of achieving administrative independence is a mirage – it would require the authority both to be linked to, and not least funded by, the public sector and at the same time be free in its activities. The solutions under EU law as implemented on the national level are therefore a balance of these interests. In this way, the Nordic examples illustrate the tensions in the field. As established in scholarship, comparative public law – including administrative and constitutional law – helps to fully understand the impact of EU law and reveals the various 'Europeanisations' of general administrative law, given the national preconditions.

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EMPLOYEE HEALTH DATA IN EUROPEAN LAW: PRIVACY IS (NOT) AN OPTION?

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While there are many feasible reasons for employers to process employee health data, the protection of such data is a fundamental issue for ensuring employee rights to privacy in the workplace. The sharing of health data within workplaces can lead to various consequences, such as losing a sense of privacy, stigmatisation, job insecurity and social dumping. At the European level, the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and EU General Data Protection Regulation (GDPR)–two interconnected instruments–offer the most enforceable protection of employee health data. The article analyses the limits of employees' right to privacy regarding health data, as delineated by the ECHR and GDPR. Using three fictive examples, we illustrate how the level of protection differs in these two instruments. In particular, we show that the protection of health data offered by the GDPR is seen as an objective act of processing at the time it is carried out, where the actual impact caused by the processing on private life is not considered. On the contrary, the ECHR's applicability and offered level of protection in the employment context depend on subjective factors, such as the consequences of sharing the data.

1 INTRODUCTION

Protection of health data at the workplace is a fundamental issue for many employees. Health data is intimate, sensitive and associated with risks if spread. Within workplaces, the sharing of such data can affect an employee's sense of dignity, lead to embarrassment, singling out, stigmatisation, job insecurity, social dumping and discrimination.[1] The sharing might also affect employees' relations with others in or outside the workplace and their general well-being.[2] On the other hand, an employer's obligations might include the necessity to process some of an employee's health data for various reasons, such as creating a safe work environment, complying with social security regulations, or ensuring the fulfilment of the

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[1] Eddie Keane, 'The GDPR and Employee's Privacy: Much Ado but Nothing New' (2018) 29 King's Law Journal 354, referencing Per Skedinger, Employment Protection Legislation: Evolution, Effects, Winners and Losers (Edward Elgar 2010); Megan Oaten, Richard J Stevenson and Trevor I Case, 'Disease Avoidance as a Functional Basis for Stigmatization' (2011) 366 Philosophical Transactions of the Royal Society B: Biological Sciences 3433; Leah S Fischer, Gordon Mansergh, Jonathan Lynch, and Scott Santibanez. 'Addressing Disease-Related Stigma During Infectious Disease Outbreaks' (2019) 13 Disaster Medicine and Public Health Preparedness 989.

[2] Sharyl Nass, Laura Levit, Lawrence O. Gostin, 'Beyond the HIPAA Privacy Rule: Enhancing Privacy, Improving Health Through Research' (*National Academies Press,* 2009) <http://www.ncbi.nlm.nih.gov/books/NBK9579/> accessed 28 April 2022.

The aim of this article is to analyse and compare the level of protection offered for employee health data in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[3] and the EU General Data Protection Regulation (GDPR).[4] These instruments have different applicational scopes, already evident from the fact that the scope of the ECHR comprises 46 Council of Europe Member States, while the scope of the GDPR is confined only to the 27 EU Member States.[5] The instruments are also addressed at different actors, where the ECHR is addressed to the states, and the GDPR, additionally, also is directly binding on those "controllers" who "process" particular personal data (here, the employers).[6] The GDPR is an implementation of Article 8—the right to data protection—of the Charter of Fundamental Rights of the European Union[7]. Yet, the GDPR's detail and scope go beyond the right to data protection in the Charter.[8] While there are differences between the ECHR and GDPR that affect the prospects of making clear-cut comparisons between these instruments, it is of great importance to study the level of protection provided by both of them. Within the EU, both instruments are simultaneously applicable. This means that the Member States, employees, employers and other stakeholders need to be cognizant of when and how the ECHR and GDPR protect health data and be able to navigate the differences in the protection provided.

In this article, our comparison will focus on how the ECHR and GDPR arrange and determine the level of protection to be offered for employee health data. To do this, we will structure our analysis around three fictive cases where health-related information is disclosed to an employer. The cases have been designed to represent situations where the ECHR and GDPR offer different levels of protection for employee health data and/or display

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[3] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as Amended) [1950].

[4] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1.
This article focuses on the level of protection each instrument offers in specific cases, which is here narrowly construed as relating to whether the particular employee health data may or may not be used by employers in these situations. The analysis does not, therefore, include other important aspects of the enforcement regimes of each instrument, such as the right to compensation or liability.
In this article we will refer to data protection as a part of the right to privacy, although the specific relations between the right to privacy and the right to data protection have been a topic of scholarly interest and debate. See, *e.g.* Orla Lynskey, 'Deconstructing Data Protection: The "added-value" of a Right to Data Protection in the EU Legal Order' (2014) 63 International and Comparative Law Quarterly 569; Bart van der Sloot, 'Legal Fundamentalism: Is Data Protection Really a Fundamental right?' in Ronald Leeds et al (eds), *Data Protection and Privacy: (In)visibilities and Infrastructures* (Cham, Springer 2017); Juliane Kokott and Christoph Sobotta, 'The Distinction between Privacy and Data Protection in the Jurisprudence of the CJEU and the ECtHR' (2013) 3 International Data Privacy Law 222.

[5] Council of Europe, 'Map & Members', <https://www.coe.int/en/web/tbilisi/the-coe/objectives-and-missions#:~:text=It%20now%20has%2046%20member,%2C%20the%20Czech%20Republic%2C%20Slovakia%2C> accessed 15 June 2022; European Union, 'Country profiles', <https://european-union.europa.eu/principles-countries-history/country-profiles_en> accessed 15 June 2022.

[6] Article 1 ECHR; in the GDPR, obligations are placed on those who process personal data, whether private or state actors. The regulation also contains some obligations directly placed on the EU Member States, as well as a general obligation for them to make sure that their national legislation is GDPR compliant (see here, also, Article 36(4) for their obligation on prior consultation). Failure of a Member State to rectify violations of the GDPR could lead to the European Commission launching a formal infringement procedure under Article 258 TFEU.

[7] Charter of Fundamental Rights of the European Union [2000] OJ C 364.

[8] See section 3.1.

differences in the interpretive steps they prescribe for assessing the permissibility of using or processing such data.[9]

In our first case, employee A is working from home due to the Covid-19 pandemic. A has tested positive for the virus, and the employer has a policy of disclosure regarding both positive and negative Covid-19 results. Although A is aware that no consequences are prescribed for incompliance, she discloses the test result to her employer.

In our second case, employee B has recently been diagnosed with bipolar disorder. B submits his medical certificate to the employer upon request to clarify the reasons for his recurring sickness absence. Shortly after, the employer e-mails all B's colleagues to inform them of the diagnosis, claiming that it will provide a safer working environment for all and psychological support to B. After the information is spread, B's colleagues avoid talking to him; B feels ostracized.

In our third case, employee C works as a nurse in a paediatric care department at a hospital and has recently been diagnosed with HIV. As required by national patient safety regulations applicable to C, she discloses this information to the employer. Shortly after, the employer decides to reallocate C to another department within the same hospital, stating that her infectious disease might risk co-workers' and patient safety in this particular working environment.

The cases of A–C each involve the exposure of an employee's health data to an employer or other external parties. However, they differ in terms of the type of disease and the consequences they incur. These differences will be discussed further to show how they affect the permissibility of employers' interference with employees' right to privacy in the workplace.

The article is structured as follows. In section 2, we will focus on the right to privacy for employees as established by the ECHR. Here, the European Court of Human Rights (ECtHR) case law will inform the analysis. In our reasoning, the Grand Chamber judgments will receive a more prominent role, but Chamber judgments and decisions will also be included.

In section 3, the provisions of the GDPR will be examined. This analysis will be based primarily on relevant legislation and the Court of Justice of the EU (CJEU) case law. Where these do not provide clear guidance, the opinions and guidelines of the Article 29 Working Party (Art. 29 WP) or the succeeding European Data Protection Board (EDPB) will be used.

We finish the article in section 4 with an overarching analysis of our findings, where we compare the different protection levels of employee health data that these instruments offer in cases A–C.

2 HEALTH DATA IN AN EMPLOYMENT CONTEXT: THE ECHR

2.1 PRIVATE LIFE AT WORK? DEFINITIONAL STAGE

We begin our analysis by highlighting Article 8 of the ECHR, which guarantees every person, including employees, the right to respect for private life. To assess whether a violation of the right to privacy has taken place, the ECtHR must first establish that an interference with

[9] As opposed to the real-life cases resolved in a specific jurisdiction, the fictive examples here allow us to illustrate the reasoning of decision-makers in accordance with both the ECHR and GDPR.

private life has occurred in a specific situation and that Article 8, therefore, is applicable.[10] If a case passes this definitional threshold of Article 8, the ECtHR will move on to assess whether the interference was justified. During this second stage, the ECtHR determines whether a state has violated the Convention. Our analysis in section 2.1 focuses on explaining the first step that the ECtHR takes in the assessment, the definitional stage. It answers whether Article 8 ECHR is applicable in situations where an employer requests an employee to provide health data, such as in cases A–C. After this (sections 2.2-2.4), we will proceed with the questions and problems raised at the second (justification) stage.

The ECtHR regards the term "private life" as broad and difficult to define.[11] Health data have long been considered a consistent part of "private life".[12] However, in an employment context, not every type of health data usage amounts to interference with private life. The ECtHR contemplates that privacy cannot always be reasonably expected in employment relations, implying an attempt to delineate private life and non-private relations.[13] These considerations are specific to employment relations and raise the threshold for applicability of Article 8 in these cases. In comparison, interference with private life occurs by default when health data is used in other spheres, such as in healthcare or by media. Nevertheless, the broad nature of private life renders Article 8 applicable in employment relations in two types of situations that may be interrelated. In these situations, the ECtHR uses either a so-called consequence-based or reason-based approach to determine the applicability. These approaches and situations are discussed below.[14]

The ECtHR would use the consequence-based approach in cases where an employer makes a decision that affects an employee's private life, to assess whether the consequences of the employer's decisions qualify as privacy interference. Examples include incidents when an employer's decisions impact the employee's reputation, opportunities to have relations with third persons, or where there are significant consequences for his or her individual "inner circle" (usually understood as a synonym for an applicant's family).[15] In cases where this approach is used, the ECtHR requires that the consequences reach a minimum level of severity. The minimum level of severity is an atypical requirement of the ECtHR jurisprudence on Article 8, yet it has been clearly established in the employment-related case

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[10] See *e.g.* Janneke Gerards and Hanneke Senden. 'The Structure of Fundamental Rights and the European Court of Human Rights' (2009) 7 International Journal of Constitutional Law 619, 623.

[11] *Bărbulescu* v *Romania* [GC] App no 61496/08 (ECtHR, 5 September 2017), para 71; *Antović and Mirković* v *Montenegro* App no 70838/13 (ECtHR, 28 November 2017), para 41; *Sidabras and Džiautas* v *Lithuania* App no 55480/00 and 59330/00 (ECtHR, 27 July 2004), para 43; *Özpınar c Turquie* requête no 20999/04 (ECtHR, 19 October 2010), para 45; *Denisov* v *Ukraine* [GC] App no 76639/11 (ECtHR, 25 September 2018), para 95.

[12] See *e.g. M.S.* v *Sweden* App no 74/1996/693/885 (ECtHR, 27 August 1997), para 35.

[13] See *e.g. Bărbulescu* v *Romania* [GC] App no 61496/08 (ECtHR, 5 September 2017), para 73; Antović and Mirković v *Montenegro* App no 70838/13 (ECtHR, 28 November 2017), para 43; Joe Atkinson, 'Workplace Monitoring and the Right to Private Life at Work' (2018) 81 (4) The Modern Law Review 694, 697.

[14] *López Ribalda and Others* v *Spain* [GC] App no 1874/13 and 8567/13 (ECtHR, 17 October 2019), para 88; *Fernández Martínez* v *Spain* [GC] App no 56030/07 (ECtHR, 12 June 2014), para 110; *Özpınar* c *Turquie* requête no 20999/04 (ECtHR, 19 October 2010), para 45; *Denisov* v *Ukraine* [GC] App no 76639/11 (ECtHR, 25 September 2018), para 100.

[15] *Fernández Martínez* v *Spain* [GC] App no 56030/07 (ECtHR, 12 June 2014), para 110; *Oleksandr Volkov* v *Ukraine* App no 21722/11 (ECtHR, 9 January 2013), para 166; *Bigaeva* c *Grèce* requête no 26713/05 (ECtHR, 28 May 2009), para 24; *Denisov* v *Ukraine* [GC] App no 76639/11 (ECtHR, 25 September 2018), para 107; *Jankauskas* v *Lithuania (no 2)* App no 50446/09 (ECtHR, 27 June 2017), para 56; *Niemietz* v *Germany* App no 13710/88 (ECtHR, 16 December 1992), para 28.

law where the consequences-based approach is used.[16] The requirement means that applicants must identify and explain the significance of the effects of the employer's decisions on their private life, including the nature and the extent of their suffering resulting from the decision.[17]

How severe the ECtHR regards the consequences of a particular health data disclosure is context-dependent. For example, the attitude towards disease in a specific society can be one such factor that influences reputation, opportunities to have relations with others and can have consequences for the "inner circle". Such attitudes are likely to differ across Europe and from one workplace to another. They may also change over time and depend on scientific knowledge about the disease. Stigmatisation and significant consequences for individuals' private life may, similarly, depend on other, already inherent factors in each case, such as ethnicity – or factors external to the applicant, like the manner and context in which the information was shared.[18]

The consequence-based approach can be typically relevant when an employment-related decision makes others aware of sensitive data regarding employees. The case of B, where sharing information about the employee's mental disorder resulted in the ostracization of B, falls under this description. If the consequences were not as severe or could not be confirmed, the consequence-based approach would not apply. Compared to the case of B, there are no known consequences for A's private life as a result of her Covid-19 status disclosure. For C, the consequences—reallocation due to HIV—clearly exist. However, they are not directly related to C's private life, and it is unclear whether the threshold of severity will be reached. Therefore, the case of A and C is unlikely to reach the minimum level of severity threshold, at least so far.

The second type of situation where Article 8 can be impugned within employment relations is when an employer makes decisions based on *reasons* that concern a person's private life. Typical examples of relevant situations include not considering employees for promotion or dismissing them from work due to circumstances directly related to their private life, such as having a particular disease.[19] In such situations, the ECtHR uses the reason-based approach to determine whether there has been an interference.[20] In contrast to

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[16] The requirement to prove that this minimum level of severity has been reached, for instance, is not clearly stated in case law where health data are shared by healthcare services. However, this requirement also exists in environmental case law. *L.H.* v *Latvia* App no 52019/07 (ECtHR, 29 April 2014), para 33; *Z* v *Finland* App no 22009/93 (ECtHR; 25 February 1997), para 70; *M.S.* v *Sweden* App no 74/1996/693/885 (ECtHR, 27 August 1997), para 35; *Mockutė* v *Lithuania* App no 66490/09 (ECtHR, 27 February 2018), paras 94–95; *Çiçek and others* v *Turkey* App no 44837/07 (ECtHR, 4 February 2020), paras 22, 29; *Fadeyeva* v *Russia* App no 55723/00 (ECtHR, 9 June 2005), para 69.

[17] *Denisov* v *Ukraine* [GC] App no 76639/11 (ECtHR, 25 September 2018), paras 110, 116–117; *Gillberg* v *Sweden* [GC] App no 41723/06 (ECtHR, 3 April 2012), para 73; *J.B. and Others* v *Hungary* App no 45434/12, 45438/12 and 375/13 (ECtHR, 27 November 2018), paras 128–129; *Gražulevičiūtė v. Lithuania*, App no 53176/17 (ECtHR, 14 December 2021), paras 99–100, 102–111.

[18] For example, in the beginning of Covid-19 pandemic it has been considered that persons of Asian descent were more stigmatised. Hyunyi Cho and others 'Testing Three Explanations for Stigmatization of People of Asian Descent during COVID-19: Maladaptive Coping, Biased Media Use, or Racial Prejudice?' (2021) 26 (1) Ethnicity & Health 94, 95.

[19] *Smith and Grady* v *the United Kingdom* App no 33985/96 and 33986/96 (ECtHR, 27 September 1999) paras 70–71; *Özpınar* c *Turquie* requête no 20999/04 (ECtHR, 19 October 2010), para 43.

[20] *Denisov* v *Ukraine* [GC] App no 76639/11 (ECtHR, 25 September 2018), paras 102–108; *Polyakh and Others* v *Ukraine* App no 58812/15, 53217/16, 59099/16 and 23231/18 (ECtHR, 17 October 2019), para 205; *Pişkin* v *Turkey* App no 33399/18 (ECtHR, 15 December 2020) para 176.

the consequences-based approach, here, the ECtHR does not require that a minimum level of severity must be reached.[21]

The case of C serves as a typical example of when the reason-based approach can be used. C was reallocated or not allowed to perform specific assignments due to her HIV, a circumstance directly related to her private life. Conversely, the employers of A and B have not made employment-related decisions.

To summarise, the definitional threshold for Article 8 will be met when employment-related decisions lead to significant consequences for an employee's private life (consequence-based approach) or are connected with a disease that an employee had (reason-based approach). This reasoning means that the consequence- and reason-based approaches can be relevant in B's and C's cases. The studied case law does not draw any relevant distinction for passing the definitional threshold depending on whether the data processing is imposed by national law (as in C's case) or conducted on request (as in B's case) for the applicability of Article 8.

In the case of A, the obligation to report Covid-19 test results has neither led to any employment-related consequences nor any yet known significant adverse effects on A's private life. The mere act of requesting data about a disease or the existence of a policy at the workplace does not signify interference with the right to privacy in the area of employment. This conclusion stands until there are no consequences for A that reach the minimum level of severity or the employer makes decisions based on A's diagnosis. The potential stigmatising effects of the disclosure are of no relevance. Therefore, A's case is unlikely to amount to an interference with the right to privacy under Article 8 ECHR, and will therefore not be discussed any further in section 2.

2.2 JUSTIFICATION STAGE: IDENTIFYING THE QUESTIONS

If the ECtHR finds that an interference with a person's private life occurred, it turns to the justification stage of the assessment. During this stage, the ECtHR evaluates whether a state has breached its duty not to interfere or failed to act to ensure the effective realisation of the right. A violation of the duty not to interfere is referred to as a breach of the state's *negative obligations*; a failure to act is categorised as a violation of *positive obligations*.

In cases concerning data usage in employment, the ECtHR has taken a relatively simple approach for distinguishing between the duty not to interfere and the obligation to act. If the employer is a state authority or company linked to the state, the duties not to interfere (negative obligations) are discussed.[22] When an alleged violation concerns the actions of a private entity, the ECtHR concludes that issues regarding the fulfilment of duties to act (positive obligations) arise if the national courts have accepted the private entities' interference with personal life.[23] Therefore, depending on whether the employer is a public

[21] *Gražulevičiūtė v. Lithuania*, App no 53176/17 (ECtHR, 14 December 2021), paras 98–99.
[22] *Libert* v *France* App no 588/13 (ECtHR, 22 February 2018), para 38; *Bigaeva* c *Grèce* requête no 26713/05 (ECtHR, 28 May 2009), para 31; *Gillberg* v *Sweden* [GC] App no 41723/06 (ECtHR, 3 April 2012), para 64; *Vukota-Bojić* v *Switzerland* App no 61838/10 (ECtHR, 18 October 2016), para 47.
[23] *Bărbulescu* v *Romania* [GC] App no 61496/08 (ECtHR, 5 September 2017), paras 109 and 111; *López Ribalda and Others* v *Spain* [GC] App no 1874/13 and 8567/13 (ECtHR, 17 October 2019), paras 109–110; *Schüth* v *Germany* App no 1620/03 (ECtHR, 23 September 2010), para 54; *Platini* c *Suisse* Requête no 526/18 (ECtHR, 11 February 2020), para 59.

or a private entity, data protection can be viewed as giving rise to negative or positive obligations on the state respectively.

The wording of Article 8.2 ECHR is explicit about the state's duties not to interfere. In such cases, three questions, deriving from the wording of the Article, should be addressed, namely:

(1) whether the interference was in accordance with the law;
(2) whether the interference pursued the legitimate interests;
(3) whether the interference was necessary in a democratic society.

Conversely, the Convention does not specify the state's positive obligations to ensure the effective realisation of the rights. However, the ECtHR, referring to the purpose of the Convention, has developed an extensive practice on these duties.[24] As opposed to the reasoning of the ECtHR on the duty not to interfere, the assessment of a state's compliance with their obligations to act in a specific situation does not always have a stable or transparent structure.[25] The ECtHR justifies this by stating that the substance of a duty to act under Article 8 may differ depending on the area of private life.[26]

In the employment-related case law on failure to act, the ECtHR usually discusses positive obligations of two types.[27] The first type is the state's duty to install regulations or ensure that a legislative framework is in place to enable the full realisation of the rights.[28] This obligation is related to legality and question 1 of the negative obligations test, although slightly reversed.

The second type of positive obligation is the duty to ensure proportionality of the data usage—which is often referred to as "fair balance" because it relates to the balance between the different interests at stake. The reasoning on "fair balance" is somewhat similar to the reasoning on proportionality regarding negative obligations (questions 2 (legitimate interests) and 3 (necessary-in-a-democratic-society) of the test).[29]

To summarise, although the ECtHR's reasoning in cases concerning the duty to act or not to act may often be very similar, there is a slight difference in the approach to legality requirements. Therefore, in the cases of B and C, depending on whether the employers are

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[24] *Christine Goodwin* v *the United Kingdom* [GC] App no 28957/95 (ECtHR, 11 July 2002), para 74; *Airey* v *Ireland* App no 6289/73 (ECtHR, 9 October 1979), paras 32–33; *A.* v *the United Kingdom* App no 100/1997/884/1096 (ECtHR, 23 September 1998) para 22; Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004) 186.

[25] Vladislava Stoyanova, 'The Disjunctive Structure of Positive Rights under the European Convention on Human Rights' (2018) 87(3) Nordic Journal of International Law 344, 346 f.

[26] *Bărbulescu* v *Romania* [GC] App no 61496/08 (ECtHR, 5 September 2017), para 113; *López Ribalda and Others* v *Spain* [GC] App no 1874/13 and 8567/13 (ECtHR, 17 October 2019), para 112.

[27] *Bărbulescu* v *Romania* [GC] App no 61496/08 (ECtHR, 5 September 2017), paras 115 and 120; *López Ribalda and Others* v *Spain* [GC] App no 1874/13 and 8567/13 (ECtHR, 17 October 2019), paras 113 and 116; *Schüth* v *Germany* App no 1620/03 (ECtHR, 23 September 2010), para 57; *Köpke* v *Germany* App no 420/07 (ECtHR, 5 October 2010).

[28] *López Ribalda and Others* v *Spain* [GC] App no 1874/13 and 8567/13 (ECtHR, 17 October 2019), para 110.

[29] *Fernández Martínez* v *Spain* [GC] App no 56030/07 (ECtHR, 12 June 2014), para 114; *Dubská and Krejzová* v *the Czech Republic* [GC] App no 28859/11 and 28473/12 (ECtHR, 15 November 2016), para 165; *Schüth* v *Germany* App no 1620/03 (ECtHR, 23 September 2010), para 55; *cf. Kotov* v *Russia* [GC] App no 54522/00 (ECtHR, 3 April 2012), para 110; Mowbray (n 23) 186 f.

linked to a state or are private companies, the formulation of requirements for compliance might be slightly different.[30]

2.3 REQUIREMENT OF LEGALITY FOR NATIONAL LAW

As explained in section 2.2, the next step of the ECtHR's assessment is to examine the requirement of legality. In those cases that concern negative obligations (where the employer is a state authority or company linked to the state), the requirement of legality means that the interference with privacy must be in accordance with the law. If the case concerns positive obligations (where the employer is a private entity), the ECtHR will analyse if the state has created a legislative framework that safeguards against abuse. In this section, these two reiterations of the requirement for legality are discussed.

The examination of whether an interference was in accordance with the law requires considering the domestic legal system in question. The Convention does not establish any requirements as to the form of domestic law. The requirement is fulfilled, disregarding who regulates the issue—Parliament, the Government, or other actors — as long as this regulator has decision-making powers under national law.[31] The mere existence of national regulations of some sort is considered insufficient, as the law must possess certain qualities, namely, to be foreseeable and accessible.[32] When discussing foreseeability, the ECtHR assesses the availability of practice and guidelines. The absence of, or self-contradicting answers in these sources, can indicate a lack of foreseeability.[33]

In an employment context, the ECtHR deems that absolute precision can be neither expected nor is it desirable: it is not required that the law defines different types of conduct in detail, but the rules can be described in broad terms.[34] The reasoning behind this is that the parties are considered equal in employment relations, as they are based on equal contracts rather than on power relations.[35]

When positive obligations to regulate in an employment context are discussed, the ECtHR, as a rule, reiterates that the states enjoy broad discretion in deciding how to regulate. The national legislator may choose whether the regulation should be embodied in labour, civil, constitutional, administrative, or criminal law.[36] Concerning the obligation to regulate employees' data protection, two requirements of domestic law are repeatedly considered. First, domestic law must ensure that there are sufficient procedural safeguards against abuse.

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[30] C's disclosure of information based on national regulation means that the state's negative obligations are involved. However, as shown in the previous section, the mere fact that health data is disclosed to the employer will likely not reach a minimum level of severity. The ECtHR will therefore view the case in light of the reason-based approach, evaluating the justification of the employer's decision rather than the fact that the national regulation demands disclosure. See similar reasoning in *Budimir* v *Croatia* App no 44691/14 (ECtHR, 16 December 2021) para 58, where positive (and not negative) obligation became a subject of discussion.

[31] *Wretlund* v *Sweden* App no 46210/99 (ECtHR, 9 March 2004).

[32] *Mateescu* v *Romania* App no 1944/10 (ECtHR, 14 January 2014), para 29; *Peck* v *the United Kingdom* App no 44647/98 (ECtHR, 28 January 2003), para 64; *Y.Y.* v *Russia* App no 40378/06 (ECtHR, 23 February 2016), paras 57–58.

[33] *Oleksandr Volkov* v *Ukraine* App no 21722/11 (ECtHR, 9 January 2013), para 185; *Surikov* v *Ukraine* App no 42788/06 (ECtHR, 26 January 2017), paras 80–81; *Köpke* v *Germany* App no 420/07 (ECtHR, 5 October 2010); *cf. Libert* v *France* App no 588/13 (ECtHR, 22 February 2018), para 44; see also *Antović and Mirković* v *Montenegro* App no 70838/13 (ECtHR, 28 November 2017), paras 59–60.

[34] *Oleksandr Volkov* v *Ukraine* App no 21722/11 (ECtHR, 9 January 2013), paras 176–177.

[35] *Bărbulescu* v *Romania* [GC] App no 61496/08 (ECtHR, 5 September 2017), paras 117–118.

[36] *Bărbulescu* v *Romania* [GC] App no 61496/08 (ECtHR, 5 September 2017), paras 115–116.

Second, it shall see to that any interference with privacy in relations between private parties is proportional.[37] Other than these requirements, the obligation has not been specified.

The broad margin of discretion regarding how to regulate, and the lack of case law on the right to privacy in employment relations, make it difficult to determine whether there are other more specific positive obligations in this field. For the cases of B (bipolar disorder) and C (HIV diagnosis), these requirements mean that if the domestic legal system does not allow any procedural safeguards against unlawful interference into privacy, Article 8 ECHR is likely to be violated. It also means that domestic law must impose the duty on decision-makers to identify conflicting interests that exist, including B and C's interest of privacy, and oblige the decision-makers to make a proportionality assessment. This identification of conflicting interests is also referred to as a "fair balance" test, and its material substance will be discussed further.

2.4 BALANCING EXERCISE

Once the ECtHR is satisfied that the requirements of legality are fulfilled, it assesses the legitimacy of the interests, or put differently, if the purposes for interfering with the employee's right to privacy were permissible. This part of the assessment derives from the language of Article 8.2 ECHR and serves to assess compliance with the duty not to interfere. The examination of legitimate interests is also a consistent part of the "fair balance" test in evaluating the state's duty to act.[38] Article 8.2 ECHR enlists interests that can be regarded as legitimate; these include public safety, protection of health, prevention of disorder and the rights of others. The varying reasons for employers to process information about employees' health may include ensuring workers' or clients'/customers' health and safety, assessing the lawfulness of absence at work, customising rehabilitation schemas, or various communications concerning insurance. They all pursue legitimate interests under Article 8.2 ECHR.[39]

Returning to our cases, in B's situation, the information on his bipolar diagnosis is provided to ensure a safer working environment and psychological support. In the case of C, the information on her HIV diagnosis is used to ensure patient safety. Therefore, neither case B nor C raise concerns about the employers' legitimate interests in processing employee health data (as mentioned above, A's Covid-19 related case does not pass the definitional threshold and, therefore, is not discussed further in the ECHR analysis).

As part of the necessary-in-a-democratic-society test for negative obligations, the ECtHR analyses whether the measures taken by the state are proportional to the legitimate interests and answers to "pressing social needs".[40] The ECtHR will usually start with identifying different interests at stake.[41]

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[37] *López Ribalda and Others* v *Spain* [GC] App no 1874/13 and 8567/13 (ECtHR, 17 October 2019), paras 112–114; *Bărbulescu* v *Romania* [GC] App no 61496/08 (ECtHR, 5 September 2017), paras 120, 122.
[38] *López Ribalda and Others* v *Spain* [GC] App no 1874/13 and 8567/13 (ECtHR, 17 October 2019), para 134.
[39] See *e.g. Surikov* v *Ukraine* App no 42788/06 (ECtHR, 26 January 2017), para 91.
[40] *Mile Novaković* v *Croatia* App no 73544/14 (ECtHR, 17 December 2020), paras 58–61; *Polyakh and Others* v *Ukraine* App no 58812/15, 53217/16 59099/16 and 23231/18 (ECtHR, 17 October 2019), para 283; *Fernández Martínez* v *Spain* [GC] App no 56030/07 (ECtHR, 12 June 2014), para 124.
[41] *Fernández Martínez* v *Spain* [GC] App no 56030/07 (ECtHR, 12 June 2014), para 123; *Mile Novaković* v *Croatia* App no 73544/14 (ECtHR, 17 December 2020), paras 61–66; *Pişkin* v *Turkey* App no 33399/18 (ECtHR, 15 December 2020), paras 222–227.

For positive obligations under Article 8, the "fair balance" test is used. The test is substantially similar to the necessary-in-a-democratic-society test for negative obligations. This test means that the interests of the employer and employees should be identified and weighed against one another. In case law on positive obligations, the ECtHR explicitly requires that national actors, in their decision-making, recognise the privacy of employees as one of the interests at stake.[42] The ECtHR does not state any other explicit requirements for weighing these interests.

After identifying the interests at stake, the ECtHR turns its attention to the margin of appreciation or the states' discretion in choosing the means to achieve the competing interests. This margin depends on the interests identified. Since the Convention has a subsidiary function, the states are often considered to be in the best position to determine the means necessary for achieving legitimate interests.

The ECtHR often reflects that the protection of health, safety, or prevention of disorders at work falls within a broad margin of appreciation. An example to confirm the broad margin to protect safety can be provided. In *Wretlund* v *Sweden* an employee at a nuclear power plant—an office cleaner—was subjected to compulsory drug tests. Although the employee did not have access to sensitive security areas, the ECtHR considered these examinations as compliant with Article 8, and the case inadmissible. The interest of safety weighed more than the interest of privacy.[43] The broad margin is also clearly visible in data protection case law outside employment relations. In *Y* v *Turkey*, the ECtHR considers that usage of the information about the applicant's HIV status within a hospital is proportional to the purpose of protecting the rights and interests of healthcare professionals and patients.[44] Similar weighing is also visible in case law on freedom of religion in employment. In *Eweida and Others* v *the United Kingdom*, the second applicant was forced to expose a religious symbol due to uniform alternation. Wearing the symbol was regarded as dangerous for patient safety. The employer reallocated the applicant to a non-nursing position to protect health and safety. The ECtHR did not examine in any detail how wearing the religious symbol would jeopardise health and safety in a hospital; it pointed out that hospital management is better placed to provide such assessment.[45]

The broad margin also applies to health and safety in hospitals and is relevant for C's case. This margin is explained by the ECtHR giving particular weight to protecting the rights to life and prohibition of torture and inhumane treatment. Since the interests of protecting lives and health weigh heavier than healthcare professionals' rights, the ECtHR regards that states must have more leeway to protect these vital interests.

The margin of appreciation can be narrowed in cases that concern aspects of realising individual rights. For instance, in cases that affect particularly vulnerable groups that have been discriminated against or stigmatised throughout history—such as persons with HIV or

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[42] *López Ribalda and Others* v *Spain* [GC] App no 1874/13 and 8567/13 (ECtHR, 17 October 2019), para 122; *Köpke* v *Germany* App no 420/07 (ECtHR, October 2010).
[43] *Wretlund* v *Sweden*, App no 46210/99 (ECtHR, 9 March 2004).
[44] *Y* v *Turkey* App no 648/10 (ECtHR, 17 February 2015).
[45] *Eweida and Others* v *the United Kingdom* App no 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013), paras 20 and 99; *Fernandes de Oliveira* v *Portugal* [GC] App no 78103/14 (ECtHR, 31 January 2019), para 104; *Shchiborshch and Kuzmina* v *Russia* App no 5269/08 (ECtHR, 16 January 2014), para 204.

mental disabilities—the margin of appreciation should be narrower.[46] This reasoning means that the ECtHR shall scrutinise in more detail the reasons for states' weighing the conflicting interests at stake in an unfavourable manner for these vulnerable groups, also determining whether the purpose could be achieved with less intrusive means. In such cases where the ECtHR has concluded a violation of Article 8 in employment relations, some form of discriminatory behaviour of the employer has typically been substantiated (in *Mile Novaković*, connected with protected characteristics of ethnicity; in *Özpınar*, a gender; and in *Polyakh and Others*, political opinion). Such cases are also typically related to very intimate aspects of the employee's private life (in *Bărbulescu*, correspondence of intimate character, in *Schüth*, an extramarital relationship with a woman who was expecting his child).[47]

The states' margin of appreciation will also be narrower when there is a European consensus on the impermissibility of certain rights limitations. Although the term "European consensus" has not been defined by the ECtHR, it can be explained as a trend to have a similar approach in the legislation of the Council of Europe states or when many of them are parties of another treaty that establishes specific rules or principles.[48] In its practice on data protection in employment relations, the ECtHR mostly refers to the International Labour Office Code of Practice on the Protection of Workers' Personal Data, the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data and the GDPR.[49] The universal features of these instruments include requirements of the lawfulness of processing the data, prohibition/limitation of processing the data for other purposes than they were collected, keeping the data up-to-date, and providing procedural guarantees.[50] The ECtHR may refer to the GDPR, or other treaties, as a possible indicator for altering the margin of appreciation; however, as this instrument is applicable only within the certain Member States of the Council of Europe, so the ECtHR is not obliged to do that. Identifying this narrower margin of appreciation usually leads the ECtHR to consider whether states used less intrusive means.[51] Whether the ECtHR will deem that the use of health data in employment relations (for the interests mentioned above) falls within the broader or narrower margin of appreciation is unclear at present due to the scarcity of case practice that explicitly addresses this issue. However, narrowing the margin of appreciation through references to the GDPR may be expected in future case law.

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[46] *Kiyutin* v *Russia* App no 2700/10 (ECtHR, 10 March 2011), paras 62, 64; *Novruk and Others* v *Russia* App no 31039/11, 48511/11, 76810/12, 14618/13 and 13817/14 (ECtHR, 15 March 2016), paras 98, 100–101; see also *Armonienė* v *Lithuania* App no 36919/02 (ECtHR, 25 November 2008), paras 42–47; *Travaš* v *Croatia* App no 75581/13 (ECtHR, 4 October 2016), para 78; *A.-M.V.* v *Finland* App no 53251/13 (ECtHR, 23 March 2017), para 73; *Cînța* v *Romania* App no 3891/19 (ECtHR, 18 February 2020), para 41.

[47] *Bărbulescu* v *Romania* [GC] App no 61496/08 (ECtHR, 5 September 2017), para 136; *Schüth* v *Germany* App no 1620/03 (ECtHR, 23 September 2010), para 74; *Mile Novaković* v *Croatia* App no 73544/14 (ECtHR, 17 December 2020), paras 64–70; *Özpınar* c *Turquie* requête no 20999/04 (ECtHR, 19 October 2010), paras 76–79; *Polyakh and Others* v *Ukraine* App no 58812/15, 53217/16 59099/16 and 23231/18 (ECtHR, 17 October 2019), paras 292–308 and 321.

[48] See *e.g. Vavřička* and *Others* v *the Czech Republic* [GC] App no 47621/13, 3867/14, 73094/14, 19298/15, 19306/15 and 43883/15 (ECtHR, 8 April 2021), para 273; Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (CUP 2015) 11.

[49] *López Ribalda and Others* v *Spain* [GC] App no 1874/13 and 8567/13 (ECtHR, 17 October 2019), paras 60–66; *Surikov* v *Ukraine* App no 42788/06 (ECtHR, 26 January 2017), para 74; *Bărbulescu* v *Romania* [GC] App no 61496/08 (ECtHR, 5 September 2017) paras 38–51, 122.

[50] *Surikov* v *Ukraine* App no 42788/06 (ECtHR, 26 January 2017), para 86.

[51] *López Ribalda and Others* v *Spain* [GC] App no 1874/13 and 8567/13 (ECtHR, 17 October 2019), paras 116 and 128.

To summarise and illustrate the ECtHR's reasoning on balancing, we will return to the cases of B and C. To decide whether the decision to reallocate C due to her HIV diagnosis is proportional, one needs to start with identifying the various interests at stake. On the one hand, these include protecting C's private life and not discriminating against C (a sensitive issue due to the history of HIV stigmatisation). On the other hand, there are interests of the employer to ensure the health and safety of other employees and patients at the hospital. As identified earlier, in the ECtHR's case law, the interests of health and safety are usually considered weighty due to the connection with the right to life and freedom from ill-treatment. The ECtHR will likely conclude that, in this case, the state enjoys a wide margin of appreciation to ensure better protection of these weighty interests. To conduct a further assessment, understanding how C's reallocation ensures a safer work environment or improves patient safety is relevant. This assessment signifies the importance of ascertaining what kind of assignment C fulfilled in paediatric care and whether transmission of HIV was even remotely possible. It can also be relevant to compare the risks in the department where C was reallocated to those risks in paediatric care. However, as mentioned above, due to the weight of the interest of protecting lives and safety in hospitals, the ECtHR will likely find that the state is better suited to decide how to protect these interests and will not consider the reallocation to be disproportional.

In the case of B, information about his bipolar disorder is disseminated to all other employees. In this situation, the ECtHR is expected to assess whether there is a foreseeable legal basis for disclosing that information or protection against abuse for unlawful processing of that data. If such a basis exists, the relevant question is whether the purpose of protection of health or security can be achieved with this dissemination.[52] The answer to this question, in particular, depends on the possibilities for providing help within such settings, how many employees and in what capacity they received this information, the way the disease is manifested, the types of assignments B fulfils, including how vital the interests of others are. The types of assignments that B and others fulfil may indicate vital interests at place and broader margin. If the interests of others are not vital, the ECtHR is likely to consider that the case falls within a narrower margin of appreciation, in particular, because B's mental disorder has historically been stigmatised. The other factor that may indicate a narrower margin of appreciation is a European consensus to limit data processing for a different purpose than was originally obtained for. Thus, B's case is likely to be the most prospective for the applicant in the ECtHR among the three cases if no other vital interests are identified.

3 PROCESSING OF EMPLOYEE HEALTH DATA IN THE GDPR

3.1 DATA PROTECTION AS A FUNDAMENTAL RIGHT AND THE NEXUS OF THE GDPR

From the EU perspective, data protection is a legal concept that extends beyond the GDPR. Article 8 of the Charter of Fundamental Rights of the EU, CFR, recognises data protection as a fundamental right, stating that such data must be processed fairly for specified purposes

[52] *Surikov* v *Ukraine* App no 42788/06 (ECtHR, 26 January 2017), para 93.

and on the basis of consent, or some other legitimate basis laid down by law.[53] In this respect, it is of interest to point out that Article 6(3) of the Treaty on European Union[54] holds the rights of the ECHR as general principles of EU law, and that many of the CFR fundamental rights are modelled after their ECHR counterparts.[55] That this regulatory link to the ECHR extends to the area of data protection is also made clear from that Article 52(3) CFR, which states that rights corresponding to those guaranteed by the ECHR should be the same in meaning and scope (while Union law may provide more extensive protection)—coupled with the fact that Article 8 CFR is based on Article 8 ECHR.[56] And, as Article 53 CFR also holds that nothing in the Charter is to be interpreted as restricting or adversely affecting ECHR rights, the right to respect for private life under the ECHR thus sets a minimum standard for the data protection to be offered by the CFR. This does not mean that the EU is formally bound by the ECHR or the ECtHR's case law (the EU has not accessioned). It does, however, mean that the EU is indirectly bound by the ECHR, as the latter must always be obeyed when restricting fundamental rights in the EU.[57] This necessitates that the CJEU interpret the ECHR and ECtHR case law, in order to make sure that any interpretations of EU law do not violate the ECHR (particularly as this would place the Member States in an invidious position).

The above-mentioned circumstances, of course, stretches into the realm of the GDPR. While the Charter certainly is the instrument that is the closest to being an equivalent to the ECHR within EU law, the GDPR is the instrument that is effectively meant to realise the Article 8 CFR data protection rights in the EU. The GDPR can thus be seen as an implementation of the fundamental right to data protection.[58] This effectively means that the ECHR, by proxy of the CFR, sets the minimum standard for the level of protection that the GDPR has to offer.[59] The CJEU must, therefore, also ensure that any interpretation of the GDPR (as well as the predecending Data Protection Directive[60]) is CFR and ECHR compliant. It is, thus, the GDPR that offers the most detailed account for the level of protection that EU law offers for employee health data.

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[53] Art 8 CFR gives effect to art 16 of the Treaty on the Functioning of the European Union, 13 December 2007, (TFEU) [2016] OJ C202/1, thus primary EU law, which states that everyone has the right to the protection of personal data concerning them.

[54] Treaty on European Union (TEU) [2008] OJ C115/13.

[55] European Parliament, Council of the European Union, European Commission, Explanations (*) Relating to the Charter of Fundamental Rights (2007/C 303/02) [2007] OJ C 303/17.

[56] See the explanation on art 8, European Parliament, Council of the European Union, European Commission, Explanations (*) Relating to the Charter of Fundamental Rights (2007/C 303/02) [2007] OJ C 303/17.

[57] Tobias Lock, 'The ECJ and the ECtHR: The Future Relationship between the Two European Courts' (2009) 8 The Law & Practice of International Courts and Tribunals 375, 382.

[58] van der Sloot (n 4) 11.

[59] Article 1(2) and Recital 2 GDPR. See also rec 4 GDPR and Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others* EU:C:2003:294, paras 69–72.

[60] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

3.2 DATA PROTECTION AT WORK? MATERIAL SCOPE AND APPLICATION OF THE GDPR IN AN EMPLOYMENT CONTEXT

In the rest of section 3, we will analyse the protection offered by the GDPR to employees in cases A–C. We will start out by focusing on the basic criteria for applicability and how they apply to our cases. These criteria are that the information must consist of protected "personal data" and be "processed".[61]

Regarding the first criteria, personal data is defined as any information relating to an identified or identifiable natural person.[62] We can state that all types of disclosed information in our cases (diagnosis of specific persons with Covid-19, bipolar disorder or HIV) are at the core of what constitutes personal data. Furthermore, these data include information about physical or mental health and, therefore, are at the core of what constitutes health data, which is recognised as a special category of data subject to a stricter data protection regime.[63]

Regarding the second criteria, the answer to whether the employers (who function as controllers under the GDPR) "process" the health data is also affirmative in all cases A–C. "Processing" encompasses any operation or set of operations performed on personal data or sets of personal data, either by automated means or manually if the data are (or intended to be) contained in a filing system.[64] Although this definition is broad, our cases illustrate some of its delineations.

The disclosure of A's Covid-19 test results likely involves processing because the employer intends to collect information on infection cases amongst employees for organisational or health and safety reasons. If the employer stores this data electronically, it is "processed" as "processing by automated means" effectively relates to all processing via computer technologies. If the data only is stored manually, it is still likely to be "processed". As long as the data is structured according to specific criteria, such as the employees' names or a list of Covid-19 cases within the workplace, it is contained in a "filing system". On the corresponding definition of filing systems in the previous Data Protection Directive 95/46/EC, the Art. 29 WP opinioned that most employment records are likely to fall within this definition.[65]

In B's case, processing similarly occurs when the information on his bipolar diagnosis is collected to certify the permissible sickness absence (whether handled electronically or manually). Had the employer chosen to inform B's colleagues of his diagnosis orally, the GDPR would not apply to that particular use (the data is not contained in a filing system). However, the fact that the employer used e-mail as the medium means that processing took place by automated means. In particular, the e-mailing qualifies as "further processing" of that data, which covers any act of processing following the data collection, whether done for the purposes initially specified or for any additional purposes.[66] As further processing only is allowed under strict conditions in the GDPR, we will return to the implications later.

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[61] Art 2(1) GDPR. The territorial scope of GDPR, art 3, will not be examined here.
[62] Art 4(1) GDPR. See, also, van der Sloot (n 4) 17.
[63] Art 4(15) and 9 GDPR, rec 35 GDPR. See also Case C-101/01 *Criminal proceedings against Bodil Lindqvist* [2003] EU:C:2003:596, para 50. The specific phrasing used in the article is "data concerning health".
[64] Art 2(1), 4(2) and 4(6) GDPR, rec 15 GDPR.
[65] The Art. 29 WP, *Opinion 8/2001 on the processing of personal data in the employment context* (WP 48 13 September 2001), p. 13; see also Case C-25/17 *Jehovan todistajat* EU:C:2018:551, para 57.
[66] The Art. 29 WP, *Opinion 03/2013 on Purpose Limitation* (WP 203 2 April 2013) 21.

Our last case does not include any information about how C disclosed her HIV status or how the employer later contained that health data. However, as the disclosure was mandated by law, the data will be contained in an electronic or manual filing system, such as a medical or HR file—meaning that the employer processes the data. The employer's later use of this data to inform the decision of C's reallocation does not in itself constitute "processing". This is because the GDPR's applicability is related to each discrete set of processing operations that handle the data. For example, data processing would occur at every instance the medical or HR file was accessed by or transmitted within the workplace or included in any new structured documentation related to the employer's decision to reallocate C. This illustrates that the procedural aspects of how the data is collected and used—rather than the purposes it is used for—are decisive for determining the GDPR's applicability. However, and as we will turn to next, what purposes the data is processed for will affect whether the processing is lawful.

3.3 BASES FOR LAWFUL PROCESSING OF EMPLOYEE PERSONAL AND HEALTH DATA

Unlike the ECHR, the GDPR formally recognises the specificity of data processing in the context of employment by including some employment-specific provisions.[67] This does not mean that employers are subject to a special data protection regime, as they can still base their processing of employee personal and health data on many of the non-employment-specific provisions of the GDPR. As we will see, however, the employment-specific provisions make GDPR more adaptable to Member States and labour market conditions when concerning employee data protection.

The basic conditions for processing any personal data are laid down in Article 5 GDPR. Of these, the principles of lawfulness, purpose limitation (requiring that the purposes for collecting data should be specified and legitimate, as well as restrict the possible further use of that data), and data minimisation (requiring that any data collected are held to a minimum as necessitated by the stated purposes for their use), are particularly relevant for delineating the possible scope of the employer's data processing in cases A–C. These three principles will be our focus, where initial and main attention will be given to the lawfulness criterion.

As introduced, all our cases concern health data, which qualifies as special category data in the GDPR.[68] To lawfully process employee health data, the employer must, therefore, not only show that at least one of the general lawful bases for processing personal data in Article 6 is met. The employer must also demonstrate that the processing is allowed under Article 9, as the article prohibits any processing of special category data unless a derogation applies.[69] In sections 3.3-3.4, we will structure our reasoning by thematically coupling the

[67] See Céline Brassart Olsen, 'To Track or not to Track? Employees' Data Privacy in the Age of Corporate Wellness, Mobile Health, and GDPR' (2020) 10 International Data Privacy Law 236, 242; Maja Brkan, 'Introduction: Employee's Privacy at the Forefront of Privacy Debates' 3 European Data Protection Law Review (Internet) 543, 543–544.

[68] Art 9 GDPR.

[69] The legal basis/bases in each of the articles need not be linked, Rec 51 GDPR and Commission expert group on the Regulation (EU) 2016/679 and Directive (EU) 2016/680, *Minutes of the Second Meeting* (2016) 2.

different bases of both articles, as either allowing for processing to cater to employer needs or to public interest needs.

3.4 LAWFUL PROCESSING FOR EMPLOYERS TO CATER TO THEIR OWN NEEDS

This section focuses on the conditions allowing employers to lawfully process health data to cater to their own obligations or interests.

First off, the processing of personal data may be allowed if the employer has asked for the employee's consent, Article 6(1)(a) GDPR. However, it is questionable whether consent may offer a legal basis for processing employee health data.[70] Article 4(11) GDPR defines consent as being freely given, specific, informed, and unambiguous. The related Recital 42 states that "freely given" implies a genuinely free choice for the data subject to be able to refuse or withdraw consent without detriment.[71] Specifically, Recital 43 also states that consent should not provide a valid legal basis for processing where there is a clear imbalance between the data subject and the controller. The Art. 29 WP has reasonably argued that employer-employee relations are of clear imbalance due to the latter's financial dependence on the former. It has been suggested that consent is "highly unlikely" as a legal basis for data processing at work unless employees can refuse without adverse consequences.[72] At the same time, Recital 155, adding specificity to Article 88 GDPR, states that Member State laws or collective agreements may regulate the conditions under which processing may be based on employees' consent. Altogether, this suggests that consent in an employment context may be a sufficient basis for the lawful processing of personal data, but that the employer-employee interests balancing should be done by a legislator or via collective bargaining—and not on an individual basis.

If no adverse consequences are linked to incompliance—as in A's case—the choice to comply with a policy to disclose Covid-19 tests results might meet the conditions for consent under 6(1)(a). However, as the case concerns health data, the consent must meet the additional requirements in Article 9(2)(a) GDPR—that it needs to be explicit, not implied. This means that a high degree of consent precision and definiteness, including a specific description of the purposes of the processing is required.[73] The GDPR emphasis on freely given consent suggests that the assessment should not be limited to formal or pre-stated sanctions. Instead, the assessment shall be contextual and encompass all factors that can affect the employees' position when asked or encouraged to consent. The mere absence of sanctions for incompliance in a workplace policy does not suffice to ensure that the employee is in a position to consent freely in the meaning of Article 9(2)(a) GDPR.

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[70] Art 7 GDPR sets out a number of conditions for consent, which will not be elaborated here.

[71] That consent should be given "freely" is in alignment with the principle of fairness in art 5(1)(a) GDPR. 41, Lee A Bygrave, 'Core Principles of Data Privacy Law' in Lee A Bygrave (ed), *Data Privacy Law: An International Perspective* (OUP 2014) 146 f. See also Case C-673/17 *Planet 49* EU:C:2019:801, para 52, on that consent points to active rather than passive behaviour from the data subject.

[72] The Art. 29 WP, *Opinion 2/2017 on data processing at work* (WP 249 8 June 2017) 3; The Art. 29 WP, *Opinion 03/2013* (n 66) 3. The Council of Europe and the European Union Agency for Fundamental Rights have also jointly made similar conclusions. European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European data protection law: 2018 edition* (Publications Office 2018) 144.

[73] Ludmila Georgieva and Cristopher Kuner, 'Article 9 Processing of Special Categories of Personal Data', in Lee A Bygrave, Cristopher Docksey and Cristopher Kuner (eds), *The EU General Data Protection Regulation (GDPR): A Commentary* (OUP Oxford 2020) 377.

For assessing if consent is freely given, the specific type of health data the case concerns must also be considered, including the level of sensitivity and stigma attached. However, the permissibility of consent as a basis for processing data in an employment context is still not clear in all respects. Suder shows that Member State Data Protection Authorities (DPAs) express different opinions in their guidelines on consent to process personal data in workplaces.[74] Further clarifications on the scope of Articles 6(1)(a) and 9(2)(a) in an employment context in future CJEU case law would therefore be welcome.[75]

Therefore, consent may be a problematic basis for the routine processing of employee (personal and) health data. The generally most important legal basis for processing employee personal data is Article 6(1)(f), allowing processing necessary for the legitimate interests pursued by the controller.[76] Any such processing must be strictly necessary for a legitimate purpose, which must outweigh the employees' privacy rights in the workplace.[77] Recital 48 indicates that the employer's legitimate interests include transmitting employee personal data for internal administrative purposes. However, there is no basis in Article 9 that permits processing of special category data under a general balancing of interests. So even if a safer working environment and psychological support could qualify as legitimate interests to the employer, they would not by themselves enable the internal communication on B's bipolar disorder within the workplace. The same is true for any potential further processing of nurse C's HIV diagnosis related to the administration of her reallocation.

Of greater relevance for processing health data in workplaces are Articles 6(1)(c) and 9(2)(b) GDPR. Article 6(1)(c) allows data processing when necessary for compliance with legal obligations to which the controller (employer) is subject. Article 9(2)(b) does not directly correspond to 6(1)(c) but is of interest for finding the additional basis required to process sensitive data. The article expressly enables the processing of health data necessary to carry out the obligations and exercise specific rights of the controller or the data subject for employment, social security, and social protection. Article 9(2)(b) is also dependent on special regulation: the processing must be authorised by Union or Member State law or a collective agreement under Member State law. Such obligations must not include a specific law for each individual processing. A specific regulated obligation could therefore enable different kinds of processing activities. However, each processing must be necessary to fulfil obligations or exercise the rights of employers or employees.[78] Notably, Article 9(2)(b) applies to the rights and obligations of employers and employees. Depending on the specific rights or obligations, such as employee rights to lawful sick leave or employer obligations to provide for a safe

[74] Seili Suder, 'Processing Employees' Personal Data during the Covid-19 Pandemic', (2020) 12 (3) European Labour Law Journal (Internet) 1, 9. Suder's analysis was primarily based on Covid-19 related guidance issued by 20 DPAs of the Member States. See also Mahsa Shabani, Tom Goffin and Heidi Mertes, 'Reporting, recording, and communication of COVID-19 cases in workplace: data protection as a moving target' (2020) 7 (1) Journal of Law and the Biosciences.

[75] Art 9(2)(e) GDPR allows processing when sensitive data (such as health data) has been manifestly made public by the data subject. This basis bears some kinship to consent, but is not relevant to the cases A–C and will not be explored in this article.

[76] This basis does not apply to processing carried out by public authorities in the performance of their tasks, art 6(1) GDPR.

[77] The Art. 29 WP, *Opinion 2/2017* (n 72) 23. See also, Claudia Oriseg, 'GDPR and Personal Data Protection in the Employment Context' (2017) 3 Labour & Law Issues 1, 12.

[78] Rec 45 GDPR. See, also, rec 41 GDPR.

working environment, Article 9(2)(b) may therefore unlock employers' possibilities to process data in many situations.

Returning to our cases, a regulation placing such obligations on employers that necessitates testing or reporting of Covid-19 cases amongst employees could enable processing in case A. The obligation must not specify the collection of Covid-19 test results, but could relate to health and safety at work or obligations justified by public interests that are specifically directed at the employer. In the case of B, social security or employment regulations creating obligations related to employee sickness absence could enable processing. Employer C is subject to national patient safety regulations obliging her to disclose her HIV-positive status. However, as will be elucidated later, Member State regulations must also be based on legitimate purposes and only allow personal data processing necessary to achieve those purposes.

Furthermore, Article 9(2)(h) GDPR can also be relevant for discussion. It allows for processing health data when required for preventive or occupational medicine, assessing the employee's working capacity, or managing health or social care systems and services. However, it only allows processing by, or under the responsibility of, a professional subject to the obligation of professional secrecy.[79] The provision, for example, enables health care professionals to help the employer assess work performance. It does not enable employers to process the data themselves, and would therefore not enable processing in the cases A–C.

As seen, employers can rarely rely on consent for processing employee health data. The most viable ground for employers to process such data is, therefore, when necessitated by the fulfilment of obligations or ensuring of employee rights, as allowed by Article 9(2)(b) GDPR. Notably, for the employment context, such rights and obligations could also be laid down in collective agreements (if pursuant to Member State law).

3.5 LAWFUL PROCESSING FOR EMPLOYERS TO CATER TO PUBLIC INTERESTS

This section focuses on the GDPR's possible legal bases for employers to lawfully process health data to cater to other (external) needs than their own, and primarily those of public interest.

Starting with Article 6(1)(e) GDPR, it permits processing if necessary for performing tasks of public interest, based on Union or Member State law. Correspondingly, Article 9(2)(g) GDPR allows the processing of sensitive data if the regulated public interest qualifies as "substantial". Recital 45 clarifies that the healthcare sector—employer in case C—is of public interest. However, the specific patient safety risk posed by C's HIV diagnosis is unlikely to qualify as "substantial" in this regard. This is indicated by Recital 46, which provides no definition of "substantial" interests, but exemplifies the less sharply worded "important grounds" of public interest as processing necessary for monitoring epidemics and their spread or in situations of humanitarian emergencies. These examples indicate that the public interests should be of a larger scale than in case C. The EDPB has in its Covid-19 specific statement, referred to substantial public interests as a plausible option for employers

[79] Art 9(3) GDPR.

to process health data to control health threats, as relevant to case A.[80] The dependence on Union or Member State law, however, underlines that more specific regulation must set out the purposes and grounds that reflect a substantial public interest.[81] Notably, this basis would therefore be relevant in cases where the public interests are laid out in law but not specifically addressed to employers in the form of legal obligations (for which case the Articles 6(1)(c) and 9(2)(b) would be more viable).

Lawful processing could also take place if necessary to protect the vital interest of the data subject or another natural person under Article 6(1)(d). Recital 112 indicates that "vital interests" include the physical integrity or life of the person. When the data are sensitive, such as health data, the corresponding basis in Article 9.2(c), however, only allows for processing when the data subject is physically or legally incapable of giving consent. Therefore, the significance of Article 6(1)(d) in an employment context and its relevance for our cases A–C is limited. The EDPB has mentioned this basis as lawful for employers to process special category data, such as health data, in emergencies.[82]

Finishing off with Article 9(2)(i) GDPR, it has no directly corresponding basis in Article 6, but enables processing necessary for reasons of public interest in the area of public health based on Union or Member State law (such as protecting against serious cross-border threats to health or ensuring high standards of quality and safety of healthcare). This basis is, therefore, particularly relevant for case A, and the EDPB (in its Covid-19 statement) foresaw its possible use to employers in processing health data when taking the already introduced Recital 46 into consideration.[83] However, Recital 54 clarifies that such processing should not result in personal data being processed for other purposes by third parties such as employers. Insofar as Article 9(2)(i) may be applicable in an employment context at all, it may therefore never be used to serve employer needs. It is rather intended for use by public health authorities, non-governmental organisations and other entities working in areas such as disaster relief and humanitarian aid.[84] However, some Member State DPA's consider that employers can rely on this basis to process employee health data relating to Covid-19 when executing explicit instructions and acting on the advice of competent authorities.[85]

To summarise, the most plausible bases for unlocking processing capabilities for employee health data in relation to our cases are Article 9(2)(g) GDPR, substantial public interests, and Article 9(2)(i), processing necessary for reasons of public interest in the area of public health. Both of these bases might be relevant, in particular, to case A. They also share that they have been made dependent on further EU or Member state regulation, which clarifies that "public interests" should be laid out in law.

3.6 PROCESSING PROVIDED FOR BY SPECIFIC REGULATION

Our observations in previous sections indicate that the GDPR allows the processing of employee health data in many—although specific—situations. As shown, consent is not a

[80] EDPB, *Statement on the processing of personal data in the context of the COVID-19 outbreak* (EDPB, 19 March 2020) 1 f.
[81] See, also, rec 52 GDPR.
[82] See EDPB (n 80) 2.
[83] EDPB (n 80) 2.
[84] Georgieva and Kuner (n 73) 380.
[85] Suder (n 74) 8.

particularly viable ground while not entirely precluded. Furthermore, most of the examined legal bases in Article 6 and all the examined derogations in Article 9, have been made dependent on specific regulations. This reliance on specific regulation allows the Member States to take divergent regulatory approaches and de facto create different protection levels of employee health data between states.[86] However, it is also clear that the Member State's mandates to install such provisions are subject to limitations.

Especially important as a restricting factor to the Member State's space for regulatory manoeuvre is the already introduced aspect that any national rules, even when installed under the approval of the GDPR, will be subordinate to (and evaluated against) the basic standards of data protection set by the CFR and ECHR. The CFR, as well as the ECHR, are therefore integral benchmarks for the right to data protection in the GDPR. One important manifestation of this permeation of human and fundamental rights into the GDPR, is the established CJEU case law that the Member States' derogations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary (which includes that the measures adopted must be less intrusive compared to other options for achieving the same goal).[87] The necessity of the legislation must, in particular, also be evaluated against the Member States' stated reasons for that specific regulation. Referencing Article 52(1) CFR, the CJEU has, for example, dismissed national legislation providing for public access to personal data because such unrestricted access was not necessary to achieve the stated objective of improved traffic safety.[88] This implies a requirement for the Member States to clarify the objectives of any specific regulation they install.

The GDPR's anchoring in fundamental rights is also underlined by the fact that the Member States' space for regulatory manoeuvre often is restricted by obligations to combine the specific regulation with safeguards aimed at protecting the rights of the data subjects. This is the case for any Union or Member state regulation allowing the processing of special category data, such as health data.[89] It is also the case for any employment specific regulation or collective agreements installed under Article 88(1) GDPR.[90] Such rules could include specific rules regarding data processing for the discharge of obligations, health and safety at work, and the enjoyment of rights and benefits related to employment— but must include safeguards aimed at protecting the employee's human dignity, legitimate interests, and fundamental rights. Particular regard should also be given to the transparency of processing, the transfer of personal data within a group of undertakings, or a group of enterprises engaged in a joint economic activity and monitoring systems at the workplace.[91] This

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[86] Rec 10 GDPR.

[87] See case C-13/*16 Valsts policijas Rīgas reģiona pārvaldes Kārtības policijas pārvalde v Rīgas pašvaldības SIA 'Rīgas satiksme* EU:C:2017:336, para 30, and cited case law.

[88] Case C-439/19 *B v Latvijas Republikas Saeima* EU:C:2021:504, paras 105, 115–122.

[89] Article 9(4) and rec 52 GDPR. See also, for example, Article 23(1); Emanuele Ventrella, 'Privacy in emergency circumstances: data protection and the COVID-19 pandemic' (2020) 21 ERA Forum 379.

[90] Patrick Van Ecke & Anrijs Šimkus, 'Article 88 Processing in the Context of Employment' in Lee A. Bygrave, Christopher Docksey and Christopher Kuner (eds), *The EU General Data Protection Regulation (GDPR): A commentary* (OUP 2020) 1234, 1237.

[91] Article 88(2) GDPR. See also rec 155 GDPR; Paul De Hert and Hans Lammerant, 'Protection of personal data in work-related relations', Study made on behalf of the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (*Publications Office* 2013) 67. Currently pending before the CJEU is a request for a preliminary ruling on whether national rules not meeting these safeguarding-requirements nevertheless can remain applicable, case C-34/21 Hauptpersonalrat der Lehrerinnen und Lehrer beim

indicates that prioritised safeguarding measures are those aimed at restricting the free flow of employee data within large and complex employer organisations, as well as those that help make employees aware of occurring processing activities (to enable better watching over that data protection rights are respected).

As put by Wagner and Benecke, the utilisation of GDPR opening clauses by Member states leads to a complex system of legal provisions requiring the addressees of those provisions, such as employers, to have a deep understanding of the relationship between European and national law.[92] This conclusion also extends to the requirements of having appropriate safeguards in place, where the specific content and effectiveness of privacy-protecting measures also need to be considered in a multi-layered legal structure. This shows that the GDPR seldom operates in isolation (as a stand-alone regulation) in the context of employment.

3.7 PURPOSE LIMITATION AND DATA MINIMISATION

We will now return to the principles of purpose limitation and data minimisation and their possible effects on our cases. Because, even if a lawful basis for processing employee health data has been established in accordance with Articles 6 and 9 GDPR, and even if there was specific regulation in place to support that particular processing, these principles are key to preventing excessive use of the data.

The purpose limitation principle holds that data must be collected for specified, explicit, and legitimate purposes (purpose specification) — and that it may not be further processed in a manner incompatible with those purposes (compatible use).[93] While A's case does not involve any apparent further processing of the collected data, B's case does. The employer's stated reasons, to provide a safe working environment and psychological support for B, are clearly different from certifying B's permissible sick leave. Therefore, further processing in B is only lawful if it passes the compatible use test. In this test, consideration should be given to factors such as the links between the original purpose and the upcoming purpose, and the contexts where the data has been collected (where the relationship between the data subject and the controller is relevant). Similarly, the data sensitivity, including the possible consequences of the intended further processing, and the existence of appropriate safeguards, shall be regarded.[94] The Art. 29 WP has expressed that the more sensitive nature of the data involved, the narrower the scope for compatible use (which is in line with the express requirement in Article 6(4) to consider the nature of the data).[95]

Here, B's subordinate position to his employer, combined with the fact that the bipolar disease is sensitive information, indicates a narrow scope and that the further processing

Hessischen Kultusministerium v Minister des Hessischen Kultusministeriums, Request for a preliminary ruling from the Verwaltungsgericht Wiesbaden (Germany), lodged on 20 January 2021.

[92] Julian Wagner & Alexander Benecke, 'National Legislation within the Framework of the GDPR' (2016) 2 European data protection law review 353–361.

[93] Art 5(1)(b), 6(1)(b) and rec 39 GDPR. Art. 29 WP, *Opinion 03/2013* (n 66) 11 f.; Cécile de Terwangne, 'Article 5. Principles relating to processing of personal data' in Lee A. Bygrave, Cristopher Docksey and Cristopher Kuner, *The EU General Data Protection Regulation (GDPR): A commentary* (OUP Oxford 2020) 315.

[94] Article 6(4) GDPR. See also, rec 50 GDPR.

[95] Art. 29 WP, *Opinion 03/2013* (n 66) 25.

would not pass the compatible use test. Informing B's colleagues without either B's consent or a basis in Union or Member State law would, therefore, be unlawful.

In C's case, we do not know whether any further processing occurred, although it is likely that C's HR or medical file was accessed or transmitted within the workplace during her reallocating to another department. Any such further processing would most probably be covered by the original purpose set by the obligating regulation—to protect patient safety (by reducing the risk of infectious disease spreading). Therefore, the circumstances of case C do not indicate that the purpose limitation principle would pose a limitation.

Moving on to the data minimisation principle, it holds that any processing should be adequate, relevant, and limited to what is necessary for the purposes of the processing.[96] This marks that the necessity and proportionality must be assessed for each specific processing rather than be based on general considerations.[97]

In our cases, the fact that employee A is working from home may call the necessity of processing Covid-19 test results into question. However, the conclusion is dependent on the specific purpose of the processing. Especially if the employer's processing is aimed at complying with a directly regulated obligation, it is likely to suffice as necessary. Where the purposes for processing are only indirectly linked to the employer, such as when prompted by public interests (like preventing the spread of a virus), the necessity of the particular processing must be assessed in relation to the employer's role in aiding those purposes. This limits the employer's conditions to take on tasks on its own initiative to serve public interests.

B disclosed his bipolar disorder diagnosis to certify his sickness absence. This fact will likely meet the necessity requirement for processing as long as the information is needed for the employer to be able to assess B's incapacity to work.

For C, even if there is a legal obligation to disclose health-related information for patient safety reasons, the necessity of the employer's processing will be assessed in relation to what type of data is covered by the disclosure obligation. If the obligation is not explicitly directed at infectious diseases or HIV status, but relates to more abstract criteria, such as the risk of endangering patient safety, the necessity of the processing must be assessed. In this assessment, C's function and specific work tasks are relevant.[98]

According to CJEU data protection case law, only those measures limiting the right to data protection that have proved to be necessary should proceed to the next step, the proportionality test.[99] Here, the proportionality assessment will have to be made for each specific processing and aim to identify whether the advantages of the measure outweigh the

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[96] This corresponds to the requirement of art 52(1) CFR which states that any limitation on the exercise of the right to personal data protection, art 8, must be "necessary" for an objective of general interest or to protect the rights and freedoms of others.

[97] See also rec 4 and 39. On the link between the data minimisation principle and proportionality, see also case C-708/18 *TK v Asociația de Proprietari bloc M5A-ScaraA* EU:C:2019:1064, para 48.

[98] Jana Žuľová, Marek Švec and Adam Madleňák, 'Personality Aspects of the Employee and their Exploration from the GDPR Perspective' (2018) 1 Central European Journal of Labour Law and Personnel Management 68, 74.

[99] Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen* EU:C:2010:662, paras 86–89; Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others* EU:C:2014:238, paras 92–98; case C-362/14 *Maximillian Schrems v Data Protection Commissioner* EU:C:2015:650, paras 92–93; European Data Protection Supervisor, *Assessing the Necessity of Measures that Limit the Fundamental Right to the Protection of Personal Data: A Toolkit* (EDPS, 11 April 2017) 5.

disadvantages it causes concerning fundamental rights.[100] As the proportionality must be assessed before the processing is carried out, the assessment cannot be based on the actual consequences that the specific data processing had for either employee A, B, or C. The assessment shall be based on the stated purpose and known circumstances at the time of processing and relate to the abstract and general risks that the processing could render.

The employer is thus obliged to justify each instance of processing personal data with a specific purpose and assess its necessity and proportionality to keep the processing to a minimum.[101] The GDPR thus prescribes as well as premises that employers have an active and conscious approach to all employee data processing within the workplace.

4 COMPARING THE INSTRUMENTS

It is now time to outline our conclusions. We will do this by comparing the level of protection for employee health data offered by the ECHR and GDPR. To highlight the identified differences in the interpretive steps for assessing the permissibility of using or processing such data, we will return to the fictive cases suggested at the beginning of this article.

In the first case, A disclosed positive Covid-19 test results to comply with an internal workplace policy. Our study indicates that cases similar to A's are unlikely to render the ECHR applicable. To invoke the right to privacy in employment relations, one must show a significant impact on private life or that there are employment-related consequences for the employee. In our example, neither the impact reaches the minimum level of severity nor has the employer made an employment-related decision due to A's disease. The structure of Article 8 ECHR means that whether consent to disclosure was given voluntarily is of no importance, the impact on the private life of the individual is in focus. Here, the fact that the health data disclosure was without prescribed consequences for incompliance has a significant bearing on this conclusion. The threshold for application of Article 8 ECHR has not yet been reached in the case of A.

When A's case is assessed from the GDPR's perspective, the more static nature of the scope of protection becomes evident. The applicability is not dependent on the actual consequences for A. Whether "processing" of protected data has occurred is assessed independently of A's particular private life impact. As the GDPR displays a hesitant position on whether consent really can be "freely" given in the employment context, the voluntariness of A's disclosure can be questioned even if there are no stated sanctions. The most viable bases for lawful processing are instead related to the employers' fulfilment of obligations or the ensuring of employee rights, substantial public interests, or public interests in the area of public health—which are all dependent on the existence of specific EU or national regulation (including collective agreements if they place obligations directly on employers). Although our case A omits information on whether any specific regulation was present, our analysis shows that there is no threshold for applicability in the GDPR other than that personal data must be processed. The analysis also shows that employers tasked with serving public

[100] Art 52(1) CFR, European Data Protection Supervisor, *Assessing the Necessity of Measures that Limit the Fundamental Right to the Protection of Personal Data: A Toolkit* (EDPS, 11 April 2017) 5.
[101] Article 23(1) GDPR, Dariusz Kloza and Laura Drechsler, 'Proportionality has Come to the GDPR', (*The European Law Blog*, 9 December 2020) <https://europeanlawblog.eu/2020/12/09/proportionality-has-come-to-the-gdpr/> accessed 1 September 2021.

interests (such as curbing the spread of Covid-19) may enjoy a more generous data protection regime in relation to processing employee health data.

The comparison in the case of A allows us to illustrate a substantial difference in reasoning between the ECHR and GDPR on the protection of employee health data. In the ECHR, what health data of the employee that will enjoy protection is determined on the basis of a relational assessment. However, the GDPR offers a static and broad definition of personal data. The notion of personal data in the GDPR, in contrast to privacy interference in the ECHR, is not context-dependent.

We now turn to the case of B, which involved the collection of health data on the employee's bipolar disorder and subsequent disclosure to other employees. The ECHR assessment here will primarily concern the disclosure of health data to others since this act, rather than the collection of data on its own, can significantly affect the employee's private life. Here, the ECtHR would use the consequence-based approach to determine the ECHR's applicability. This approach means that the ECtHR will assess whether the consequences of data disclosure have reached the minimum level of severity for B's private life. Whether an interference has occurred is a subject of dynamic interpretation and dependent on multiple factors, such as the attitude towards disease in a society or persons carrying it or other specific circumstances. We have argued that B's situation likely reaches the minimum level of severity as it has resulted in the inability to maintain social contacts at work.

At the justification stage, the assessment of B's case will concern the legality and proportionality of the interference. As to the legality, the ECtHR considers that the parties—the employer and the employee—are equal in employment relations. The acknowledgement of equal status rather than power relations results in the ECtHR's undetailed acceptance of the legal basis in domestic law. As to proportionality assessment, sharing information with other employees is likely to be considered a too invasive measure. For a qualified judgment, identifying and weighing the interests at stake in a specific case is necessary. Suppose other vital interests of the employer cannot be identified. In that case, B's mental disorder—a condition that historically has been stigmatised—is a factor requiring weighty reasons for sharing the data. If no vital interests of the employer for sharing the data are identified, the state's discretion in choosing whether to interfere with privacy is narrower. In such a case, the ECtHR is likely to find that sharing the data was not a proportionate means to fulfil a legitimate aim and that a violation of Article 8 took place. Furthermore, the ECtHR is likely to consider that the state's powers to decide are restricted due to the European consensus to limit data processing in relation to purposes other than that which the data was obtained for. To identify this narrower margin of appreciation, the ECtHR may refer to the GDPR's purpose limitation principle.

The GDPR reasoning regarding the scope of protection in B's case is similar to A's: the processing is viewed as a static and objective act, where the applicability is assessed independently of the particular consequences of the data that is processed. However, the case involves different instances of processing, which should be assessed separately: the collection of data about B's disease and the dissemination of that same data to others. Regarding the first processing, the regulation forming the basis of the employer's rights or obligations in this regard must, firstly, be proportionate by the standards of the CFR and the ECHR. This is a responsibility that rests with the national legislator. Since the capacity to assess permissible sick leave is an important but not solely unilateral interest of the

employer—but interest also relevant from the employee- as well as ultimately the public perspectives—we argue that specific regulation enabling employers to process such data is likely to be considered proportionate.[102] However, even if the specific regulation installed in accordance with a GDPR opening clause is proportional, this does not by default imply the necessity of processing any data covered by that regulation in the specific case. Employer B must also assess the proportionality of the particular processing following the "necessity-requirements" under Articles 6 and 9 and the data minimisation principle. Thus, employers can not solely rely on the national legislator's abstract proportionality assessment as manifested through regulation, but must also make their assessment before each specific processing—where the specific needs and specific risks the data processing entails for the employee are balanced against each other in more detail. In case B, the employer would have to consider what level of detail would be needed regarding B's condition to assess whether his absence was permissible, and keep the processing to a minimum.

Moving on to the second processing in case B, the purpose limitation principle must be considered. This is due to the data being collected for one purpose and disseminated for another (disclosing information to colleagues). As seen, the more sensitive the information involved, the narrower the scope for compatible use would be. The particular type of data concerned may therefore affect whether further processing is lawful under the original purpose, where information about B's bipolar disorder is particularly sensitive. We, therefore, argue that the second purpose for processing is unlikely to be compatible with the first. The conclusion is that further processing would require either B's consent or a separate basis in law.

For B, the outcome is similar in the ECHR and GDPR. However, this conclusion is reached through assessments focusing on slightly different aspects of the factual circumstances. As Article 8 ECHR is concerned with protecting the private life of persons (rather than just data protection), it approaches the question of permissibility rather broadly by focusing on the impact that the use of the data has on life and relations of the victim. By contrast, the fact that the assessment of lawful processing in the GDPR needs to be made before the event, means that the actual consequences that followed a given act of processing are not relevant regarding its legality,[103] while they may be essential to determine whether there has been an interference with privacy under the ECHR. This is because the GDPR determines the conditions under which the *act* of processing is lawful at the time it is carried out. The GDPR does not, and does not aim to, set out the full conditions for employees' (or other data subjects') right to privacy. As seen, it does not regulate whether employers may require their employees to disclose particular data but whether they are allowed to "process" that same data. The method by which the data is handled is decisive. So, although the GDPR more actively permeates the employer's everyday dealings with employee personal data in workplaces—by regulating every instance of processing—it also displays blind spots that

[102] See, for example, Case F-130/07 *Fiorella Vinci v European Central Bank* EU:F:2009:114, paras 122, 139. In the case, the Civil Service Tribunal did not find excessive, an EU body's collection of health data through the full examination of a staff members' general state of health in order to assess whether repeated sickness absence had been justified. The relevant regulation was the Regulation (EC) No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

[103] The specific consequences may, however, affect the data subject's compensation in case of violation, art 82 GDPR.

employers can utilise. By choosing to inform B's colleagues orally rather than via e-mail, the employer could have avoided GDPR applicability regarding the choice to inform B's colleagues, whilst this detail would not have had any decisive relevance under the ECHR.

The comparison in cases A and B also shows that the ECHR and GDPR recognise the relationship between employers and employees differently. The ECHR predominantly views the parties in employment relations as equals; the power imbalance in employer-employee relations is rarely acknowledged. The employment contract thus justifies a certain interference with privacy by employers under the ECHR. Instead, the GDPR explicitly recognises a general power imbalance between employees and employers in its data protection design, as particularly manifested through the restrictive view on consent. Even though there are several possible grounds in the GDPR that allow employers to process health data within the workplace, the instrument directs the primary focus away from the individual autonomy of the employee. The focus shifts towards the Member States' responsibility to determine, and manifest via the installation of national regulation, what type of data processing employers should be allowed to carry through.

Finally, C's case—a nurse reallocated to another department in the hospital due to her HIV—is likely to render the ECHR applicable. As the employer has made disadvantageous employment-related decisions based on personal life circumstances (namely, having a specific disease), the ECtHR would assess this situation using the reason-based approach and conclude that Article 8 is applicable. However, the ECtHR's broadly permissible approach to proportionality in cases on protection of health would make a violation unlikely. Unless the employee's interests significantly outweigh the employer's interests, states are presumed to have a broad margin of discretion in choosing means. In cases similar to C's, the protection of health and safety usually outweighs employees' interests, and such interference is usually seen as necessary.

The data collection regarding C's diagnosis amounts to "processing" under the GDPR, and is likely to be lawful when necessitated by applicable health and safety regulations. However, the use of C's health data to inform the decision to reallocate her will only be "caught" by the GDPR if the data is "further processed". The broad definition of processing, which includes any access to or transmissions of C's HR or medical files within the workplace, renders some form of further processing of her health data for reallocation purposes likely. In such a case, the further processing would likely be covered by the original purpose set by the obligating regulation—to protect patient safety (by reducing the risk of infectious disease spreading). Under the GDPR, processing occurs here and now, and only circumstances known at the time of processing are relevant to assess the lawfulness. Therefore, whatever impact the processing had on the employee's private life will not directly affect the assessment of whether it was lawful when it was carried out. This means that the compatibility assessment will be independent of whether, for example, the final decision to reallocate C is lawful.

As we see, the ECHR and GDPR also generate similar conclusions for the case of C, that the data usage is likely to be permissible (although derived through different assessments). A circumstance of particular interest in case C is, however, that we know that the disclosure was explicitly mandated by law. We have argued that this type of regulation would most probably suffice to the legality, necessity, and proportionality requirements under both the ECHR and the GDPR due to the type of disease and the purpose of

protecting health, safety, and preventing disorders at work. As the ECHR (by proxy of the CFR) functions as one standard setting instrument for the level of protection that the GDPR has to offer, the case law of the ECtHR under Article 8 ECHR is relevant, although not necessarily conclusive, when assessing whether a limitation is compliant with the CFR.[104] The CJEU's established general condition that any regulation interfering with CFR rights must be "strictly" necessary, indicates a more restrictive view on necessity than indicated by the ECtHR in its employment specific case law (where the court's view of the effect of the employment contract on the balance of power between employee and employer has justified a broad margin of appreciation). So, although it is likely that the mandatory disclosure regulation in case C would pass the bar in both the ECHR and the GDPR, the standards that such regulation needs to meet might be particularly divergent in the employment context. As we have argued, a narrowing of the ECHR margin of appreciation through references to the GDPR might be expected in future ECtHR case law.

To summarise, we have observed that the ECHR and GDPR deliver similar but not identical answers to whether the data usages in cases A-C are permissible. This demonstrates that the instruments offer different levels of protection for employee health data. They do this partly because the instruments showcase different views on the power-balance between employers and employees, and, thus, do not fully overlap with regards to the types of data protected in the context of employment. As illustrated through our examples, they also do it partly because their different legal designs bring the assessments of lawful use or processing into slightly different focuses. Giving thought to these differences is relevant to determining what "the law is" and understanding the interconnectivity of European data protection.

[104] European Data Protection Supervisor, *Assessing the Necessity of Measures that Limit the Fundamental Right to the Protection of Personal Data: A Toolkit* (EDPS, 11 April 2017) 6; Herke Kranenborg, 'Art 8 – Protection of Personal Data' in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The EU Charter Of Fundamental Rights: A Commentary* (Uppl. 2, Hart Publishing 2014); Case C-601/15 *J.N. v Staatssecretaris van Veiligheid en Justitie* EU:C:2016:84, para 77.

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IMPARTIALITY AND INDEPENDENCE OF JUDGES: THE DEVELOPMENT IN EUROPEAN CASE LAW

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Both the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the Charter of Fundamental Rights of the European Union (CFR) include the right to a fair trial by an independent and impartial tribunal established by law. The exact meaning of the phrase 'an independent and impartial tribunal established by law' has developed in case law. In this article, I analyse how the European Court of Human Rights and the Court of Justice of the European Union have developed these brief statements into more detailed criteria. The approach is historical, that is, I analyse how law has developed, and I also base my analysis on older sources where independence and impartiality have developed. As a tool for assessing independence and impartiality, I introduce five different aspects: 1) Impartiality as a state of mind, 2) Procedural impartiality, 3) Independence as a state of mind, 4) Institutional independence, and 4) The importance of appearances.

1 INTRODUCTION

When the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) was adopted in 1950, the following clause was included in the right to a fair trial in Article 6 (1):

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Also in Article 47 (2) of the Charter of Fundamental Rights of the European Union of 2000 (CFR), a similar clause was introduced:

> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

The exact meaning of the phrase 'an independent and impartial tribunal established by law' has developed in case law. In this article, I will analyse what criteria the European Court of Human Rights (ECtHR) and the Court of Justice of the EU (CJEU) have used to define whether a tribunal is impartial and independent. There are, of course, many texts analysing

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these cases.[1] And the interpretation of Article 47 (2) in the Charter is supported by the case law relating to Article 6 (1) of the ECHR.[2]

The focus here will, however, be on the way law has developed. That is, a legal historical perspective will be used. As far as I have been able to find, such a perspective has not been used for an analysis of these cases so far. This means that I will not more than indirectly focus on the law as it is, but rather, how law has developed. Laurent Pech and Dimitry Kochenov have recently written a report for Sieps, the Swedish Institute for European Policy Studies, a report which is a casebook overview of key judgments about the rule of law from the Portuguese Judges case[3] from September 2021.[4] In that report, they focus on the most recent developments, whilst I in this article present the historical development up to and including the Portuguese Judges case.

Both the ECtHR and the CJEU have a technique of not often discussing explicitly how an assessment in an earlier case can be rewritten as a principle of law. Rather, the courts phrase legal principles in one case with reference to another case, where an assessment was done *in casu,* as a matter of fact, but where the principle was not made explicit. The courts also use the technique of only seldom referring to the original case where the principle was first formulated, but rather to the most recent case where it was applied. This calls for a legal historical analysis, since the original context of the development of a principle it is not otherwise made explicit.

As a tool for my analysis, I will divide the notions of impartiality and independence into some more detailed categories. This division is also made using a historical understanding, supplemented by requirements according to some more recent international documents.

When I discuss the cases, I will focus on cases where the standards of impartiality and independence are defined in relation to institutions that rather clearly are tribunals in the meaning of Article 6 ECHR and Article 47 of the Charter. This means, that I will not discuss for example the case law about whether an institution has enough characteristics of a court to be able to ask for a preliminary ruling.[5] Admittedly, the perspectives are interconnected,

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[1] See for example D. J. Harris, M. O'Boyle, E. P. Bates and C. M. Buckley, *Law of the European Convention on Human Rights,* 4th ed., Oxford: Oxford University Press, 2018, pp. 446-459; Christoph Grabenwarter and Katharina Pabel, *Europäische Menschenrechtskonvention. Ein Studienbuch.* 7th ed., München: Beck, 2021, pp. 509-522 [Grabenwarter and Pabel 2021]; Katharina Pabel, 'Judicial independence and the court's organisation from the perspective of the European Convention on Human Rights' in Wojciech Piątek (ed.), *Supervision over Courts and Judges. Insights into Selected Legal Systems,* Studies in Philosophy and Social Sciences: Dia-Logos vol. 30, Berlin: Peter Lang, 2021, pp. 27-50 [Pabel 2021]; Cristina Teleki, *Due Process and Fair Trial in EU Competition Law,* Leiden/Boston: Brill/Nijhoff, 2021, doi.org/10.1163/9789004447493_012, pp. 164-188 (ch. 8 'The Case-law of the ECtHR on the Right to an Independent and Impartial Tribunal'); European Court of Human Rights Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (civil limb), updated to 31 December 2021, pp. 43-69, and European Court of Human Rights Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (criminal limb), updated to 31 December 2021, pp. 19-31.

[2] Pabel 2021 pp. 28-29.

[3] C-64/16, Associação Sindical dos Juízes Portugueses, 27 February 2018, ECLI:EU:C:2018:117.

[4] Laurent Pech and Dimitry Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice. A Casebook Overview of Key Judgments since the Portuguese Judges Case,* Sieps Report 2021:3, available at <www.sieps.se>.

[5] See for example C-54/96, Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH, 17 September 1997, ECLI:EU:C:1997:413, and C-53/03, Synetairismos Farmakopoion Aitolias & Akarnanias v GlaxoSmithKline plc and GlaxoSmithKline AEVE, 31 May 2005, ECLI:EU:C:2005:333; Henrik Matz, *Begreppet domstol i EU-rätten. En studie av domstolsbegreppet i bestämmelserna om förhandsavgörande,* Uppsala: Iustus,

as will also be seen when I discuss some cases. Still, I focus on cases where the question is whether a court or tribunal meets the standards of impartiality and independence, rather than on cases where the question is whether an institution is enough independent and meets such standards of impartiality that it is to be considered as a court.

2 A HISTORICAL AND CURRENT UNDERSTANDING OF IMPARTIALITY AND INDEPENDENCE

In this section, I divide the notions of impartiality and independence into some more detailed categories. I do this based on a historical understanding; however, the historical background is very brief and serves only to highlight some important historical facts that provide clear examples of different aspects of independence and impartiality of judges. The discussion is supplemented by requirements according to some more recent international documents.

2.1 IMPARTIALITY AS A STATE OF MIND

Impartiality is a state of mind[6] of a judge, striving to treat both parties equally. Historically, we can trace this ideal to ancient Rome (Callistratus[7] and Cicero[8]) and to medieval legal texts (for example Isidore of Seville,[9] Gratian,[10] and Innocent III[11]) and medieval oaths of judges.[12] The main theme in these texts is that a judge should not hand down wrongful judgements because of for example friendship, hate or other emotions in relation to the parties, or because of bribes. The theme therefore relates primarily to the procedural function of the court, to be an institution that is neutral between the parties.

According to the Basic Principles on the Independence of the Judiciary, adopted in 1985 by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences,

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2010. See also C-284/16, Achmea, 6 March 2018, ECLI:EU:C:2018:158, §§ 48-49, and Nils Wahl and Luca Prete, 'The Gatekeepers of Art 267: On Jurisdiction and Admissibility of References for Preliminary Rulings' in Common Market Law Review, vol. 55, issue 2, doi.org/10.54648/cola2018035, pp. 511-547.

[6] I have borrowed this phrase from the ECtHR cases Khrykin v Russia, app. no. 33186/08, 19 April 2011, and Baturlova v Russia, app. no. 33188/08, 19 April 2011, identical §§ 28-30 in both cases; see below section 3.7.

[7] Callistratus, Dig. 1, 18, 19, 1. See e.g. Alan Watson (transl. and ed.), *The Digest of Justinian,* vol. 1, Philadelphia: University of Pennsylvania Press, 1998.

[8] Cicero, *De officiis,* 3, 10, 43-44. See e.g. Cicero, *On Duties. Translated by Walter Miller,* Loeb Classical Library 30. Cambridge, MA: Harvard University Press, 1913, pp. 310-313.

[9] Isidore of Seville, *Sententiae,* Thomas L. Knoebel (transl. and ed.), New York/Mahwah: The Newman Press, 2018, p. 207. See Luca Loschiavo, 'Isidore of Seville and the construction of a common legal culture in early medieval Europe' in *Clio@Themis. Revue électronique d'histoire du droit,* no. 10, 2016, doi.org/10.35562/cliothemis.1203.

[10] *Decretum Gratiani* (c. 1140), C. 11 q. 3 c. 78

[11] Lotario dei Segni (Pope Innocent III); Robert E. Lewis (ed.), *De miseria humanae conditionis,* (1195) The Chaucer Library, Athens: The University of Georgia Press, 1978, pp. 144-145.

[12] For example the oath of the imperial judge according to the Reichslandfrieden of Mainz 1235, see Ludwig Weiland, *Constitutiones et acta publica imperatorum et regum inde ab a. MCXCVIII usque a. MCCLXXII (1198-1272),* Hannover 1896, on *Monumenta Germaniae Historia,* www.dmgh.de/index.html, pp. 247 and 262. See Arno Buschmann, 'Der Mainzer Landfriede von 1235 – Anfänge einer geschriebenen Verfassung im Heiligen Römischen Reich' in *Juristische Schulung. Zeitschrift für Studium und Ausbildung,* 1991 pp. 453-460, esp. 454.

inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.[13]

In the Bangalore Principles of Judicial Conduct, impartiality is expressed thus: 'A judge shall perform his or her judicial duties without favour, bias or prejudice.'[14] This is the main principle dealing with the actual impartiality as a state of mind; the other principles mainly deal with the impression of the judge in the view of a reasonable observer. However, there is also one specific rule about avoiding influences on the judge's mind:

> A judge and members of the judge's family, shall neither ask for, nor accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the judge in connection with the performance of judicial duties.[15]

Under the value 'Equality', there is another relevant statement:

> A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ("irrelevant grounds").[16]

Judges shall carry out their duties without differentiation on any of these irrelevant grounds.[17]

2.2 PROCEDURAL IMPARTIALITY

If the aspects of impartiality described in section 2.1. relate to the judges' state of mind, there is also a slightly different type of impartiality that relates more to the procedural possibilities of the parties, that is, whether the procedural rules are such that both parties can put forward their arguments equally and before the judge makes up his or her mind. I call this procedural impartiality, and it is an important part of the right to a fair trial, often called 'equality of arms'.

There are many aspects of procedural impartiality, for example the parties' equal right to put forward evidence, to have a reasoned judgment, and to have possibilities to appeal a judgment. Also the accountability of judges is related to procedural impartiality, for example when a party puts forward complaints related to a miscarriage of justice. But in this context, I will confine myself to discuss the principle that the judge should hear both parties, 'Audiatur et altera pars'.

The principle 'Audiatur et altera pars' traces its origins to ancient Rome and before,[18] and it is a maxim that represents the essence of equality of arms. The exact phrase 'Audiatur

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[13] Basic Principles on the Independence of the Judiciary, adopted 6 September 1985 by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985, p. 2.
[14] The Bangalore Principles of Judicial Conduct 2002, value 2, p. 2.1.
[15] The Bangalore Principles of Judicial Conduct 2002, value 4, p. 4.14.
[16] The Bangalore Principles of Judicial Conduct 2002, value 5, p. 5.1.
[17] The Bangalore Principles of Judicial Conduct 2002, value 5, p. 5.3.
[18] Detlef Liebs, *Lateinische Rechtsregeln und Rechtssprichwörter,* 7th ed., München: Beck, 2007, p. 37; Andreas Wacke, 'Audiatur et altera pars. Zum rechtlichen Gehör im Römischen Zivil- und Strafprozeß' in Martin Josef Schermaier and Zoltán Végh (eds.), *Ars boni et aequi. Festschrift für Wolfgang Waldstein zum 65. Geburtstag,* Stuttgart: Steiner, 1993, pp. 369-399.

et altera pars' was coined in the Middle Ages, but the principle was mentioned by, for example, Seneca the Younger, wo had Medea say: 'He who decides an issue without hearing one side has not been just, however just the decision.' (*'Qui statuit aliquid parte inaudita altera, aequum licet statuerit, haud aequus fuit'*).[19] What is partly lost in this translation is 'parte inaudita altera', that is, 'with the other party unheard', which points forward to the phrase 'Audiatur et altera pars'.[20]

The principle has then found its place in various declarations of human rights from the late eighteenth century onwards and also in many constitutions.[21] It is closely related not only to 'equality of arms' but also to the adversarial principle, and it requires:

> a "fair balance" between the parties: each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent or opponents.[22]

Since procedural impartiality relates to the procedural system as a whole, and to the right to a fair trial in general, it is outside the scope of this article to discuss it in detail.

2.3 INDEPENDENCE AS A STATE OF MIND

According to the ancient and medieval texts mentioned in section 2.1., judges are also required to act independently. Fear is mentioned as an emotion that should not cause the judge to hand down a wrongful judgment. It is important to note that fear not only relates to the parties, but can equally relate to people external to the judicial process. As Isidore of Seville made clear, human judgment is perverted 'by fear when we are afraid to speak the truth out of fear of someone's power'.[23]

Fear is in some contexts paired with favour,[24] meaning that the judge should not strive for popularity in the local community. So far, these aspects require the judge to act independently, but there are no guarantees as regards tenure or income for a judge that acts independently.

In the Bangalore Principles of Judicial Conduct, this is expressed thus:

> A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.[25]

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[19] Seneca the Younger, *Medea,* in Seneca, *Tragedies, Volume I: Hercules. Trojan Women. Phoenician Women. Medea. Phaedra. Edited and translated by John G. Fitch,* Loeb Classical Library 62, Cambridge, MA: Harvard University Press, 2018, pp. 334-335; Wacke 1993 p. 375. A translation closer to the original would be 'He who decides anything with the other party unheard, even if he may have decided justly, has hardly been just.'
[20] Cf. Wacke 1993 p. 377.
[21] Wacke 1993 p. 369-371.
[22] Regner v the Czech Republic [GC], app. no. 35289/11, 19 September 2017, § 146.
[23] Isidore of Seville, *Sententiae,* Thomas L. Knoebel (transl. and ed.), New York/Mahwah: The Newman Press, 2018, p. 207.
[24] For example in the oath of the imperial judge according to the Reichslandfrieden of Mainz 1235, see Ludwig Weiland, *Constitutiones et acta publica imperatorum et regum inde ab a. MCXCVIII usque a. MCCLXXII (1198-1272),* Hannover 1896, on *Monumenta Germaniae Historia,* www.dmgh.de/index.html, p. 247 and 262.
[25] The Bangalore Principles of Judicial Conduct 2002, value 1, p. 1.1.

2.4 INSTITUTIONAL INDEPENDENCE

Much can be said about how to define a 'court' as an institution,[26] and the concept of a 'court' is 'complex and changeable'[27] if its history is to be analysed. This is valid for a common law country, perhaps less in a country where law is codified.[28] Here, I will highlight one important part of the institutional independence of judges, the permanent tenure.

The earliest examples of guarantees as regards judges' tenure can be found in the *Reichskammergerichtsordnung* (the statute of the Imperial Chamber Court) of 1555.[29] Such guarantees were granted consistently in England after the Revolution Settlement in 1689, even though there are earlier examples there, too, and the principle was confirmed through the Act of Settlement in 1701. Judges were appointed *quamdiu se bene gesserint,* during good behaviour. This was an improvement compared to the earlier situation, when judges could be deposed at the monarch's will. The income of judges was also fixed at this time.[30]

The same clause was taken into Article III section 1 of the U.S. Constitution, in force since 1789, and Alexander Hamilton explained that permanent tenure of judicial offices was necessary because it contributed to the independent spirit in the judges, a spirit which was essential if the judges were to check that legislation was in conformity with the constitution.[31]

On the continent, civil servants including judges were generally irremovable from the eighteenth and nineteenth centuries onwards. However, the permanent tenure of judges specifically as a guarantee for institutional independence was introduced after the 1848-49 Frankfurt Parliament, such as in the Austrian constitutions of 1848 (*Pillersdorfsche Verfassung,* Article 28) and 1849 (*Märzverfassung,* Article 101) and in the Prussian constitution of 1850 (Article 87).[32]

According to the Basic Principles on the Independence of the Judiciary from 1985, the institutional independence is secured through the requirements that the term of office of judges, and their remuneration and conditions of service, shall be adequately secured by law. Further, judges shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.[33] And decisions in disciplinary, suspension or removal proceedings should be subject to an independent review.[34]

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[26] Sir John H. Baker, 'The Changing Concept of a Court' in Sir John H. Baker, *The Legal Profession and the Common Law. Historical Essays,* London: The Hambledon Press, 1986, pp. 153-169.
[27] Baker 1986 p. 169.
[28] Cf. Coëme and others v Belgium, app. no. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, 22 June 2000, § 98. See below section 6.2.
[29] Adolf Laufs (ed.), *Die Reichskammergerichtsordnung von 1555,* Quellen und Forschungen zur höchsten Gerichtsbarkeit im Alten Reich, vol. 3, Köln, 1976; Robert Walter, *Verfassung und Gerichtsbarkeit,* Wien: Manzsche Verlags- und Universitätsbuchhandlung, 1960, p. 76.
[30] C. H. McIlwain, 'The Tenure of English Judges' in *The American Political Science Review,* Vol. 7, No. 2, 1913, pp. 217-229; David Lemmings, 'The Independence of the Judiciary in Eighteenth-Century England' in Peter Birks (ed.), *The Life of the Law. Proceedings of the Tenth British Legal History Conference Oxford 1991,* London: The Hambledon Press, 1993, pp. 125-149; Eirik Holmøyvik, 'Nokre historiske utviklingsliner for domstolane sitt sjølvstende i Noreg' in Nils Asbjørn Engstad et al. (eds.), *Dommernes uavhengighet. Den norske dommerforening 100 år,* Bergen: Fagbokforlaget, 2012, pp. 99-125.
[31] Alexander Hamilton, *The Federalist* No. 78.
[32] Robert Walter 1960 pp. 75-77; Eirik Holmøyvik 2012 pp. 119-120.
[33] Basic Principles on the Independence of the Judiciary, pp. 11-12.
[34] Basic Principles on the Independence of the Judiciary, p. 20.

2.5 THE IMPORTANCE OF APPEARANCES

That judges should not only be impartial and independent but should also appear impartial and independent was expressed in an English case in November 1923: 'Justice should not only be done but should manifestly and undoubtedly be seen to be done'.[35] Lord Chief Justice Hewart referred to a 'long line of cases' without exact references. But the observation of Hewart that 'nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice'[36] relates to the constant need for judges to think about the importance of appearances.

It is unclear what cases Hewart actually might have referred to by the 'long line of cases'. It has been argued that there might have been no such cases at all, and that the comment by Lord Hewart can rather be contextualised by reference to what was at the time an issue of contemporary concern, namely the independence and impartiality of national judges appointed to the Permanent Court of International Justice. That court started working in 1922, and the judges were to make solemn declarations that they would exercise their powers impartially and conscientiously. In that context, the appearance of impartiality was highlighted.[37]

What is important with appearances is that judges behave in a way that shows that they are impartial and independent. This can also assist judges in remembering being impartial and independent.[38] To help judges remembering the need for being and appearing impartial and independent, there has been a tradition for placing allegoric paintings (*'Exempla Justitiae'*) in court rooms.[39] Such paintings can in a detailed manner present the differences between *justitia* and *injustitia,* but the ideal of an impartial and independent court can also be represented by *Justitia* with sword and scales.[40] Similarly, simple statements in constitutional documents that judges shall be independent, more or less have a similar symbolic function.[41]

In the Bangalore Principles of Judicial Conduct 2002, there are many principles aiming towards the manifestation of independence and impartiality, highlighting the importance of appearances. For example, there are references to the impression of 'a reasonable observer' as regards independence[42] and impartiality.[43] The value 'Integrity' relates solely to the conduct of a judge 'in the view of a reasonable observer',[44] and the 'behaviour and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary'.[45] The maxim 'Justice must

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35 R v. Sussex Justices ex parte McCarthy ([1924) 1 KB 256, [1923] All ER Rep 233 per Hewart LCJ.
36 Ibid.
37 Anne Richardson Oakes and Haydn Davies, 'Justice must be seen to be done: A contextual reappraisal' in *Adelaide Law Review,* vol. 37, 2016, pp. 461-494.
38 Carl Ussing, 'Domstolene og den offentlige Mening' in *Tilskueren. Maanedsskrift for Litteratur, Samfundsspørgsmål og almenfattelige videnskabelige Skildringer* 1899 p. 326; Jens Peter Christensen, *Domstolene – den tredje statsmagt,* Århus 2003, pp. 69-89.
39 Georges Martyn,'Exempla Iustitiae: Inspiring Examples' and Alain Wijffels, 'Justice and Good Governance' in Stefan Huygebaert et al. (eds.), *The Art of Law. Three Centuries of Justice Depicted,* Tielt: Lannoo, 2016, pp. 39-56 and 154-158; Stefan Huygebaert et al. (eds.), *The Art of Law. Artistic Representations and Iconography of Law and Justice in Context, from the Middle Ages to the First World War,* Cham: Springer, 2018.
40 Lars Ostwaldt, *Aequitas und Justitia. Ihre Ikonographie in Antike und Früher Neuzeit,* Halle: Peter Junkermann, 2009.
41 Cf. Walter 1960 pp. 55-56.
42 The Bangalore Principles of Judicial Conduct 2002, value 1, p. 1.3.
43 The Bangalore Principles of Judicial Conduct 2002, value 2, p. 2.5.
44 The Bangalore Principles of Judicial Conduct 2002, value 3, p. 3.1.
45 The Bangalore Principles of Judicial Conduct 2002, value 3, p. 3.2.

not merely be done but must also be seen to be done' is also mentioned.[46] The value 'Propriety' also provides many principles where appearances are highlighted.[47]

3 DEFINING INDEPENDENCE AND IMPARTIALITY

The first line of case law to be discussed concerns the early steps, beginning with the Neumeister case from 1968, through which the ECtHR in the 1960s and 1970s started to define the core criteria of the independence and impartiality of judges, and what conclusions were drawn in the 1980s. The importance of appearances was first identified separately, beginning with Delcourt in 1970, but that line of case law but was soon merged with the Neumeister line of cases, something that will be discussed in section 4.

3.1 NEUMEISTER 1968: THE COURT'S INDEPENDENCE OF THE EXECUTIVE AND OF THE PARTIES TO THE CASE

The first case in which the ECtHR began to define the independence of a court is the Neumeister judgment from 1968. The ECtHR discussed the matter in the context of the principle of 'equality of arms',[48] thus, from the perspective of what I call procedural impartiality. The case concerned the applicant Neumeister's detention on remand.[49] According to the ECtHR, the decisions relating to his detention were given after the prosecuting authority had been heard in the absence of the applicant or his representative on the written request made by the authority. Such a procedure was contrary to the 'equality of arms', which was to be included in the notion of a fair trial.

What was to be tried was, however, not this issue but rather the procedure when Neumeister requested provisional release. The ECtHR did not consider the principle of 'equality of arms' applicable in that context (something which has changed in later case law, and this aspect of the Neumeister case can nowadays be disregarded[50]). The ECtHR applied Article 5 (4) ECHR, according to which everyone who is deprived of his liberty by detention has the right to proceedings by which the lawfulness of the detention shall be decided speedily by a court.

The ECtHR interpreted the word 'court' like this:

> This term implies only that the authority called upon to decide thereon must possess a judicial character, that is to say, be independent both of the executive and of the parties to the case; it in no way relates to the procedure to be followed.[51]

This is a very basic definition of a court. The independence in relation to the executive is highlighted, as well as the independence in relation to the parties (which might be an equivalent to impartiality, see below section 3.6.). What is interesting in this case is the clear statement that whether an institution is a court or not 'in no way relates to the procedure to be followed', something which probably has to be understood in the context of Article 5 (4)

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[46] The Bangalore Principles of Judicial Conduct 2002, value 3, p. 3.2.
[47] The Bangalore Principles of Judicial Conduct 2002, value 4, pp. 4.1, 4.3. etc.
[48] Pabel 2021 p. 27.
[49] Neumeister v Austria, app. no. 1936/63, 27 June 1968, §§ 22-25.
[50] Harris et al. 2018 p. 360.
[51] Neumeister v Austria, app. no. 1936/63, 27 June 1968, § 24.

ECHR. In more recent case law, the ECtHR has explicitly concluded that the interpretation of Article 5 (4) has developed so that it provides 'certain procedural guarantees to a detainee'.[52] These are similar to the notion of a fair trial required by Article 6 (1).

3.2 DE WILDE 1971: ADDING THE PROCEDURAL ASPECT

After Neumeister, the criterion 'independence of the executive and of the parties to the case' was used in the De Wilde judgment 1971, to define an institution falling under the concept 'tribunal'.[53] In this case, also the guarantees of judicial procedure were understood as relevant, and the fact that whether the principle of 'equality of arms' was not relevant in the Neumeister case did not mean that the same was not 'true in a different context and, for example, in another situation which is also governed by Article 5 (4)'.[54] In the Ringeisen judgment later the same year, the ECtHR observed that the proceedings before a regional real property transactions commission afforded 'the necessary guarantees'.[55]

Further on, in Sramek 1984 and H v Belgium 1987, a 'tribunal' was defined through being 'characterised in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner'.[56] In Sramek, there is a reference to Campbell and Fell 1984 § 76 (see below section 4.3.), where the wording was different; the rules of law and the proceedings conducted in a prescribed manner were there discussed in a more indirect way.[57]

3.3 RINGEISEN 1971: ADDING THE TERM OF APPOINTMENT

In the just mentioned Ringeisen judgment 1971, the criterion 'independence of the executive and of the parties to the case' was also used in the context of Article 6 (1) as regarded the regional real property transactions commission. The ECtHR added that the members of the regional commission were 'appointed for a term of five years'.[58] This clarified the phrase 'independent of the executive and also of the parties' in the specific case. Even though the judges did not have permanent positions, the five-year tenure offered sufficient independence.

In H v Belgium 1987, the ECtHR made the assessment that there could 'be no question about the independence of the members' of the court in question, the Council of the *Ordre des Avocats,* a council which functioned as a disciplinary court for advocates. These judges were 'elected by their peers' and were not 'subject to any authority, being answerable only to their own consciences'.[59] This statement was given as a matter of fact without references to other cases, and it is mentioned here to illustrate that the way of selecting judges could be equally important to assess independence as the term of office – the judgment seems to

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[52] Lebedev v Russia, app. no. 4493/04, 25 October 2007, §§ 69-71.
[53] De Wilde, Ooms and Versyp v Belgium, app. no. 2832/66, 2835/66 and 2899/66, 18 June 1971, §§ 74-80;
[54] De Wilde, Ooms and Versyp v Belgium, app. no. 2832/66, 2835/66 and 2899/66, 18 June 1971, § 78.
[55] Ringeisen v Austria, app. no. 2614/65, 16 July 1971, § 95.
[56] Sramek v Austria, app. no. 8790/79, 22 October 1984, § 36; H v Belgium, app. no. 8950/80, 30 November 1987, § 50.
[57] Campbell and Fell v The United Kingdom, app. no. 7819/77 and 7878/77, 28 June 1984, § 76 and – importantly – the reference there to the information in §§ 38 and 39 about the rules and the procedure.
[58] Ringeisen v Austria, app. no. 2614/65, 16 July 1971, § 95.
[59] H v Belgium, app. no. 8950/80, 30 November 1987, § 51.

indicate that the judges had a one year term, since the election was 'held before the end of each judicial year'.[60]

The independence in relation to parliament was discussed in the Crociani decision by the commission from 1980, dealing with the question whether the Italian constitutional court was impartial in relation to the Italian parliament, notwithstanding the fact that additional judges of the court were chosen by lot from a list of persons drawn up by parliament.[61] The commission did not make a principled statement on how to define this independence, but the case highlights another aspect of the importance of how judges are appointed.

3.4 LE COMPTE 1981: THE COURT'S INDEPENDENCE OF THE EXECUTIVE AND OF THE PARTIES TO THE CASE, PROCEDURAL GURANANTEES AND DURATION OF THE JUDGES' TERM OF OFFICE

In the Le Compte judgment 1981, the ECtHR summarized the case law so far. With reference to the Neumeister, De Wilde and Ringeisen judgments, the 'independence of the executive and of the parties to the case' and 'guarantees afforded by its procedure' were relevant for the assessment. But now, the 'duration of its members' term of office'[62] were added to the criteria. This was based on the Ringeisen judgment, and the development in Le Compte in relation to Ringeisen was that the assessment of the five-year tenure in that specific case was transformed into the more general 'duration of its members' term of office'.

3.5 PIERSACK 1982: DIFFERENCE BETWEEN INDEPENDENCE AND IMPARTIALITY, AND ADDING SAFEGUARDS OUTSIDE PRESSURES

In the Piersack judgment from 1982, the ECtHR was not convinced by Piersack's claim that he had been convicted by a court that was not an independent tribunal. On the contrary, the ECtHR held that 'the three judges of whom Belgian assize courts are composed enjoy extensive guarantees designed to shield them from outside pressures' according to the Belgian Constitution (at that time Articles 99-100) and by statute, 'and the same purpose underlies certain of the strict rules governing the nomination of members of juries'.[63] The ECtHR made this statement under the heading 'independent tribunal' (§ 27), and continued to discuss whether the court was an 'impartial tribunal' (§§ 28-32), thus making a difference between the two concepts. The court wrote:

> Whilst impartiality normally denotes absence of prejudice or bias, its existence or otherwise can, notably under Article 6 § 1 of the Convention, be tested in various ways. A distinction can be drawn in this context between a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given

[60] H v Belgium, app. no. 8950/80, 30 November 1987, § 25.
[61] Crociani, Palmiotti, Tanassi and Lefebvre d'Ovidio v Italy, app. no. 8603/79, 8722/79, 8723/79 and 8729/79, 18 December 1980, *Decisions and Reports of the European Commission for Human Rights,* vol. 22, pp. 221-222. Cf. Harris et al. 2018 p. 448.
[62] Le Compte, van Leuven and de Meyere v Belgium, app. no. 6878/75 and 7238/75, 23 June 1981, § 55.
[63] Piersack v Belgium, app. no. 8692/79, 1 October 1982, § 26.

> case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect.[64]

So far, the subjective and objective approaches were different ways of assessing impartiality. The references to the specific Belgian guarantees designed to shield judges from outside pressures were soon transformed into a more general statement. In the Campbell and Fell judgment in 1984, the ECtHR formulated the criterion as 'the existence of guarantees against outside pressures' with reference to the Piersack case and combining it with independence 'notably of the executive and of the parties to the case' and with 'the manner of appointment of its members and the duration of their term of office', all with reference to Le Compte. The question whether the body presents an appearance of independence was also added, with a reference to Delcourt (see below section 4).[65] And as mentioned above, in Sramek 1984 a passage in Campbell and Fell[66] was developed into the criterion 'proceedings conducted in a prescribed manner'.

3.6 BELILOS 1988: REPLACING 'INDEPENDENCE IN RELATION TO THE PARTIES' WITH 'IMPARTIALITY'

In the Belilos judgment 1988, the ECtHR referred to H v Belgium from 1987, as regards the definition of a tribunal. The ECtHR highlighted the judicial function of a tribunal, determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner. It referred to Le Compte as regards the 'further requirements – independence, in particular of the executive; impartiality; duration of its members' terms of office; guarantees afforded by its procedure'.[67]

It is interesting to note that 'impartiality' was introduced in this case – even though independence and impartiality had been discussed separately in Piersack. But now 'impartiality' replaced 'independence of [---] the parties to the case' in the phrase from the Le Compte judgment. This indicates that 'impartiality' and 'independence in relation to the parties' are synonymous concepts and highlights that independence and impartiality are two different things.

3.7 KHRYKIN AND BATURLOVA 2011: INDEPENDENCE AS A STATE OF MIND

In two cases decided the same day in 2011,[68] the ECtHR made further clarifications and discussed independence of a judge as, firstly, individual and a state of mind, and, secondly, institutional. This is where 'independence as a state of mind', as I have called it, occurs for the first time in the case law.

> Independence of the judiciary refers to the necessary individual and institutional independence that are required for impartial decision making. It thus characterises

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[64] Piersack v Belgium, app. no. 8692/79, 1 October 1982, § 30.
[65] Campbell and Fell v The United Kingdom, app. no. 7819/77 and 7878/77, 28 June 1984, § 78.
[66] Campbell and Fell v The United Kingdom, app. no. 7819/77 and 7878/77, 28 June 1984, § 76 compared to §§ 38 and 39.
[67] Belilos v Switzerland, app. no. 10328/83, 29 April 1988, § 64.
[68] Khrykin v Russia, app. no. 33186/08, 19 April 2011, and Baturlova v Russia, app. no. 33188/08, 19 April 2011, identical §§ 28-30 in both cases.

> both a state of mind and a set of institutional and operational arrangements. The former is concerned with the judge's impartiality and the latter with defining relations with other bodies, in particular other state powers ([---]), and are, sometimes, indivisible […].[69]

As we can see, individual and institutional independence are prerequisites for impartiality, and the judge's state of mind and institutional independence go hand in hand. However, in the next sentence, the state of mind is mostly related to impartiality, and independence is more institutional and concerns relations with other bodies, in particular other state powers. As regards the indivisibility, there are indirect references to Langborger and thus also to Campbell and Fell (see below section 4.3.).

In the two Khrykin and Baturlova cases, the ECtHR also defined the individual independence of judges, clarifying that:

> judicial independence also demands that individual judges be free not only from undue influences outside the judiciary, but also from within. This internal judicial independence requires that they be free from instructions or pressures from the fellow judges and vis-à-vis their judicial superiors.[70]

This was based on the Parlov-Tkalčić judgment from 2009, where reference was made to other cases 'by implication',[71] especially the Daktaras case from 2000.[72] Finally, the ECtHR discussed how to assess independence and essentially used a standard phrase mentioned below in section 4.3.

3.8 THE NEUMEISTER LINE OF CASE LAW: CONCLUSIONS

In the Neumeister judgment 1968, the ECtHR defined a 'court' as an authority independent both of the executive and of the parties to the case. Thus, it mixed the constitutional position of a court (independence) with its procedural role (impartiality). Beginning in the De Wilde judgment 1971, and more clearly in Sramek 1984, procedural aspects, such as 'equality of arms', were added. Thus, not only the court should be neutral, but the parties should have equal opportunities in the process. In Sramek, there was a reference to Campbell and Fell 1984 (see below), where the wording was different; the rules of law and the proceedings conducted in a prescribed manner were there discussed in a more indirect way.

In Ringeisen 1971, the term of appointment was added as a criterion for independent judges. In the Le Compte judgment 1981, the ECtHR summarized the case law so far. With reference to the Neumeister, De Wilde and Ringeisen judgments, the 'independence of the executive and of the parties to the case' and 'guarantees afforded by its procedure' were relevant for the assessment. But now, the 'duration of its members' term of office' was added as a more general statement than in Ringeisen. In the Campbell and Fell judgment in 1984,

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[69] Khrykin v Russia, app. no. 33186/08, 19 April 2011, and Baturlova v Russia, app. no. 33188/08, 19 April 2011, identical § 28.
[70] Khrykin v Russia, app. no. 33186/08, 19 April 2011, and Baturlova v Russia, app. no. 33188/08, 19 April 2011, identical § 29.
[71] Parlov-Tkalčić v Croatia, app. no. 24810/06, 22 December 2009, § 86.
[72] Daktaras v Lithuania, app. no. 42095/98, 10 October 2000.

the ECtHR discussed 'the existence of guarantees against outside pressures' with reference to Piersack 1982, where the same aspect was discussed in a more indirect way.

In Piersack 1982, the ECtHR also made a difference between independence and impartiality. Finally, in Belilos 1988, the concept 'independence in relation to the parties' was replaced with 'impartiality', making the difference between the constitutional position of a court (independence) and its procedural role (impartiality) clearer.

Thus, the method of transforming an assessment in a specific case into a more general statement was used in Le Compte 1981 in relation to Ringeisen 1971, in Campbell and Fell 1984 in relation to Piersack 1982, and in Sramek 1984 in relation to Campbell and Fell the same year.

Admittedly, when the executive branch is one of the parties before a tribunal, the impartiality and the independence of that tribunal tend to be treated as interconnected. If the tribunal is considered as 'an arm of the executive',[73] it is neither independent nor impartial. This way of reasoning has also been extended to parties at large, in terms of 'independence of the executive and of the parties to the case'.[74] There is good reason to conclude that the ECtHR 'commonly considers the two requirements together, using the same reasoning'[75] both as regards independence and impartiality. Still, the Belilos judgment highlights the need to keep the two things apart.

In the Khrykin and Baturlova cases from 2011, the ECtHR was clearer and understood individual and institutional independence as prerequisites for impartiality. The judge's state of mind is mostly related to impartiality, and independence is more institutional and concerns relations with other bodies, in particular other state powers.

4 DEFINING THE IMPORTANCE OF APPEARANCES

The second line of case law to be discussed concerns the importance of appearances, first highlighted in the Delcourt case from 1970. Soon, however – in the 1980s – this line of case law merged with the Neumeister line of cases.

4.1 DELCOURT 1970: JUSTICE MUST ALSO BE SEEN TO BE DONE

As early as in the Delcourt case in 1970, the ECtHR referred to the dictum 'justice must not only be done; it must also be seen to be done'[76] when assessing whether the right of the Belgian *Procureur général* to be present at the deliberations of the *Cour de Cassation* set the impartiality and independence of that court aside. Since the *Procureur général* was himself independent and was not considered a party to the case, Article 6 was not violated.

To go a little deeper into the reasoning of the ECtHR, there were reasons to question the impartiality of the Belgian court. Such considerations were 'of a certain importance which must not be underestimated'.[77] But the ECtHR then continued:

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[73] Campbell and Fell v The United Kingdom, app. no. 7819/77 and 7878/77, 28 June 1984, § 77.
[74] See e.g. Le Compte, van Leuven and de Meyere v Belgium, app. no. 6878/75 and 7238/75, 23 June 1981, § 55.
[75] Harris et al. 2018 p. 446.
[76] Delcourt v Belgium, app. no. 2689/65, 17 January 1970, § 31. The same issue was tried, after the 'considerable evolution' (§ 24) of ECtHR case law, in Borgers v Belgium, app. no. 12005/86, 30 October 1991.
[77] Delcourt v Belgium, app. no. 2689/65, 17 January 1970, § 31.

> If one refers to the dictum "justice must not only be done; it must also be seen to be done" these considerations may allow doubts to arise about the satisfactory nature of the system in dispute. They do not, however, amount to proof of a violation of the right to a fair hearing. Looking behind appearances, the Court does not find the realities of the situation to be in any way in conflict with this right.[78]

Then, the ECtHR provided reasons why the Belgian court was not partial. If one relates to the British origin of the 'dictum' (see above section 2.5.), it can be assumed that the British judge and president of the ECtHR, Sir Humphrey Waldock, brought it into the case.[79] It can be noted that he gave it a shorter and less emphatic phrasing, omitting what Lord Hewart had said about that justice should 'manifestly and undoubtedly' be seen to be done.

In the Le Compte judgment 1981 (see above section 3.4.), the Delcourt case was used as an authority for the fact that there was no doubt as to the independence of the Court of Cassation and that it raised no problem on the issue of impartiality.[80] In the same judgment, the ECtHR found that the Belgian Appeals Council had the characteristics of a tribunal.[81] The Delcourt and Neumeister lines of case law were, however, not discussed in the same context but rather separately.

4.2 PIERSACK 1982: ADDING APPEARANCES ACCORDING TO DELCOURT TO THE NEUMEISTER LINE OF CASE LAW

In the 1982 Piersack case (see above section 3.5.), the ECtHR made a distinction between 'independent tribunal' (§ 27) and 'impartial tribunal' (§§ 28-32) in Article 6 ECHR. In the context of discussing impartiality, the court made a distinction between a subjective and an objective approach: The subjective approach was characterised by 'endeavouring to ascertain the personal conviction of a given judge in a given case' and the objective by 'determining whether [the judge] offered guarantees sufficient to exclude any legitimate doubt in this respect.'[82]

The ECtHR then discussed the subjective impartiality test with reference to Le Compte 1981 and the objective impartiality test with reference to Delcourt 1970. The ECtHR did not repeat the dictum as such, but presented its essence in a new way: 'even appearances may be of a certain importance'.[83] The question of appearances is part of the objective test, and the court highlighted that what is 'at stake is the confidence which the courts must inspire in the public in a democratic society'.[84]

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[78] Delcourt v Belgium, app. no. 2689/65, 17 January 1970, § 31.
[79] Cf. Borgers v Belgium, app. no. 12005/86, 30 October 1991, dissenting opinion of judge Martens (from the Netherlands), note 24: 'Is it by accident that in its Delcourt judgment the Court, presided over by the British judge Sir Humphrey Waldock, chose to use a much milder [than the one coined by Lord Hewart] form of the maxim and has continued to use that form instead of the original one?'. Cf. also Haydn Davies and Anne Richardson Oakes, 'Problems of Perception in the European Court of Human Rights: A Matter of Evidence?' in *Journal of International and Comparative Law,* vol. 3, no. 2, 2013, pp. 127-128.
[80] Le Compte, van Leuven and de Meyere v Belgium, app. no. 6878/75 and 7238/75, 23 June 1981, §§ 57-58.
[81] Le Compte, van Leuven and de Meyere v Belgium, app. no. 6878/75 and 7238/75, 23 June 1981, § 55, and see above section 2.4.
[82] Piersack v Belgium, app. no. 8692/79, 1 October 1982, § 30.
[83] Piersack v Belgium, app. no. 8692/79, 1 October 1982, § 30; see also Sramek v. Austria, app. no. 8790/79, § 42.
[84] Piersack v Belgium, app. no. 8692/79, 1 October 1982, § 30. See Anne Richardson Oakes and Haydn Davies, 'Process, Outcomes and the Invention of Tradition: The Growing Importance of the Appearance of Judicial Neutrality' in *Santa Clara Law Review,* vol. 51, no. 2, 2011, pp. 581-586.

Both the dictum, the phrase 'even appearances may be important', and the subjective and objective tests were mentioned in the De Cubber judgment of 1984.[85] The ECtHR highlighted that it did not doubt the impartiality of a judge that had conducted a preliminary investigation, but concluded that the impartiality of the court, where that judge was then a member, 'was capable of appearing to the applicant to be open to doubt'.[86] In later judgments, procedures where a judge has made pre-trial decisions in a case, have been tried against this standard.[87]

4.3 CAMPBELL AND FELL 1984: WIDENING THE APPROACH

As already mentioned in sections 3.2. and 3.5., in the Campbell and Fell judgment 1984, the procedural aspects were taken into account indirectly,[88] the independence and impartiality (the latter at that time called independence 'of the parties to the case'), and the manner of appointment of the court's members and the duration of their term of office were taken into account with reference to Le Compte 1981, and the existence of guarantees against outside pressures was taken into account with reference to Piersack 1982. This is the time when the ECtHR had widened its approach and established 'the core criteria of an independent and impartial tribunal'.[89] To what followed from Le Compte and Piersack was added, as an integrated criterion and with reference to Delcourt 1970, the question whether the institution presents an appearance of independence.[90] Thus, through Campbell and Fell, all five aspects discussed in section 2 – that is, impartiality as a state of mind, procedural impartiality, independence as a state of mind, institutional independence, and the importance of appearances – were assessed in one judgment.

The essence of the Campbell and Fell judgment then developed into a standard phrase, used for example in Langborger 1989,[91] Bryan 1995[92] and Findlay 1997.[93] As it was formulated in Langborger § 32:

> In order to establish whether a body can be considered "independent", regard must be had, inter alia, to the manner of appointment of its members and their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence (see, inter alia, the Campbell and Fell judgment of 28 June 1984 […] para. 78).
>
> As to the question of impartiality, a distinction must be drawn between a subjective test, whereby it sought to establish the personal conviction of a given judge in a

[85] De Cubber v Belgium, app. no. 9186/80, 26 October 1984, §§ 26, 30 and 32.
[86] De Cubber v Belgium, app. no. 9186/80, 26 October 1984, § 30.
[87] See e.g. Hauschildt v Denmark, app. no 10486/83, 24 May 1989, § 48, and Fey v Austria, app. no. 14396/88, 24 February 1993, § 30.
[88] Campbell and Fell v The United Kingdom, app. no. 7819/77 and 7878/77, 28 June 1984, § 76 compared to §§ 38 and 39.
[89] Pabel 2021 p. 28.
[90] Campbell and Fell v The United Kingdom, app. no. 7819/77 and 7878/77, 28 June 1984, § 78.
[91] Langborger v Sweden, app. no. 11179/84, 22 June 1989, § 32.
[92] Bryan v The United Kingdom, app. no. 19178/91, 22 November 1995, § 37.
[93] Findlay v The United Kingdom, app. no. 22107/93, 25 February 1997, § 73. Cf. also Coëme and others v Belgium, app. no. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, 22 June 2000, §§ 99 and 120-121.

> given case, and an objective test, aimed at ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see, amongst other authorities, the De Cubber judgment of 26 October 1984 […] para. 24).
>
> In this case it appears difficult to dissociate the question of impartiality from that of independence.[94]

The last remark was done because what was at stake was the independence and impartiality of a Swedish Housing and Tenancy Court, where the lay assessors had been nominated by, and had close links with, two associations which both had an interest in the continued existence of a negotiation clause which the applicant in the ECtHR case had sought the deletion of from his contract. He could, according to the ECtHR, 'legitimately fear that the lay assessors had a common interest contrary to his own and therefore that the balance of interests, inherent in the Housing and Tenancy Court's composition in other cases, was liable to be upset when the court came to decide his own claim'.[95]

The second and third sections of the quote recurred for example in essence, but not as a direct quote, in Findlay 1997.[96] There reference was made to the Pullar judgment from 1996, where on the other hand it was considered more appropriate to examine the applicant's complaints in relation to impartiality, even though independence and impartiality were closely related.[97] The ECtHR then referred to the subjective and objective tests,[98] as it has done in many cases referring to the tests as 'constant case-law'.[99]

4.4 THE DELCOURT LINE OF CASE LAW: CONCLUDING COMMENTS

Through Delcourt, the maxim 'justice must not only be done; it must also be seen to be done' was brought into the case law of the ECtHR, probably by the British judge Sir Humphrey Waldock, but in a shorter version than the one Lord Hewart had originally coined. The Delcourt judgment came two years after Neumeister, but not until Piersack in 1982 the ECtHR started merging the two lines of case law, discussing the subjective impartiality test with reference to Le Compte 1981 (in its turn referring to Neumeister) and the objective impartiality test with reference to Delcourt 1970.

In Campbell and Fell 1984, the approach was widened. The core criteria of an independent and impartial court were established, and the 'appearance of independence' was made a criterion along with the manner of appointment of judges and the guarantees against outside pressure. As regards impartiality, there was an objective test with exclusion of legitimate doubts in focus. This means that, through Campbell and Fell, impartiality as a state of mind, procedural impartiality, independence as a state of mind, institutional independence, and the importance of appearances, were assessed, even though the different aspects were not categorised in that manner explicitly.

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[94] Langborger v Sweden, app. no. 11179/84, 22 June 1989, § 32.
[95] Langborger v Sweden, app. no. 11179/84, 22 June 1989, § 35.
[96] Findlay v The United Kingdom, app. no. 22107/93, 25 February 1997, § 73.
[97] Pullar v the United Kingdom, app. no. 22399/93, 10 June 1996, § 29.
[98] Pullar v the United Kingdom, app. no. 22399/93, 10 June 1996, § 30.
[99] E.g. Mežnarić v Croatia, app. no. 71615/01, 15 July 2005, § 29. See also Morice v France [GC], app. no. 29369/10, 23 April 2015, §§ 73-78 and Ivanovski v The Former Yugoslav Republic of Macedonia, app. no. 29908/11, 21 January 2016, §§ 137-141.

5 A COMPARISON WITH THE EXTERNAL AND INTERNAL ASPECTS OF INDEPENDENCE ACCORDING TO THE CJEU

So far, I have dealt with ECtHR case law, and I have identified Campbell and Fell 1984 as the judgment where all the relevant criteria were assessed. I will now turn to the CJEU and discuss how that court discussed the approach according to Campbell and Fell further.

5.1 WILSON 2006: INTRODUCING THE EXTERNAL AND INTERNAL ASPECTS

In the Wilson judgment from 2006,[100] the CJEU had to decide a case where it was disputed whether two disciplinary councils for lawyers in Luxemburg were to be considered as courts or tribunals, or whether they did not meet the characteristics of such institutions. This was not in the context of whether these councils could ask for a preliminary ruling but rather whether an appeal procedure required by a directive was implemented. The CJEU referred to its case law about which institutions could be defined as courts in the context of preliminary rulings, namely 'whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law',[101] but it then developed the criteria of independence and impartiality. According to the CJEU, the 'concept of independence, which is inherent in the task of adjudication, involves primarily an authority acting as a third party in relation to the authority which adopted the contested decision'.[102]

Apart from being this neutral third party, the concept of independence has – according to the CJEU – 'two other aspects'.[103] This way of defining independence was a novelty in this case and the two aspects were called external and internal. The CJEU defined the external aspect thus:

> The first aspect, which is external, presumes that the body is protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them (see, to that effect, Case C-103/97 Köllensperger and Atzwanger [1999] ECR I-551, paragraph 21, and Case C-407/98 Abrahamsson and Anderson [2000] ECR I-5539, paragraph 36; see also, to the same effect, Eur. Court HR Campbell and Fell v. United Kingdom, judgment of 28 June 1984, Series A No 80, § 78). That essential freedom from such external factors requires certain guarantees sufficient to protect the person of those who have the task of adjudicating in a dispute, such as guarantees against removal from office (Joined Cases C-9/97 and C-118/97 Jokela and Pitkäranta [1998] ECR I-6267, paragraph 20).[104]

The CJEU judgments mentioned in this quote contain assessments *in casu* rather than principled statements, which are therefore new in the Wilson case. However, in § 78 in

[100] C-506/04, Wilson, 19 September 2006, ECLI:EU:C:2006:587.
[101] C-506/04, Wilson, 19 September 2006, ECLI:EU:C:2006:587, § 48.
[102] C-506/04, Wilson, 19 September 2006, ECLI:EU:C:2006:587, § 49, with reference to two cases relating to the right to require preliminary rulings.
[103] C-506/04, Wilson, 19 September 2006, ECLI:EU:C:2006:587, § 50.
[104] C-506/04, Wilson, 19 September 2006, ECLI:EU:C:2006:587, § 51.

Campbell and Fell (see section 4.3. above), the ECtHR had discussed independence 'of the executive and of the parties to the case' and included 'the manner of appointment of [the court's] members and the duration of their term of office', 'the existence of guarantees against outside pressures' and 'the question whether the body presents an appearance of independence' as relevant factors for the assessment. The CJEU then continued with the other aspect:

> The second aspect, which is internal, is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject-matter of those proceedings. That aspect requires objectivity (see, to that effect, Abrahamsson and Anderson, paragraph 32) and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law.[105]

The reference to Abrahamsson again is to an assessment *in casu,* but it is interesting to note the reference to Campbell and Fell 1984 in the preceding paragraph. This was before the ECtHR in Belilos 1988 replaced the concept 'independence in relation to the parties' with 'impartiality'. One might wonder whether the ECtHR notion of independence 'of the executive and of the parties to the case' inspired the CJEU to distinguish between external and internal independence rather than independence and impartiality and to describe impartiality as 'linked to' the internal aspect.

Anyway, the CJEU concluded that the guarantees of independence and impartiality require rules, particularly:

> as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it.[106]

Here, the CJEU referred to a few cases, of which the most interesting to note are the Dorsch Consult case from the line of cases about the right to ask for a preliminary ruling and the ECtHR judgment in De Cubber (see above section 4.2.).

5.2 PORTUGUESE JUDGES 2018: ADDING REMUNERATION OF JUDGES

We will now turn to the CJEU case law as regards courts that react on possible infringements of the guarantees for their independence and impartiality and ask the CJEU for a preliminary ruling about how to assess their status. The first in this line of case law is from 2018, the Associação Sindical dos Juízes Portugueses case, commonly called the Portuguese Judges case. The CJEU defined independence thus:

> The concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any

[105] C-506/04, Wilson, 19 September 2006, ECLI:EU:C:2006:587, § 52.
[106] C-506/04, Wilson, 19 September 2006, ECLI:EU:C:2006:587, § 53.

> hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions […].[107]

In the judgment, there is a reference to Wilson, but there is no discussion about the external and internal aspects. The phrasing is also new, even though the content resembles earlier case law. There is also a reference to another case, Margarit Panicello, where the external and internal aspects were mentioned.[108] The fact that the Portuguese Judges case did not require the CJEU's discussion about impartiality might be the reason why the CJEU did not discuss the dichotomy between external and internal aspects.

In the Portuguese Judges case, the CJEU specified the guarantees for independence by adding remuneration:

> Like the protection against removal from office of the members of the body concerned (see, in particular, [---] Wilson [---]), the receipt by those members of a level of remuneration commensurate with the importance of the functions they carry out constitutes a guarantee essential to judicial independence.[109]

The Portuguese Judges case is particularly important since the CJEU established a general obligation for the Member States to guarantee and respect the independence of their national courts, and it can be considered one of the *Grandes Décisions* of the CJEU.[110]

5.3 LM 2018: THE EXTERNAL AND INTERNAL ASPECTS REVISITED

In the wake of the backsliding of the rule of law in Poland, the CJEU has had to answer questions from other countries about whether to surrender suspects of crime to Poland according to the European Arrest Warrant procedure and whether there is still a right to a fair trial in Poland with access to independent and impartial courts. In the LM case, the CJEU referred to the Portuguese Judges case and repeated the wording there as regards independence but related it to the external aspect according to the Wilson judgment.[111] As regards the internal aspect, the CJEU referred to the Wilson case but described impartiality with partly different words:

> The second aspect, which is internal in nature, is linked to impartiality and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law ([…] Wilson […] paragraph 52 and the case-law cited).[112]

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[107] C-64/16, Associação Sindical dos Juízes Portugueses, 27 February 2018, ECLI:EU:C:2018:117, § 44.
[108] C-503/15, Margarit Panicello, 16 February 2017, ECLI:EU:C:2017:126.
[109] C-64/16, Associação Sindical dos Juízes Portugueses, 27 February 2018, ECLI:EU:C:2018:117, § 45.
[110] Pech and Kochenov 2021 pp. 15 and 32.
[111] C-216/18 PPU, LM, 25 July 2018, ECLI:EU:C:2018:586, §§ 63-64.
[112] C-216/18 PPU, LM, 25 July 2018, ECLI:EU:C:2018:586, § 65.

The most important difference is that the CJEU replaced the phrase 'seeks to ensure a level playing field for the parties to the proceedings and their respective interests' with 'seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests'. There seems to be no material difference but rather a different use of metaphors, the one where 'equal distance' is used being clearer, even though 'level playing field' refers to the fairness of the trial. The CJEU also summed up what the guarantees for independence *and* impartiality should mean, when it comes to the content of the rules about courts:

> Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it. In order to consider the condition regarding the independence of the body concerned as met, the case-law requires, inter alia, that dismissals of its members should be determined by express legislative provisions […].

There is a reference to a case about whether a board was to be considered a court in the context of the preliminary ruling procedure.[113] The distinction between the external and internal aspects of independence has later on been used frequently by the CJEU.[114] Some reflections about this way of defining independence and impartiality are relevant:

Firstly, that independence and impartiality require rules that are part of what I have called institutional independence. These rules relate very much to what in the ECHR context is discussed under the heading 'tribunal established by law', see section 6. They deal with how judges are appointed and their protection against being removed.

Secondly, that the difference between external and internal independence relates – through Wilson and Campbell and Fell – to the independence 'of the executive and of the parties to the case' and – through Campbell and Fell read in the light of Belilos – to the difference between independence and impartiality in the case law of the ECtHR.

Thirdly, that the 'internal aspect' of independence, which is essentially impartiality, is something completely different from the concept 'internal independence', defined as the independence of a judge in relation to other judges and aiming to protect judges from undue pressure from within the judiciary.[115]

6 TRIBUNAL ESTABLISHED BY LAW

When I now turn to the criterion 'tribunal established by law', I will have to return to the Piersack case from 1982, but then the main development has taken place more recently, especially through the Ástráðsson judgment in 2020.

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[113] C-222/13, TDC, 9 October 2014, ECLI:EU:C:2014:2265.

[114] See e.g. C-274/14, Banco de Santander, 21 January 2020, ECLI:EU:C:2020:17, §§ 57-63, and C-357/19 et al., SC Euro Box Promotion SRL, 21 December 2021, ECLI:EU:C:2021:1034, §§ 215-243.

[115] Joost Sillen, 'The concept of 'internal judicial independence' in the case law of the European Court of Human Rights' in *European Constitutional Law Review,* vol. 15, issue 1, March 2019, doi.org/10.1017/S1574019619000014, pp. 104-133.

6.1 PIERSACK 1982: THE COMPOSITION OF THE BENCH IN EACH CASE?

The Piersack case has been mentioned in relation to both lines of case law, since the ECtHR made a distinction between 'independent tribunal' (§ 27) and 'impartial tribunal' (§§ 28-32) in Article 6 ECHR, discussed the existence of 'guarantees designed to shield [judges] from outside pressures',[116] and referred to the importance of appearances in the Delcourt line of case law, and introduced the subjective and the objective test. What is now going to be addressed is that the ECtHR also attached importance to the criterion 'tribunal established by law' in Article 6 ECHR.[117]

The applicant Piersack had at first argued that the national court was not a tribunal established by law because of the participance on the bench of a judge who was not, according to Piersack, independent and impartial. Piersack had later on refrained from putting forward that argument, and the ECtHR concluded that there was a violation of Article 6 on other grounds. The ECtHR just commented the matter like this:

> In order to resolve this issue, it would have to be determined whether the phrase "established by law" covers not only the legal basis for the very existence of the "tribunal" – as to which there can be no dispute on this occasion (Article 98 of the Belgian Constitution) – but also the composition of the bench in each case; if so, whether the European Court can review the manner in which national courts – such as the Belgian Court of Cassation in its judgment of 21 February 1979 […] – interpret and apply on this point their domestic law; and, finally, whether that law should not itself be in conformity with the Convention and notably the requirement of impartiality that appears in Article 6 § 1 […].[118]

This can be seen as a first step towards not only assessing that a tribunal had a basis in law but also assessing that the composition of the bench in each case was according to law. However, the question whether this was a task for the ECtHR remained unresolved.

6.2 COËME 2000: LAW EMANATING FROM PARLIAMENT

In Coëme 2000 § 98, the ECtHR recalled that the phrase 'tribunal established by law' was meant to indicate 'that the judicial organisation in a democratic society [does] not depend on the discretion of the Executive, but that it [is] regulated by law emanating from Parliament' with reference to a decision of the European Commission from 1978.[119] The ECtHR added:

> Nor, in countries where the law is codified, can organisation of the judicial system be left to the discretion of the judicial authorities, although this does not mean that the courts do not have some latitude to interpret the relevant national legislation.[120]

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116 Piersack v Belgium, app. no. 8692/79, 1 October 1982, § 27.
117 Piersack v Belgium, app. no. 8692/79, 1 October 1982, § 33.
118 Piersack v Belgium, app. no. 8692/79, 1 October 1982, § 33.
119 Coëme and others v Belgium, app. no. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, 22 June 2000, § 98, see Zand v Austria, application no. 7360/76, Commission's report 12 October 1978,
120 Coëme and others v Belgium, app. no. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, 22 June 2000, § 98.

What was at stake in the case was that the Belgian Court of Cassation in a case had claimed jurisdiction also over defendants that were to be tried by another court. There was a connection between those defendants and the defendants that were actually to be tried by the Court of Cassation, but the rule giving the Court of Cassation jurisdiction was made up by the court itself.[121] This was not acceptable. There was no reference to Piersack, probably because the Coëme case dealt with the question whether the court had jurisdiction rather than with the question whether the composition of the bench was in conformity with the relevant rules.

6.3 LAVENTS 2002: THE COMPOSITION OF THE BENCH IN EACH CASE

What was indicated in Piersack and partly clarified in Coëme about that the composition, organisation and competence of a court need to be established by law has been discussed in other cases. For example, in the Lavents judgment from 2002, the ECtHR clarified that the expression 'tribunal established by law' did not only relate to the basis of the existence of a court but also the composition of the bench in each case (*'L'expression « établi par la loi » concerne non seulement la base légale de l'existence même du tribunal, mais encore la composition du siège dans chaque affaire'*).[122]

In the judgment, the court referred to another judgment[123] where this standard was not explained in an equally principled manner; this means that the Lavents case is the first judgment where the principle was expressed explicitly. However, the court also referred to a decision of admissibility in the Buscarini case, where the ECtHR had expressed the principle explicitly with a reference to Piersack.[124] As we have seen above, the ECtHR did not actually assess the question in that judgment, because it was not necessary since there was a violation of Article 6 ECHR for other reasons. However, the result according to the Buscarini decision is that the composition of a court must be in accordance with law. The Buscarini decision then was referred to in many of the cases which the Ástráðsson judgment was built upon (see below section 6.5).

6.4 FLUX 2007: APPOINTMENT OF JUDGES BY THE EXECUTIVE OR THE LEGISLATURE

In some cases, the ECtHR has commented on the fact that the notion of the separation of powers between the political organs of government and the judiciary has assumed growing importance in its case law.[125] In the Flux (no. 2) judgment, the ECtHR decided that appointment of judges by the executive or the legislature is permissible, provided that appointees are free from influence or pressure when carrying out their adjudicatory role.[126] This was based on one of the findings in Campbell and Fell, where the court had not made the principle explicit but had found that appointment by a minister did not in itself mean

[121] Pabel 2021 p. 31.
[122] Lavents v Latvia, app. no. 58442/00, 28 November 2002, § 114.
[123] Bulut v Austria, app. no. 17358/90, 22 February 1996, § 29.
[124] Buscarini v San Marino, app. no. 31657/96, 4 May 2000.
[125] Stafford v the United Kingdom [GC], app. no. 46295/99, 28 May 2002, § 78, with reference to Incal v Turkey, app. no. 22678/93, 9 June 1998.
[126] Flux (no. 2) v Moldova, app. no. 31001/03, 3 July 2007, § 27.

that judges were not independent.[127] The assessment in Flux (no. 2) was then repeated in further cases, and the growing importance of the separation of powers did not change this.[128]

6.5 ÁSTRÁÐSSON 2020: THE NEW DEFINITION OF 'ESTABLISHED BY LAW'

In the Astrađsson judgment (Grand Chamber) from 2020, the question was whether the new Icelandic Court of Appeal was a 'tribunal established by law'. The fact that the Court of Appeal as such was established by a law emanating from Parliament was not contested,[129] but also the participation of the judges in the examination of a case needs to be based on law. In sum, the phrase 'established by law' covers not only the legal basis for the very existence of a 'tribunal' but also the compliance by that tribunal with the particular rules that govern it. The ECtHR related to the earlier statements that the 'law' should emanate from parliament and the importance of the separation of powers.[130] The court continued, in a review of its own case law, to say that 'compliance with the requirement of a "tribunal established by law" has so far been examined in a variety of contexts – under both the criminal and civil limbs of Article 6 (1) – including, but not limited to, the following'[131] aspects:

1. a court acting outside its jurisdiction,[132]
2. the assignment or reassignment of a case to a particular judge or court,[133]
3. the replacement of a judge without providing an adequate reason as required under the domestic law,[134]
4. the tacit renewal of judges' terms of office for an indefinite period after their statutory term of office had expired and pending their reappointment,[135]
5. trial by a court where some members of the bench were disqualified by law from sitting in the case,[136]
6. trial by a bench the majority of which was composed of lay judges despite the absence of a legal basis in domestic law for the exercise of judicial functions as a lay judge,[137]

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127 Campbell and Fell v The United Kingdom, app. no. 7819/77 and 7878/77, 28 June 1984, § 79.
128 Maktouf and Damjanović v Bosnia and Herzegovina [GC], app. no. 2312/08 and 34179/08, 18 July 2013, § 49.
129 Ástráđsson v Iceland, app. no. 26374/18, 1 December 2020, § 206.
130 Ástráđsson v Iceland, app. no. 26374/18, 1 December 2020, §§ 211-215.
131 Ástráđsson v Iceland, app. no. 26374/18, 1 December 2020, § 217.
132 Reference made to Coëme and others v Belgium, app. no. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, 22 June 2000, §§ 107-109, see above section 6.2., and Sokurenko and Strygun v Ukraine, app. no. 29458/04 and 29465/04, 20 July 2006, §§ 26-28.
133 Reference made to DMD GROUP, a.s. v Slovakia, app. no. 19334/03, 5 October 2010, §§ 62-72; Richert v Poland, app. no. 54809/07, 25 October 2011, §§ 41-57; Miracle Europe Kft v Hungary, app. no. 57774/13, 12 January 2016, §§ 59-67; Chim and Przywieczerski v Poland, app. no. 36661/07 and 38433/07, 12 April 2018, §§ 138-142; and Pasquini v San Marino, app. no. 50956/16, 2 May 2019, §§ 103 and 107.
134 Reference made to Kontalexis v Greece, app. no. 59000/08, 31 May 2011, §§ 42-44.
135 Reference made to Gurov v Moldova, app. no. 36455/02, 11 July 20016, § 37, and Oleksandr Volkov v Ukraine, app. no. 21722/11, 9 January 2013, §§ 152-156.
136 Reference made to Lavents v Latvia, app. no. 58442/00, 28 November 2002, § 115, see above section 6.3., and Zeynalov v Azerbaijan, app. no. 31848/07, 30 May 2013, § 31.
137 Reference made to Gorguiladzé v Georgia, app. no. 4313/04, 20 October 2009, § 74, and Pandjikidzé and others v Georgia, app. no. 30323/02, 27 October 2009, § 110.

7. the participation of lay judges in hearings in contravention of the relevant domestic legislation on lay judges,[138]
8. trial by lay judges who had not been appointed in compliance with the procedure established by the domestic law,[139]
9. delivery of a judgment by a panel which had been composed of a smaller number of members than that provided for by law,[140] and
10. conduct of court proceedings by a court administrator who was not authorised under the relevant domestic law to conduct such proceedings.[141]

In sum, a court must not only be established by law but also have jurisdiction according to law, the case must be assigned to the court and judge correctly, judges must be appointed correctly, and the procedural rules about the competence of the court must be adhered to.

After making its summary in ten bullet points, the ECtHR Grand Chamber found that the case provided the court 'with an opportunity to refine and clarify the meaning to be given to the concept of a 'tribunal established by law', and to analyse its relationship with the other 'institutional requirements' under Article 6 (1) of the Convention, namely, those of independence and impartiality'.[142]

As regards the definition of a 'tribunal', the court recalled the phrasing of independence in Belilos – 'in particular of the executive; impartiality; duration of its members' terms of office'[143] – and added the requirement that a tribunal should be 'composed of judges selected on the basis of merit – that is, judges who fulfil the requirements of technical competence and moral integrity to perform the judicial functions required of it in a State governed by the rule of law'.[144]

As regards 'established', the ECtHR noted, with reference to an earlier case,[145] that 'irregularities in the appointment procedure' of judges could mean that a tribunal was not established by law.[146]

As regards 'by law', the ECtHR clarified, *firstly,* that 'the requirement of a "tribunal established by law" also [means] a "tribunal established in accordance with the law", and *secondly,* that its concern is to ensure 'that the relevant domestic law on judicial appointments is couched in unequivocal terms, to the extent possible, so as not to allow arbitrary interferences in the appointment process, including by the executive'.[147] As regards the more specific phrase 'established in accordance with' rather than 'established by', it is clear from the references to the Ilatovskiy,[148] Momčilović,[149] and Mocanu[150] cases that it means that it is not sufficient that the court as an institution is established by law, on the contrary, it must

[138] Reference made to Posokhov v Russia, app. no. 63486/00, 4 March 2003, §§ 39-44.
[139] Reference made to Ilatovskiy v Russia, app. no. 6945/04, 9 July 2009, §§ 38-42.
[140] Reference made to Momčilović v Serbia, app. no. 23103/07, 2 April 2013, § 32, and Jeniţa Mocanu v Romania, app. no. 11770/08, 17 December 2013, § 41.
[141] Reference made to Ezgeta v Croatia, app. no. 40562/12, 7 September 2017, § 44.
[142] Ástráðsson v Iceland, app. no. 26374/18, 1 December 2020, § 218.
[143] Belilos v Switzerland, app. no. 10328/83, 29 April 1988, § 64.
[144] Ástráðsson v Iceland, app. no. 26374/18, 1 December 2020, §§ 219-222.
[145] Ilatovskiy v Russia, app. no. 6945/04, 9 July 2009.
[146] Ástráðsson v Iceland, app. no. 26374/18, 1 December 2020, §§ 223-228.
[147] Ástráðsson v Iceland, app. no. 26374/18, 1 December 2020, § 230.
[148] Ilatovskiy v Russia, app. no. 6945/04, 9 July 2009.
[149] Momčilović v Serbia, app. no. 23103/07, 2 April 2013.
[150] Jeniţa Mocanu v Romania, app. no. 11770/08, 17 December 2013.

also be assessed whether the composition of the court is in conformity with the relevant rules and that the judges have been appointed in a correct way.

Since independence is a requirement for an institution to be a 'tribunal', the reasoning can become circular when the assessment is to be made whether a tribunal is independent. The ECtHR observes this and states that the aim is 'upholding the fundamental principles of the rule of law and the separation of powers'.[151] Therefore, 'the examination under the "tribunal established by law" requirement must not lose sight of this common purpose and must systematically enquire whether the alleged irregularity in a given case was of such gravity as to undermine the above-mentioned fundamental principles and to compromise the independence of the court in question'.[152]

Then, the ECtHR clarifies what independence is:

> "Independence" refers, in this connection, to the necessary personal and institutional independence that is required for impartial decision-making, and it is thus a prerequisite for impartiality. It characterises both (i) a state of mind, which denotes a judge's imperviousness to external pressure as a matter of moral integrity and (ii) a set of institutional and operational arrangements – involving both a procedure by which judges can be appointed in a manner that ensures their independence and selection criteria based on merit – which must provide safeguards against undue influence and/or unfettered discretion of the other State powers, both at the initial stage of the appointment of a judge and during the exercise of his or her duties (see, mutatis mutandis, Khrykin v. Russia, no. 33186/08, §§ 28-30, 19 April 2011).[153]

After this, the ECtHR develops a 'treshold test', which aims to answer 'the basic question whether any form of irregularity in a judicial appointment process, however minor or technical that irregularity may be, and regardless of when the breach may have taken place, could automatically contravene that right'.[154] The 'treshold test' has been applied also later,[155] and the concept 'established in accordance with the law' has influenced the case law of the CJEU.[156]

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[151] Ástráðsson v Iceland, app. no. 26374/18, 1 December 2020, § 233.
[152] Ástráðsson v Iceland, app. no. 26374/18, 1 December 2020, § 234.
[153] Ástráðsson v Iceland, app. no. 26374/18, 1 December 2020, § 234.
[154] Ástráðsson v Iceland, app. no. 26374/18, 1 December 2020, § 235. See §§ 236-252 as to how the threshold test works, and cf. partly concurring, partly dissenting opinion by judge Pinto de Albuquerque, who writes that 'the right to a court established by law is a self-standing Convention right and its own autonomous content is not to be confused with that of the principles of independence, impartiality or irremovability of judges' and continues: 'The appointment of a judge to a court in accordance with the relevant eligibility criteria is undoubtedly part of the essence of this right. This is also supported by the fact that a significant number of Contracting Parties consider that the requirement of a "tribunal established by law" covers the legal procedure for the appointment of judges and allows or even imposes the reopening of the proceedings in the event of a judgment being adopted by a judge who has been unlawfully appointed to office' (§ 9).
[155] Xero Flor v. Poland, app. no. 4907/18, 7 May 2021, §§ 243-291.
[156] C-487/19, W.Ż., 6 October 2021, ECLI:EU:C:2021:798, §§ 124-130; C-542/18 RX-II and C-543/18 RX-II, Simpson and HG, ECLI:EU:C:2020:232, § 74.

6.6 THE PIERSACK LINE OF CASE LAW: CONCLUSIONS

In Piersack 1982, the ECtHR just commented that the composition of the bench in each case might be governed by the standard 'established by law'. In Coëme 2000, it was clarified that 'law' was law emanating from parliament. In the Lavents case 2002, which built upon the decision in Buscarini from 2000, it was clarified that 'established by law' actually means that the composition of the bench is in accordance with law.

In Ástráðsson, the ECtHR summed up the case law and developed it as regards the lawful composition of the court. Case law between Lavents and Ástráðsson had dealt with irregularities in the appointment of judges and the composition of courts, but the ECtHR now got a chance to clarify the principles to be applied. Even though 'irregularities in the appointment procedure' might mean that a court is not established by law, a threshold test was introduced to avoid considering a tribunal not established by law because of any minor or technical irregularity in appointment processes. It is interesting to note that the development of the concept 'established by law' is later than the other parts of the case law on independence and impartiality.

7 CONCLUDING COMMENTS

In this section, I will provide some concluding comments and sum up the analysis that I have made in the preceding sections. One important conclusion is that the details in the assessments of impartiality and independence have developed slowly and inconsistently, in spite of the fact that independence and impartiality of judges are not new concepts.

7.1 IMPARTIALITY AS A STATE OF MIND

As I mentioned in section 2.1., impartiality as a state of mind is a very old ethical requirement when being a judge, and it continues to be highly relevant. There are, however, not many cases in which the ECtHR or the CJEU have been able to conclude that a judge was actually partial in his or her mind.[157] This is not surprising, since it is difficult to assess the impartiality in the mind of the judge (subjective impartiality), and this means that the question of appearances will be most important for the assessment (objective impartiality). The personal impartiality of a judge is presumed until there is proof to the contrary, but on the other hand, the requirement of objective impartiality provides an important guarantee for a fair trial.[158] Even though it is easy to understand the difficulties that would arise if the ECtHR were to assess impartiality as a state of mind of national judges, this means that national judges can only obtain very limited guidance through the case law of the ECtHR and the CJEU.

In early cases, the standard approach was to assess independence and impartiality together, as independence 'of the executive and of the parties to the case'. However, in the Belilos judgment 1988, the concept 'impartiality' replaced the earlier concept 'independence of [---] the parties to the case'. This indicates that these concepts are synonymous, but it also relates to the lacking difference between assessments of independence and impartiality. Even though the state can act as a party and try to influence the court in that capacity, conceptually

[157] Pabel 2021 pp. 40-412, Harris et al. 2018 pp. 451-452.
[158] See for example Kyprianou v Cyprus, app. no. 73797/01, 15 December 2005, §§ 118-135.

that behaviour can be distinguished from situations where the state more generally threatens the independence of courts.

In the Khrykin and Baturlova judgments 2011, the ECtHR defined impartiality as independence as a state of mind. Still, the conceptual distinction between independence and impartiality is unclear, at least in comparison to the Wilson and LM cases from the CJEU, where the discussion of independence and impartiality – or literally the external and internal aspects of independence – are clearer. Still, for a judge to know how to be impartial in his or her mind, not much detailed information can be obtained from ECtHR and CJEU case law. The judge needs to consult other texts, such as the Bangalore principles.

7.2 PROCEDURAL IMPARTIALITY

Procedural impartiality has not been so much discussed from the point of view of the judge and how a fair trial with 'equality of arms' functions as a means to keep the judge impartial.[159] Unsurprisingly, procedural impartiality has been discussed in terms of whether the parties have had equal opportunities to present their cases under conditions that do not place them at a substantial disadvantage compared to the opponent.[160] That lies outside the scope of this article, but I would like to highlight that just as institutional independence is a guarantee for independence as a state of mind of a judge, procedural impartiality can function as a guarantee for impartiality as a state of mind. If institutional independence helps the judge thinking independently, procedural arrangements where there is equality of arms and where both parties can put forward their arguments help the judge thinking impartially. It is not only a duty for a judge to listen to both parties, but it is also required that the legislator arranges the procedure so that equality of arms prevails.

7.3 INDEPENDENCE AS A STATE OF MIND

Fear is, since the Middle Ages, repeatedly mentioned as an emotion that should not cause a judge to hand down a wrongful judgment,[161] and fear can relate to both the parties and people external to the judicial process. Fear is in some contexts paired with favour,[162] meaning that the judge should not strive for popularity in the local community. But just as impartiality as a state of mind is difficult to assess, independence as a state of mind also is.

In the Portuguese Judges case, the CJEU concluded that judges should function 'wholly autonomously, without being subject to any hierarchical constraint'.[163] This not only relates to institutional arrangements but also to the attitude of the individual judge. Just like impartiality as a state of mind, independence as a state of mind is an ideal of which not much detailed information can be obtained from ECtHR and CJEU case law.

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159 Cf. however Campbell and Fell v The United Kingdom, app. no. 7819/77 and 7878/77, 28 June 1984, § 76 compared to §§ 38 and 39.
160 Regner v the Czech Republic [GC], app. no. 35289/11, 19 September 2017, § 146.
161 Isidore of Seville, *Sententiae,* Thomas L. Knoebel (transl. and ed.), New York/Mahwah: The Newman Press, 2018, p. 207.
162 For example in the oath of the imperial judge according to the Reichslandfrieden of Mainz 1235, see Ludwig Weiland, *Constitutiones et acta publica imperatorum et regum inde ab a. MCXCVIII usque a. MCCLXXII (1198-1272),* Hannover 1896, on *Monumenta Germaniae Historia,* www.dmgh.de/index.html, p. 247 and 262.
163 C-64/16, Associação Sindical dos Juízes Portugueses, 27 February 2018, ECLI:EU:C:2018:117, § 44.

7.4 INSTITUTIONAL INDEPENDENCE

Institutional independence has been easier to assess than the impartiality and the independence in the minds of judges, but on the other hand, the criterion 'tribunal established by law' developed late, at least in comparison to other aspects of the institutional independence or the importance of appearances. For example, in Ringeisen 1971, the term of appointment was considered a criterion for independent judges, and in the Piersack and Campbell and Fell judgments from the early 1980s, the ECtHR discussed 'the existence of guarantees against outside pressures'. Campbell and Fell 1984 established the 'core criteria' of an independent and impartial tribunal,[164] and according to later case law, for example Khrykin and Baturlova 2011 (see section 4 above), the factors to assess can be summarised thus:

- the manner of appointment of the members of the court,
- their term of office,
- guarantees against outside pressures,
- guarantees against pressure from within courts,
- separation of powers.

The criterion 'established by law' has developed later than many other of the aspects. Only in the Ástráðsson judgment from 2020, the ECtHR clarified that the concept tribunal 'established by law' is to be understood as 'established in accordance with law', indicating that a court must not only be established by law but also have jurisdiction according to law, the case must be assigned to the court and judge correctly, judges must be appointed correctly, and the procedural rules about the competence of the court must be adhered to. From the case law of the CJEU, it should be mentioned that the Portuguese judges and LM cases show that guarantees as regards appointment and remuneration mean that there are also guarantees for independence.

If the different parts of institutional independence are understood as means for helping the judge thinking independently, it must be highlighted that it is the duty of the legislator or the drafters of constitutions to arrange resilient institutions.

7.5 THE IMPORTANCE OF APPEARANCES

Through Delcourt 1970, the maxim 'justice must not only be done; it must also be seen to be done' was brought into the case law of the ECtHR, probably by the British judge Sir Humphrey Waldock, but in a shorter version than the one Lord Hewart had originally coined. Even though the word 'appearance' was mentioned in Delcourt, it was in Piersack 1982 that the importance of 'appearances' was linked to the 'objective approach'.[165] In Campbell and Fell 1984, the 'appearance of independence' was made a criterion for an independent court.[166]

When the ECtHR started developing its case law as regards the role of judges in the 1960s and early 1970s, it started interpreting the right to a fair trial according to Article 6

[164] Pabel 2021 p. 28.
[165] Piersack v Belgium, app. no. 8692/79, 1 October 1982, § 30.
[166] Campbell and Fell v The United Kingdom, app. no. 7819/77 and 7878/77, 28 June 1984, § 78.

ECHR, without much reference to historical facts and principles that could have guided the court, such as common European constitutional principles and the various oaths and documents where judicial ethics has been defined. This is perhaps not very surprising, since the task of the court was to interpret and apply the convention.[167] What is more surprising is the weight attached to the maxim 'justice must not only be done; it must also be seen to be done'. Obviously, it was of British origin, even though it was probably coined in an international context.

I would say that bringing the maxim 'justice must not only be done; it must also be seen to be done' into its case law it is a very important contribution by the ECtHR to the definition of the ethics of judges. It has been criticised,[168] based on a need to distinguish between independence and impartiality[169] with which I agree, but I think it is important for a judge to consider all the four different factors – impartiality as a state of mind, procedural impartiality, independence as a state of mind, and institutional independence – from the point of view of appearances. Judges will then have to be aware of which impressions different types of behaviour will give, and such awareness can contribute to strengthening the independence and impartiality in their minds.[170]

[167] Article 45 of the original text of the ECHR (1950).
[168] Oakes and Davies 2013 pp. 130-137 and 157-160; Oakes and Davies 2016 pp. 493-494.
[169] Oakes and Davies 2016 p. 492.
[170] Ussing 1899 p. 326; Christensen 2003 pp. 69-89.

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WHEN DO AGREEMENTS RESTRICT COMPETITION IN EU COMPETITION LAW?

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Under EU competition law, it is prohibited to conclude agreements distorting competition, but little guidance is available on what to consider anti-competitive. However, case law has given rise to patterns holding some practices anti-competitive by object while others must be assessed in detail and against their effect without providing a workable definition on the lines between these two approaches. Other issues remain equally open-ended, e.g., when the anti-competitive effect is appreciable. In this paper, a possible roadmap for the appraising of restrictive agreements in EU competition law will be provided.

1 INTRODUCTION

It follows directly from the wording of Article 101 of the Treaty on the Functioning of the European Union (Article 101) that agreements, decisions, or concerted practices can be anti-competitive by *object* or *effect*. It also follows from case law that the form, official purpose, or subjective intent is immaterial[1] jointly with ignorance of Article 101.[2] Nor does it matter whether the agreement in question is restrictive in itself or by virtue of specific elements herein, or only by its impact on the market in light of the prevailing market conditions. Only the actual or plausible consequences for competition matter under Article 101(1). Naturally, mitigating factors, e.g., a socially desirable purpose, may be accommodated under Article 101(3), but only subject to the strict conditions here. While indicating some easily applicable principles, the reality is, as always, more complex, and very little can be extracted from the examples provided in the text of Article 101.[3] However, the European Commission has in its guidelines tried to capture the essence of the assessment by explaining that:[4]

> If an agreement is not restrictive of competition by object it must be examined whether it has restrictive effects on competition. Account must be taken of both actual and potential effects… For an agreement to be restrictive by effect it must affect actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable degree of probability. Such negative effects must be appreciable. The prohibition rule of Article [101] does not apply when the identified anti-competitive effects are insignificant. [Neither is it]

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[1] See case C-209/07, *Beef Industry* EU:C:2008:643, para 21; case C-67/13P, *Groupement des cartes bancaires* EU:C:2014:2204, para 54; and case C-32/11, *Allianz Hungária* EU:C:2013:160, para 37.

[2] Case T-61/89, *Dansk Pelsdyravlerforening*, EU:T:1992:79, para 157.

[3] Article 101(1) refers to (a) fixing of prices and trading conditions; (b) limiting of production or developments; (c) share of markets; (d) discrimination; and (e) tying.

[4] *Guidelines on the application of Article 81(3) of the Treaty,* recital 24, and footnote 31.

> sufficient in itself that the agreement restricts the freedom of action of one or more of the parties…. This is in line with the fact that the object of Article [101] is to protect competition on the market for the benefit of consumers.

From case law, it follows that the object of Article 101(1) is not confined to protecting competitors and consumers, as indicated above, but it also encompasses market structure and the notion of consumer welfare.[5] Moreover, in the assessment, regard must be made to the agreement's content, the objectives it seeks to attain, and the economic and legal context of which it forms part,[6] thereby readmitting the issue of intent to the assessment under Article 101(1).

From these principles, it follows that enforcers must start by formulating a theory of harm,[7] outlining how an agreement, decision, or concerted practices (potentially) are detrimental to the object of Article 101(1), and then substantiate this by testing the matter. This can be implemented by contemplating whether the practice in question:

1) Is concluded between two or more undertakings that are directly or indirectly actual or potential competitors, making it a horizontal agreement. Alternately, if their relationship is vertical within a distribution chain or activities attributable to different markets. The latter two are appraised much more leniently compared to the former.

2) Has as its object or effect the restriction of competition, which in practice often comes down to the ability to refer to a legitimate purpose. Formally, restriction by effect requires, in contrast to restriction by object, substantial analysis of the its impact on competition. Typically, such an analysis is performed by comparing competition with and without the practice in question.

3) Has an appreciable adverse effect on competition, or if this can be precluded based on its ancillary nature or insignificant impact. While in principle an extension of the counterfactual analysis outlined above, the questions remain a separate step not to be confused with the issue of finding a restriction by object or effect.

In this paper, these three steps will be developed to outline the notion of anti-competitive agreements under Article 101. The presentation will not touch upon what to consider an agreement, decision, or concerted practices in the first place, nor any of the other requirements[8] embedded in Article 101. E.g., that trade between the EU member states must be affected, and that the conduct in question originates from the undertakings involved. Neither will it explore the matter of exemption under Article 101 (3). Moreover, for

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[5] United cases C-501/06P, C-513/06P, 515/06P, and 519/06, *GlaxoSmithKline Services* EU:C:2009:610, para 63, and *Guidelines on the application of Article 81(3) of the Treaty,* recital 13. For further discussions on the objects of EU competition law, see, e.g., Jonathan Faull & Ali Nikpay, *The EC Law of Competition*, 3rd edition, Oxford, 2014, pp. 5-9 and 228-235, and Massimo Motta, *Competition Policy, Theory and Practice*, Cambridge, 2004, pp. 17-30.

[6] *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (2011), recital 25.

[7] Examples of possible theories can be found in *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (2011), recitals 33-38, and *Guidelines on Vertical Restraints* (2022), recitals 18-20.

[8] For further, see, e.g., Richard Whish, Competition Law, 10th Edition, 2021, pp. 83-120, and Jonathan Faull & Ali Nikpay, *The EC Law of Competition*, 3rd edition, Oxford, 2014, pp. 204-226.

simplicity, the concept of agreements will also encompass decisions and consorted practices unless otherwise specified, regardless of three concepts that are equally open-ended. Finally, the paper pertains to EU competition law, but as the national competition law of the EU members states must be aligned with Article 101,[9] the outlined principle would also apply to national enforcement.

2 THE LINE BETWEEN HORIZONTAL AND NON-HORIZONTAL BEHAVIOUR

Nothing in the wording of Article 101 indicates a division between horizontal and non-horizontal agreements and restrictions. However, it could be argued that the examples listed in Article 101(1) are more horizontal than vertical in nature, making it clear that the former should form the core of enforcement. This has transcended into practice rendering a much more lenient appraisal available for non-horizontal behavior, even involving a presumption of substantial scope for efficiencies associated with these.

In *Allianz Hungária*,[10] involving agreements concluded between Hungarian insurances companies and auto shops, the Court of Justice felt compelled to state that vertical agreements also could infringe Article 101(1) by object or effect. However, vertical agreements would often be less damaging to competition than horizontal agreements by their nature. This was made even more explicit in *Visma,*[11] involving the review of restrictive provisions in a distribution agreement, potentially limiting competition between the distributors. In reply to a preliminary reference, the Court of Justice recalled how vertical agreements, in general, are less likely to be harmful than horizontal agreements and how restrictions of competition between distributors of the same brand (intra-brand competition) would rarely be problematic unless competition between different brands (inter-brand competition) was already weakened. In *Consten and Grundig,*[12] involving the assessment of vertical exclusivity agreements, the parties even argued that Article 101(1) did not apply to vertical agreements but only horizontals. The Court of Justice rebutted this, clarifying that Article 101 was not limited in scope and application to horizontal agreements, but also covered non-horizontal agreements.

The qualification of an agreement is done against the market definition and the parties' position herein. However, the market structure or the senior management's actions may taint the appraisal, transforming a non-horizontal agreement into a horizontal concluded between competitors, with legal consequences for the assessment.

In *Hasselblad,*[13] the EU Commission did not object to the vertical exchange of sensitive price information between a wholesaler and its retailer, but only that the information had also been passed on to the latter, adding a horizontal element to the vertical agreement. In *HFB,*[14] a group of undertakings had colluded in prices and allocation of customers, infringing Article 101(1). In its decision, the EU Commission had included some additional undertakings as these

[9] For further see, e.g., Richard Whish, Competition Law, 10th Edition, 2021, pp. 77-82.
[10] (n 1), para 43. See also *Guidelines on Vertical Restraint*, recital 6.
[11] Case C-306/20, *Visma* EU:C:2021:935, para 78.
[12] United cases C-56/64 and 58/64, *Établissements Consten S.à.r.l. and Grundig-Verkaufs-GmbH* EU:C:1966:41, pp. 339-340.
[13] Case IV/25.757, *Hasselblad*, O.J. 1982L 161/18, recital 49. Partly overturned by case C-86/82 - *Hasselblad.*
[14] Case T-9/99, *HFB* EU:T:2002:70, paras 8-33 (background) and 55-68 (controlled by one entity).

were considered group-affiliated to one of the cartelist. This was done against overlaps in ownership and management, joint representation, and internal documents indicating a single common strategy.

The undertakings in question does not have to be actual competitors although they would compete in the same market and for the same customers. It is sufficient that they could qualify as *potential* competitors. Nor is it material if the restrictions in question affected competition between different brands and products (inter-brand competition) or between different suppliers (intra-brand competition). All types of conduct are covered by the scope of Article 101(1) if anti-competitive.

2.1 ACTUAL AND POTENTIAL COMPETITORS AND THIRD PARTIES

Following the process of defining the market, it can then be decided if the parties are, as a minimum, potential competitors. Usually, this is accepted if both are active in the same market,[15] even where the agreement involved is in principle non-horizontal, and the overlap is related to different but associated markets, e.g., up- or downstream.

In *Screensport/EBU,*[16] a group of broadcasters had established a consortium directed at buying sports rights and, at the same time, a transnational satellite-based sports channel directed at utilizing these. However, one of the members was at the same time engaged in establishing its own transnational satellite-based sports channel potentially competing with the consortium, creating a horizontal overlap at a downstream market. In *Cekacan,*[17] a Swedish and a German company had formed a joint venture to market a new packing technology currently only utilized by the latter for the German market. The coorporation was exclusive and included the underlying machines and production facilities. The European Commission held it anti-competitive that the agreement had de facto eliminated the German company as a separate competitor.

In particular, associations of undertakings can blur the lines as some members might compete against each other. Decisions made by the governing bodies of associations of undertakings can therefore blend horizontal and non-horizontal elements, requiring separate assessments of these.[18] It is not even required that all members to an anti-competitive practice should be competitors, provided that a minimum of two would qualify as such, as detailed later. Further, in a vertical distribution chain, the lines become even more blurred as undertakings might be customers on the upstream (wholesale) market, but competitors on the downstream retail or aftermarket, giving what is in principle a vertical agreement a horizontal twist.

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[15] *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (2011), recital 10.
[16] Case IV/32.524 - *Screensport/EBU,* O.J.1991L 63/32, recitals 52-66.
[17] Case IV/32.681 - *Cekacan,* O.J. 1990L 299/64, recitals 34-39.
[18] Pursuant to *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (2011), recital 12, the horizontal elements are to be assessed first followed by the verticals.

2.1[a] Potential Competitors

As outlined above, Article 101(1) does not require direct and imminent competition between the involved undertakings. It is sufficient that this could emerge following market entry, expanding the concept to potential competitors.

In *Toshiba*[19] and *Franco-Japanese ball-bearings agreement,*[20] the parties had concluded gentleman agreements directed at shielding their respective home markets. In the assessment, it was considered irrelevant that none of these actually competed there as they could have entered the markets void of the understanding. The General Court even referred to the understanding as evidence of their status as potential competitors.

An undertaking would qualify as a potential competitor if market entry was feasible without the agreement in question as a reaction to a small, but significant and non-transitory increase in price (this is known as the SSNIP test).[21] If relevant, matters can be taken into account following investments or procurements of resources or termination of restrictive agreements.

In *VISA,*[22] involving the condition for being accepted into the VISA credit card system, the General Court was called to clarify when to consider an undertaking a potential competitor. To challenge this, the parties i.a. submitted that the European Commission had rested its conclusion on an intention to enter the market in question rather than actual facts. The Court refuted this, but also declared that the assessment could not be made in the abstract. Instead, it had to be based on evidence or an analysis of the relevant market structures where declared intentions were one factor and market structure void of the involved agreements another. Further, an undertaking could not be described as a potential competitor if entry was not an economically viable strategy or if entry would not take place with sufficient speed to exert a competitive constraint on market participants. In *Roche,*[23] the reversed situation was presented as the activities, and thus market entry, of one of the parties rested on an IP license granted by the other. It could therefore be submitted that void of the agreement, it would not be possible to enter, nor remain, in the market. However, the Court of Justice did not accept this but identified the parties as competitors under Article 101(1).

Guidance on when to consider undertakings as potential competitors can be found in the principles used when defining the relevant market and the concept of potential competition.[24] Here, an undertaking would normally be considered a potential competitor if entry would be possible within 2 to 3 years.[25] However, the legal standard was formulated in *VISA,* requiring entry to take place with sufficient speed to exert a competitive constraint

[19] Case T-519/09, *Toshiba* EU:T:2014:263, paras 230-232. Upheld with case C-373/14P, *Toshiba* EU:C:2016:26
[20] Case IV/27.095 - *Franco-Japanese ball-bearings agreement,* OJ. 1974L 343/19.
[21] *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (2011), recital 10. Other possible tests are available, including e.g. the GUPPI test where entry would occur with a General Upwards Pressure on Pricing Indicies.
[22] Case T-461/07, *VISA* EU:T:2011:181, paras 162-176 and 189-190.
[23] Case C-179/16, *F Hoffmann-La Roche* EU:C:2018:25, paras 35 and 75. In contrast, the Advocate General had rebutted this in his Opinion in Case C-179/16, *F Hoffmann-La Roche* EU:C:2017:714, para 94.
[24] See, e.g., *VISA*, (n 22) para 170, referring to the definition of 'potential competitor' in the *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (2011). Recital 10, footnote 3, of this refers to less than three years.
[25] In *Guidelines on Vertical Restraints* (2022), recitals 90 within one year is used a benchmark.

on market participants. In this the market structure also plays a role as entry might be prevented by legal restraints.

In *E.ON Ruhrgas,*[26] the European Commission had intervened against a supply agreement between the German and French gas incumbents stipulating that the latter could not enter the German market directly. A clause considered restrictive by object. However, there was no competition between the companies at the time of the agreement as the German market was reserved for Ruhrgas by law precluding entry. Therefore, the General Court overturned the decision, holding that Article 101(1) only applied to sectors open to competition.

A special practice has been developed and applied to the pharmaceutical sector. Here the question must be decided against the background of the underlying IP rights and the different license agreements potentially concluded between the parties.

In *Roche,*[27] a company was granted an IP license to sell medical drugs for specific purposes under the marketing authorization held by the licensor. Consequently, market entry was made possible solely by virtue of that agreement, which did not preclude the status as competitors. Neither did it matter to the Court of Justice that the use was outside the issued marketing authorization, potentially making it punishable, but not illegal, to sell the drug. In *Lundbeck,*[28] the European Commission had labeled a patent settlement between the original manufacturer and a potential infringer as a hidden market sharing agreement involving pay for delay. The former argued unsuccessfully that competition between the parties was precluded by virtue of the patent. While not accepted for the specific case, perhaps influenced by the fact that production had already been initiated, the argument appears to have carried some weight in *Teva/Cephalom.*[29] Here it was rebutted to include a generic competitor as a potential competitor if market entry infringed valid patents. Further, does *Roche* indicate a reading where market entry would not be accepted if illegal. These principles were developed further in *Generics,*[30] also involving pay for delay settlements, where the Court of Justice focused on the existence, or lack of, insurmountable barriers for entry and whether different forms of prepatory steps had been taken which indicated entry as plausible. In this, circumstantial evidence could be useful, e.g., if that payment was made in exchange for delaying market entry, making it plausible that the parties viewed themselves as competitors. Against these cases, it appears that IP rights formulate a rebuttable presumption that must be further substantiated before a conclusion can be rendered.

2.1[b] Non-Competitors' Participation in a Horizontal Agreement

An anti-competitive agreement infringing Article 101(1) may encompass undertakings with different roles where some act as ring leaders while others play a passive role. Newer practice

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[26] Case T-360/09, *E.ON Ruhrgas* EU:T:2012:332, para 84, 97-117. See also Joined Cases T-374/94, T-375/94, T-384/94, and T-388/94, *European Night Services* EU:T:1998:198, para 139, and Case C-307/18, *Generics and others* EU:C:2020:52, para 36.

[27] *F Hoffmann-La Roche*, (n 23), paras 35, 52-59, 67 and 75.

[28] Case T-472/13, *Lundbeck* EU:T:2016:449, para 121. Upheld as case C-591/16P, *Lundbeck*. EU:C:2021:243. The outcome cannot be fully aligned with *European Night Services,* (n 26), para 139 referring to regulatory obstacles as precluding market entry.

[29] Case COMP/M.6258 - *Teva/Cephalom,* recitals 98-99. See also case *F Hoffmann-La Roche*, (n 23), para 52, and case AT.39.612 - *Perindopril (servier)*, recitals 1156-1183.

[30] *Generics and others,* (n 26), paras 36-39, 42-56.

has taken this a step up by introducing a concept of *cartel facilitation*[31] under which third parties may be deemed to enter a horizontal agreement if they are somehow instrumental in bringing it about.

In *AC-Treuhand II,*[32] an intermediary had coordinated the operation of a cartel concluded between groups of undertakings. As the intermediary's activities felt outside the sector, it could in principle not be considered a full cartel member, but rather complicity to this. However, this concept, originated in criminal law, and had no place in administrative law, why the Advocate General preparing the case recommended precluding the company from responsibility.[33] This was not accepted by the Court of Justice, having no problem in including the undertaking giving ground for the concept of cartel facilitation. In *Yes Interest Rate Derivatives,*[34] also involving a facilitator, a group of financial institutions had manipulated the pricing of financial instruments linked to the Japanese yen through a strategy of information exchange and incorrect reporting to the market. After concluding the main cases, the European Commission directed its interest at a company that had acted as an intermediary between the cartel members inter partes and vis-vis third parties. More importantly, the company had knowingly assisted and should therefore be held liable jointly with the full cartel members. The General Court accepted the concept of cartel facilitation and joint responsibility, but rebutted the facts supporting knowledge of the (entire) infringement and thus application to the specific case.

From *AC-Treuhand II* and *Yes Interest Rate Derivatives* follows that undertakings can become members of, e.g., a cartel if they have knowledge about this and are instrumental in bringing it about. Even where their activities must be allotted to completely different markets and segments and thereby precluded from contributing to the reduction in competition directly. It is sufficient that others can provide this, implementing the anti-competitive understanding. From this, it follows that while an anti-competitive horizontal agreement per definition must involve two undertakings that can be considered competitors, this is not a requirement for the remaining parties. Moreover, it is even possible to be 'sucked' into a cartel by association, making it dangerous to be associated with these.

2.2 RESTRICTIONS IN INTER-BRAND VERSUS INTRA-BRAND COMPETITION

As already indicated, the assessment of anti-competitive effects should encompass the context of the agreements in question and how the competition would develop void of this. This involves taking account of the likely impact on **a**) inter-brand competition, i.e., competition between suppliers of competing brands, and on **b**) intra-brand competition, i.e., competition between distributors of the same brand. Where the first group of restrictions can foreclose third parties, the second would predominately victimize the producers in the short term, making it likely they have balanced its effect, seeing it as positive in the longer perspective. Regardless of that, Article 101(1) covers both, but accepts intra-brand restrictions to be (significant) less capable of distortion.

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[31] For further on this concept, see Lukas Solek, *Passive Participation in Anticompetitive Agreements*, Journal of European Competition Law & Practice, 2017, vol 8 (1), pp. 15-24.
[32] Case C-194/14P, *AC-Treuhand (II)* EU:C:2015:717, paras 33-47.
[33] See Advocate General Wahl's Opinion in Case C-194/14P, *AC-Treuhand (II)* EU:C:2015:350, paras 78-84.
[34] Case AT.39.861 - *Yen Interest Rate Derivatives (YIRD),* recitals 77-179 (behavior) and 206-209 (knowledge). Partly uphold with Case T-180/15, *Icap* EU:T:2017:795, and case C-39/18P, *Commission v Icap* EU:C:2019:584

In *Consten and Grundig,*[35] the parties had concluded an exclusive distribution agreement covering part of France and subsequently attempted to prevent parallel imports from outside the allotted territory. On appeal, the Court of Justice held that Article 101(1) was not confined to restrictions in inter-brand competition, but also covered restrictions in intra-brand competition. Therefore, it was not possible to grant absolute territorial protection preventing all forms of sales into allotted areas. In *Visma,*[36] the Court of Justice was called to offer guidance on the appraisal of a distribution system in which six months of priority were granted to the first distributor approaching a potential customer. Regardless of some confusion on the precise effect and scope of the priority clauses, it remained clear how they only restricted the distribution of the company's own products and thus were intra-brand restrictions. In its reply, the Court of Justice recalled how vertical agreements, in general, were less likely to be harmful and how restrictions of competition between distributors of the same brand (intra-brand competition) would rarely be problematic unless competition between different brands (inter-brand competition) was already weakened.

The concepts of inter- and intra-brand restrictions are not considered mutually exclusive as an agreement could influence both, e.g., if suppliers restrict their distributors from competing both with each other (intra-brand competition) and with third parties (inter-brand competition). Neither can restrictions in one be offset by increases in the other.

In *Metropole*,[37] the European Commission had intervened against a partnership directed at establishing a new pay TV channel in France and obligations tying the parents to supply certain channels exclusively to this. The clauses thereby restricted access to the channels and thus intra-brand competition, but were purportedly required to bring about the partnership and thus introduce a new competitor for the benefit of the inter-brand competition. The General Court did not accept this and held that agreements restricting intra-brand competition did not elude Article 101(1) merely because they increased inter-brand competition. This would entail a pro and con analysis outside the scope of Article 101(1).

While the segmentation does not influence the assessment of horizontal agreements, the treatment of vertical differs. As already indicated, the theory of harm associated with *intra-brand* restrictions is weaker as the direct victim is the producer, restricting access to own products and services. Presumably, against a careful balancing of different interests making it imprudent to intervene without a solid theory of harm. This explains why distribution forms confined to intra-brand restrictions as franchise, exclusive and selective distribution are treated leniently under Article 101(1)[38] and void of other factors should elude this completely.

3 A RESTRICTION BY OBJECT OR EFFECT

Pursuant to the text of Article 101(1), this covers agreements having as '…*their object or effect the prevention, restriction or distortion of competition*…', making it apparent that testing for this involves considering if:

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[35] (n 12), pp. 339-340. See also *Guidelines on the application of Article 81(3) of the Treaty,* recital 17.
[36] (n 11), para 78.
[37] Case T-112/99, *Metropole* EU:T:2001:215, paras 64, 70 and 77.
[38] See, e.g., Simon Bishop and Mike Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement,* Sweet & Maxwell, 2010, pp. 195-196, citing the EU Commission 1997 Green Paper and subsequent vertical guidelines.

a) The *object* of the agreement in question appears to be of an anti-competitive nature, making it less pivotal to include and undertake a careful balancing of different interests, as these, at the core, are incompatible with the object of Article 101.

b) The *effect* of the agreement in question might be anti-competitive, but this is not the object of this, making it pivotal to include, and undertake, a careful balancing of different interests, as these comply with the object of Article 101.

The segregation between object and effect is rooted in the factual wording of Article 101(1) as outlined above and is observable in foundational case law.

In *Consten and Grundig,*[39] the parties had concluded an exclusive distribution agreement covering part of France and subsequently attempted to prevent parallel imports from outside the allotted territory. The agreement thereby attempted to create absolute territorial protection detrimental to Article 101(1) objects, making further analysis redundant. In *Société Technique Minière,*[40] also involving an exclusive distribution agreement, the Court of Justice added further by stating that restriction by object or effect was not cumulative but alternative requirements. If an analysis of a clause did not reveal the effect on competition to be sufficiently deleterious, its effect could be evaluated as an alternative.

Restrictions by object or effect are alternatives and not cumulative requirements. Thus, if an agreement restricts competition by object, it is unnecessary to show that it is also restrictive by effect and vice versa. However, assuming the doctrine to be fully developed from the beginning would be manifestly wrong.[41] Rather, decisional practice in the early years leaned heavily on the impact on the freedom of action of firms and a rather mechanic appraisal of restrictions in these. Looking back, it is more likely that the doctrine did not come about in its own right before the turn of the millennium and is still subject to lacunas and ambiguity. This descends into the use of older cases as these might not represent the current reading of the doctrine. Further, as detailed later, this, rather than a list of object infringements, involves a case-by-case approach where restrictive elements, depending on the context, may be either object or effect infringements, complicating the matter further.[42]

3.1 WHAT TO CONSIDER RESTRICTIVE BY OBJECT

Restrictions by object cover classic cartel infringements of Article 101(1). This includes agreements between competitors (active or potential) on prices, output, and sharing of markets and customers and when it comes to non-competitors (e.g., vertical arrangements) fixing (minimum) resale prices and (some) territorial restrictions. Beyond these classic

[39] (n 12), p. 340.
[40] Case C-56/65, *Société Technique Minière* EU:C:1966:38, p. 249. See also case C-234/89, *Delimitis* EU:C:1991:91, para 13, and Case C-228/18, *Budapest Bank* EU:C:2020:265, para 44.
[41] For an outline of early practice, see e.g., D. Waelbroeck & D Slater, *The Scope of object vs. effect under Article 101 TFEU*, contribution to Jacques Bourgeois and Denis Waelbroeck, *Ten Years of the Effects-Based Approach in EU Competition Law Enforcement*, Bruylant, 2012, pp. 131-157. See also Opinion by Advocate General Bobek in case C-228/18, *Budapest Bank* EU:C:2020:265, paras 1, 2 and 49, for some notable considerations on the lack of clarity and simple applicable principles.
[42] In principle, an agreement stripped of restrictive clauses can still restrict competition, e.g., by virtue of information exchange as detailed later.

examples, what to consider inappropriate conduct becomes blurred, and even restrictions by effect are unclear, making it challenging to apply the correct test. However, a justification[43] for having a category of object infringements has been provided by referring to the concept of 'risk offenses' in general criminal law, e.g., driving under the influence of alcohol or drugs. Here, punishment is warranted wholly irrespective of whether actual danger or accident is endured. The Court of Justice has also provided justification by noting how:[44]

> […] certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition …., in order to determine whether an agreement between undertakings reveals a sufficient degree of harm that it may be considered a 'restriction of competition by object' within the meaning of Article 101(1) TFEU, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms part.

To make the concept clearer and help identify by object infringements, the European Commission has explained how:[45]

> Restrictions of competition by object are those that by their very nature have the potential of restricting competition. These are restrictions which in light of the objectives pursued by the Community competition rules have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article [101(1)] to demonstrate any actual effects on the market. This presumption is based on the serious nature of the restriction and on experience showing that restrictions of competition by object are likely to produce negative effects on the market and to jeopardise the objectives pursued by the Community competition rules. Restrictions by object such as price fixing and market sharing reduce output and raise prices, leading to a misallocation of resources, because goods and services demanded by customers are not produced. They also lead to a reduction in consumer welfare, because consumers have to pay higher prices for the goods and services in question.

Further elements to the mosaic have been provided by two rulings from 2020 essentially establishing that an agreement would amount to a restriction by object when it has no plausible purpose but the restriction of competition. Moreover, it rested with the enforcers to establish this.

In *Budapest Bank,*[46] the Court of Justice was requested to clear up if a national agreement on interbank fees was restrictive by object and if the concepts of restriction by object and effect were mutually exclusive. In reply, the Court rebutted the latter and held that an agreement that was cable of having a pro-competitive effect should not be considered restrictive by object. Even when the latter was found, the actual effect could still be relevant

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[43] Opinion by Advocate General Kokott in Case C-8/08, *T-Mobile Netherlands* EU:C:2009:110, para 47.
[44] *Toshiba*, (n 19), paras 26-27. See also *Groupement des cartes bancaires*, (n 1), para 51, and *Guidelines on the application of Article 81(3) of the Treaty,* recital 21.
[45] *Guidelines on the application of Article 81(3) of the Treaty,* recital 21.
[46] *Budapest Bank,* (n 40), paras 44 and 82-83.

for the final evaluation under Article 101(1). In *Generics,*[47] also involving the matter of when to accept an agreement as restrictive by object, the Court of Justice essentially held that this could be assumed when the agreement served no other purpose but the restriction of competition.

In preparing *Budapest Bank*, Advocate General Bobek[48] even recommended that the concept of by object infringements was reserved to obvious infringements easily identifiable, noting that:

> […] if it looks like a fish and it smells like a fish, one can assume that it is fish. Unless, at the first sight, there is something rather odd about this particular fish, such as that it has no fins, it floats in the air, or it smells like a lily, no detailed dissection of that fish is necessary in order to qualify it as such. If, however, there is something out of the ordinary about the fish in question, it may still be classified as a fish, but only after a detailed examination of the creature in question.

Budapest Bank and *Generics* were national cases referred to the Court of Justice, but their principles, including the need to check for a commercial explanation, are also observable in cases challenging a decision by the EU Commission.

In *Krka,*[49] the European Commission had acted against a set of agreements closing a patent conflict. Under the terms of these, the (alleged) infringer accepted the validity of the patent and divested certain overlapping IP rights, and was in return granted a license. To the European Commission, this masked a market sharing understanding, and in particular the low royalty (3%) indicated how the infringer was paid for stopping the infringement. The General Court did not agree on this. First and foremost, did patent settlements per see involve a form of market sharing where one party accepts the other party's rights. Secondly, did internal documents indicate how the 'infringer' was concerned about the merits of his claims and how this motivated the decision to settle. Thirdly, it had not been established that the royalty was suspiciously low why all elements of the settlement appeared commercially based to the extent they were linked or unusual.

Against this, it becomes apparent that restriction *by object* does more than table a presumption of unlawfulness that can be rebutted,[50] but relates to actions that by their very nature are harmful to the proper functioning of normal competition, reducing the need for further investigations. This encompasses behavior where the anti-competitive effect can be expected from **i**) their serious nature, **ii**) experience, or **iii**) high potential for damage.[51] An assessment to be undertaken against the objective content, purpose, legal context, and background[52] of the behavior in question, including any alternative explanation than the

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47 *Generics and others* (n 26), paras 82 and 87-90.
48 Opinion of Advocate General Bobek in *Budapest Bank* (n 40) para 51.
49 Case T-684/14, *Krka Tovarna Zdravil* EU:T:2018:918, paras 19-25 (the agreements), 140 (settlements imply a form of market sharing), 221, 250, 268, 293 and 298 (not by object), 425 and 451, 453, 470 (not by effect) and 471-473 (conclusion). Pending appeal as Case C-151/19P, *Commission v Krka.*
50 See the Opinion by Advocaet General Kokott in *T-Mobile Netherlands* (n 43), para 45.
51 *Guidelines on the application of Article 81(3) of the Treaty,* recital 21.
52 See Joined Cases C-29/83 & 30/83, *Compagnie royale asturienne des mines SA and Rheinzink GmbH* EU:C:1984:130, paras 25-26; Case C-67/13P, *Groupement des cartes bancaires*, (n 1), paras 53-54; and *Budapest Bank,* (n 40) para 76.

pursuit of an anti-competitive aim.[53] In contrast, it is immaterial **iv**) what the parties subjectively intended,[54] or **v**) if they lacked commercial interest in limiting competition,[55] **vi**) pursued another and more acceptable purpose,[56] and **vii**) acted in full public[57] with consent from, e.g., the buyers.[58] However, **viii**) the elements in question should not be considered restrictive by object if ancillary to an (unproblematic) agreement[59] allowing even horizontal price agreements to elude. Moreover, while **ix**) less likely to be problematic, vertical agreements can also be restrictive by object.[60] Finally, the concept should be used restrictively[61] and would most likely be unwarranted if **x**) a pro-competitive rationale only can be excluded by studying the actual effects[62] or **xi**) if the organization of the market excludes any potential for competition.[63]

3.1[a] Two Readings of the Concept of Object Restrictions

Regardless of some colorful metaphors providing justifications for the concept of by object infringements, no operative definition, that can be applied directly has been developed.[64] However, two readings have emerged, centered on:

a) *A two-step analysis* where regard first must be made to the *content* of the practice in question and then its economic and legal *context*. Although the parties' intention is not a necessary factor, there is nothing precluding it from being taken into account. Under this analysis, even horizontal price agreements could fall short of being restrictive by object, and normally benign agreements could be included. Of particular relevance would be the ability (or inability) to refer to a legitimate explanation for the practice and how competition would have developed void of this.

b) Segregation between *obvious and less obvious* by object infringements, where the latter requires more substantial examinations, including reviewing the parties' subjective

[53] See Advocate General Saugmandsgaard Øe in Case C-179/16, *F Hoffmann-La Roche* EU:C:2017:714, para 148.
[54] *Beef Industry* (n 1), para 21; Case C-67/13P, *Groupement des cartes bancaires*, (n 1), para 54; and Case C-32/11, *Allianz Hungária,* (n 1), para 37.
[55] Case C-403/04P, *Sumitomo Metal Industries Ltd* EU:C:2007:52, paras 45-46.
[56] Case C-551/03P, *General Motors BV* EU:C:2006:229, para 64; *Beef Industry Development Society Ltd*, (n 1), para 21; and Case T-587/08, *Del Monte* EU:T:2013:129, para 425. However, Case C-519/04P, *David Meca-Medina and Igor Majcen* EU:C:2006:492, para 45, might be read differently.
[57] *Toshiba*, (n 19), para 26, which, in contrast to older practice does not refer to secret agreements as a special trait of cartels.
[58] *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (2011), recital 22.
[59] See e.g. Advocate General Wahl in *Groupement des cartes bancaires*, (n 1), para 56; Case E-3/16, *Ski Follo Taxidrift AS,* para 99; and further in section 3.3.
[60] See e.g., *Visma* (n 11), para 61.
[61] *Groupement des cartes bancaires* (n 1), para 58.
[62] Opinion of Advocate General Bobek in *Budapest Bank* (n 40), para 81.
[63] *E.ON Ruhrgas* (n 26), para 84.
[64] Unless accepted that restriction by object is agreements that have no plausible purpose but the restriction of competition. Attempts to provide operative guidelines can be found with Advocate General Trstenjak in Case C-209/07, *Beef Industry* (n 1), paras 50-52, and Advocate General Saugmandsgaard Øe in *F Hoffmann-La Roche* (n 53), paras 145-150.

> intent.[65] This reading is of particular attractiveness by feeding directly into the sanctioning as the fine can be graduated accordantly, but does provide for a problematic expansion of the concept and the introduction of three categories of infringements deprived of support in the text of Article 101(1). Not to mention additional blurring of the lines and mingling of what should be alternatives; restrictive by object or by effect.[66]

More references have been made to **i**) the hardcore lists incorporated in the different block exemptions,[67] **ii**) the absence of a legitimate purpose,[68] and **iii**) the examples offered in Article 101(1).[69] This would, e.g., cover different forms of market sharing and price-fixing arrangements and allow any agreements attaining to secure this to be held restrictive by object. However, the concept of object infringements is not confined to these,[70] but covers also surrogates if pursuing such objects as demonstrated by the approach to pay-for-delay arrangements. Further, even traditional hardcore infringements of Article 101(1) as price agreements could elude labeling as anti-competitive by object if concluded within joint production, research, purchase arrangements,[71] or for the purpose of public safety or health.[72] The same would apply to market sharing that follows from a trademark assignment.[73] The only solid and persistent elements to the concept of restriction by object are the call for a restrictive application[74] and the matter of alternative explanations. It then rests with the enforcers to provide a plausible link between the tabled theory of harm and the agreement in question.

3.1[b] What Not to Consider as Object Infringements

Across the two possible readings of what to consider a restriction by object, a number of practices have been reviewed and considered outside the scope, including **i**) exclusive elements in a lease contract,[75] **ii**) award of exclusivity in a vertical relationship,[76] and **iii**) prohibiting internet sales in selective distribution.[77] However, in particular the *two-step analysis* indicates that the true objectives of an agreement trump legal structure and form, extending the concept of a restriction by object to surrogates. Under this, there is, in principle, no safe

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65 The idea of two categories is advanced by Advocate General Wathelet in case C-373/14P, *Toshiba* EU:C:2015:427, paras 87-90, where the first would cover the examples provided in Article 101(1) and the second would require a more thorough analysis of the economic and legal context.
66 See, e.g., Advocate General Saugmandsgaard Øe in *F Hoffmann-La Roche* (n 53), para 148.
67 See 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), recital 13.
68 See, e.g., Advocate General Saugmandsgaard Øe in *F Hoffmann-La Roche*, (n 53), para 148.
69 *Toshiba*, (n 19), paras 89-90.
70 See *Beef Industry Development Society Ltd*, (n 1), para 23.
71 Guidance on restrictions of competition 'by object' for the purpose of defining which agreements may benefit from the De Minimis Notice, section 2.
72 See Guidelines on Vertical Restraints (2022), recital 180, and Guidance on restrictions of competition 'by object' for the purpose of defining which agreements may benefit from the De Minimis Notice, section 1.
73 See C-9/93, *IHT Internationale Heiztechnik GmbH* EU:C:1994:261, para 59.
74 *Groupement des cartes bancaires*, (n 1), para 58, and case E-3/16 - *Ski Follo Taxidrift AS,* para 62.
75 See Case C-345/14, *Maxima Latvija*, EU:C:2015:784, para 24.
76 *Football Association Premier League Ltd,* (n 55) para 137, and Case C-262/81, *Coditel* EU:C:1982:334, para 15. *Visma*, (n 11), paras 60-61 would probably fit into this. However, the fact of the case was blurred, and the Court of Justice did not provide a clear answer to the request for clarification.
77 Case C-230/16, *Coty* EU:C:2017:941, para 58. However, this might not apply to all forms of selective distribution.

harbor, and while horizontal agreements are more likely to be caught by the restrictive concept of restriction by object, this is by no means confined to these. Also, vertical arrangements can fall within the by object concept.[78]

3.2 RESTRICTION BY OBJECT AND REQUIRED ANALYSIS

In contrast to the ambiguity dominating the lines between being anti-competitive by object or effect, a consensus has emerged on the legal implications as the former is considered covered by Article 101(1) per se. Instead, any positive or pro-competitive elements would be referred to Article 101(3),[79] providing for exemptions if warranted. Newer practices appear to have modified the first to a context analysis inducing some analysis requirements even for by object infringements.

In *Groupement des cartes bancaires,*[80] both the European Commission and the General Court had labeled horizontal agreements on interbank fees as restrictions by object and in defiance of Article 101(1). However, the Court of Justice did not accept this, overturning and remanding the decision back to the General Court. In addition to commanding a restrictive use of the concept, it was also required to make regard to the content of the agreement in question, its provisions, objectives, and the economic and legal context of which it forms part, including the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question. In short, the agreements had to be viewed broader than against their naked content, commanding some analysis.

Against *Groupement des cartes bancaires,* it appears that in order to determine if an agreement reveals a sufficient degree of harm to competition, warranting labeling as restriction of competition by object, regard must be made to its content and context. Embedded in this, some analysis of its effects might be warranted. Further, as even traditional hardcore infringements of Article 101(1) could elude labeling as anti-competitive by object if pursuing certain objects, as outlined above, this context analysis does, in reality, readmit the subjective intent of the agreement to the analysis. In contrast, it is immaterial if the agreement had not been implemented[81] or concluded between undertakings normally considered too small to thwart competition (*de minimis)*.[82] Neither is it required to provide a full and final market definition[83] past the need to establish the parties' positions inter partes (competitors v non-competitors).

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[78] See, e.g., *Visma*, (n 11) para 61.
[79] See, e.g., *Beef Industry*, (n 1), paras 19-21; case C-439/09, *Pierre Fabre* EU:C:2011:649, paras 49 and 59; and Guidance on restrictions of competition 'by objectä for the purpose of defining which agreements may benefit from the De Minimis Notice, section 1.
[80] *Groupement des cartes bancaires*, (n 1), paras 53 and 58. See also *Budapest Bank,* (n 40) para 82.
[81] See COMP/36.545/F - *PO/Amino acids,* recital 376.
[82] See case C-226/11, *Expedia* EU:C:2012:795, para 37, and Guidance on restrictions of competition 'by object' for the purpose of defining which agreements may benefit from the De Minimis Notice, section 1.
[83] Case C-439/11P, *Ziegler* EU:C:2013:513, para 63.

3.3 RESTRICTION BY EFFECT AND REQUIRED ANALYSIS

Practices not having as their object to restrict competition must be considered further[84] and would only be covered by Article 101(1) if:[85]

> […] factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent. The competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute; the interference with competition may in particular be doubted if the agreement seems really necessary for the penetration of a new area by an undertaking […].

This involves an objective analysis of the agreement's impact on the competitive situation where restraints are not to be viewed in isolation or abstractly, but under the existing conditions for market entry and prevailing market forces.[86] An approach that essentially involves a counterfactual analysis where the effect is compared to the competition in the absence of the restriction in dispute. Only where this involves a tangible reduction in the parameters of competition, such as price, the quantity and quality of goods and services,[87] would Article 101(1) be applicable. Moreover, the anti-competitive effect should neither be confused with a pro and con analysis[88] nor a loss of consumer welfare.[89] It is not even required that the effect is imminent or have already materialized, only that it appears plausible.[90]

3.3[a] Anti-Competitive Effect Must be Established or Indicated

Void of analysis and evidence making the anti-competitive effect plausible, decisions have been suspended and remanded.[91] Further, the General Court has dictated that the effect analysis[92] must be real and substantiated by the facts and the market structure rather than different presumptions. Therefore, an investigation should initiate with outlining a theory of harm followed by explaining and if, relevant, testing how consumers, competitors and the structures in the market are impacted negatively by the agreement in accordance with this. Case law offers some examples of this.

In *Servier,*[93] five patent settlements involving pay for delay were held anti-competitive by object as they appeared to serve no other purpose than to prevent potential competitors from entering the market. However, the European Commission did not rest its finding

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[84] See *Guidelines on the application of Article 81(3) of the Treaty,* recital 24 and note 31.
[85] Case T-328/03 - *O2*, para 69; case T-111/08, *MasterCard* EU:T:2012:260, para 128; and *Société Technique Minière,* (n 40) pp. 249-250.
[86] Case AT.40.208 - *ISU*, recital 190, and the cited case law.
[87] Case C-382/12P, *Mastercard* EU:C:2014:2201, para 93.
[88] *Metropole*, (n 37), para 77, and section 2.4. below.
[89] See, e.g., Case C-8/08, *T-Mobile Netherlands* EU:C:2009:343, para 38.
[90] Case C-1/12, *Ordem dos Técnicos Oficiais de Contas mod Autoridade da Concorrência* EU:C:2013:81, para 71, and *Maxima Latvija* (n 75) para 30.
[91] See *European Night Services* (n 26), paras 139-147. See also case *O2* (n 85), paras 65-117.
[92] *VISA* (n 22), para 167.
[93] Case AT.39.612 - *Perindopril (Servier)*, recitals 1125-1211 (restriction by object), 1212-1269 (restriction by effect) and 1270-2061 (assessment of the five settlements). Partly upheld with Case T-691/14, *Servier* EU:T:2018:922. Pending appeal as case C-176/19P and C-201/19 P, *Servier* EU:C:2022:577.

merely on the agreement being anti-competitive by object, but also undertook to consider its effect. This involved establishing market power, lack of effective competition, and how the payments altered the incentives of potential competitors. Further, the absence of a legitimate purpose and an overall foreclosure strategy had already been established. In *ISU,*[94] the European Commission acted against a skating union banning members from tournaments outside the union. The European Commission held this to be an infringement by object, but also found it restrictive by effect as it served no legitimate purpose but the financial interests of the union and could foreclose competing unions by denying them access to sources of supply (skaters).

Elements of the contrafactual analysis can be found with the European Commission decisions,[95] referring to: if **a**) the parties have market power and **b**) how the agreement potentially contributes to creating, maintaining or strengthening this. Further, this must involve an objective analysis of the plausible impact on the competitive situation[96] at the time of the conclusion of the agreement.[97] Again, case law offers some examples of these considerations.

In *Night Service,*[98] the European Commission had intervened against a joint venture, arguing that it could foreclose third parties, but failed to substantiate this further. Moreover, the parties' market shares were negligible, and the rendered market description somewhat superficial. The General Court therefore decided to overturn the decision. In *Van den Bergh Foods,*[99] the use of freezer exclusivity, reserving these for the supplier's products, was held anti-competitive. Not by virtue of the individual agreements, but of the cumulative effects of these tying a substantial part of the market and foreclosing it for competition. In *Servier,*[100] the patent settlements had to be assessed based on the fact at the time of the settlement and not against the later factual development as claimed by the parties. In *UK Tractor,*[101] the parties had established an extensive information exchange system that created a high degree of market transparency in an already concentrated market, limiting any competition. The system did not involve internal sensitive information, e.g., on prices, why the anti-competitive effect did not follow from the adopting specific restrictions as traditional but rather the market as highly concentrated.

These considerations indicate an analysis based on **i**) the competitors' abilities to remain viable alternatives, **ii**) market power with the parties, **iii**) penetration of the agreements in question, **iv**) their cumulative effects joint with others, and **v**) other prevailing

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[94] Case AT.40.208 - *ISU*, recitals 154-160 (principles), 161-188 (restriction by object), 189-208 (restriction by effect). Upheld in substance as case T-93/18, *International Skating Union* EU:T:2020:610. Pending appeal as case C-124/21P, *International Skating Union.*

[95] See *Guidelines on the application of Article 81(3) of the Treaty,* recital 25.

[96] *O2*, (footnote 85), para 77.

[97] Case AT.39.612 - *Perindopril (servier)*, recital 1220. Partly upheld with *Servier,* (n 93). Pending appeal as Case C-176/19P and C-201/19P, *Servier* EU:C:2022:577.

[98] See *European Night Services,* (footnote 26), paras 97 and 139-160. See also case*O2*, (footnote 85), paras 65-117.

[99] Case T-65/98, *Van den Bergh Foods* EU:T:2003:281, para 83. See also Case C-23/67, *Brasserie de Haecht* EU:C:1967:54, p. 416.

[100] Case AT.39.612 - *Perindopril (servier)*, recitals 1125-1211 (restriction by object), 1212-1269 (restriction by effect) and 1270-2061 (assessment of the five settlements). Partly upheld with *Servier,* (n 93). Pending appeal as case C-176/19P and C-201/19P, *Servier*,

[101] Case IV/31.370 and 31.446 - *U.K. Agricultural Tractor Registration Exchange,* O.J. 1992L 68/19*,* recitals 36-37. Uphold with Case C-7/95P - *John Deere* and C-8/95P, *New Holland* EU:C:1998:256.

conditions in the market commanding a restrictive approach. Moreover, it must be explained how the agreements influence these by creating a plausible link between the tabled theories of harm and submitted evidence. In contrast, pro-competitive elements would only be relevant for exemption under Article 101(3) as the counterfactual analysis does not encompass these.[102]

The European Commission[103] has summarized this into a two-step test where it can be contemplated if:

1) the agreement or practice in question would be *capable of restricting competition* assessed against a counterfactual analysis of its impact for inter-and intra-brand competition, and

2) this would be a *plausibility,* taking into consideration whether the parties have market power and how the agreement influence the exercise of this in light of prevailing market conditions. Moreover, the impact must be appreciable.

This is supplemented by different forms of presumptions, e.g., that market power could not be identified merely against market shares: **a**) exceeding what is considered de minimis (< 10-15%) under *EU de minimis notice*,[104] or **b**) the thresholds in the different block exemptions (> 20-30%) issued under Article 101(3). Neither would it establish a presumption of anti-competitive effect that the block exemptions are unavailable unless caused by infringing their incorporated hardcore lists, as these traditionally are seen as mirroring the concept of restrictions by object.[105] Finally, it can be noted that as case law[106] does not require implementation of the agreements in question, both the effect and contrafactual analysis may be somewhat abstract and hypothetical. The essential part is establishing a link between the theory of harm and realities, making the former plausible.

3.4 THE US RULE OF REASON

US antitrust law, which has historically served as an inspiration for EU competition law, has adopted a distinction between restrictions *per se anti-competitive* and those subject to a *rule of reason* approach where the former are condemned rather mechanically. A doctrine that appears to mirror the EU's by object doctrine at first glance, but involving balancing pro- and anti-competitive elements of the restrictions. Any transfer of this to EU law has clearly and irrevocably been refused in case law.[107] Moreover, what to consider *per see* infringements in the US involve a limited catalog of actions whereas the EU's by object concept is more dynamic and decided on a case-by-case basis as outlined above.

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[102] *Metropole*, (n 37), para 72.
[103] See *Guidelines on the application of Article 81(3) of the Treaty,* recitals 18 and 24-25. For further, see Jonathan Faull & Ali Nikpay, *The EC Law of Competition*, 3rd edition, Oxford, 2014, pp. 281-288.
[104] See *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),* recital 8. For further on the concept of *de minimis,* see section 3.2 below.
[105] See *De Minimis Notice* (n 104)*,* recital 13.
[106] See *HFB Holding,* (n 14), paras 193 and 200-201; case C-199/92P, *Hüls* EU:C:1999:358, paras 163-165; and Case T-25/95, *Cimenteries CBR v Commission* EU:T:2000:77, paras 1864-1865.
[107] See, e.g., *Metropole*, (n 37), para 77. However, practice is not consistent, making the matter more open, as detailed by Jonathan Faull & Ali Nikpay, *The EC Law of Competition*, 3rd edition, Oxford, 2014, pp. 269-278.

4 HAVING AN APPRECIABLE NEGATIVE EFFECT ON COMPETITION

Article 101(1) refers to agreements that prevent, restrict or distort competition by object or effect, which by case law[108] has been read to include that this must be *appreciable*. Conceptually, the latter can be segmented into:

1) Restrictions that by their *content* do not appear capable of restricting competition, allowing, e.g., quality-based requirements to elude.

2) Restrictions that by their *limited impact* do not appear capable of restricting competition, precluding agreements held to be *de minimis*.

3) Restrictions that by their *context* do not appear capable of restricting competition, permitting different forms of ancillary restraint.

The assessments are made against the agreements, incorporated restrictions, and the position of the undertaking involved, but if competition is already reduced or eliminated through regulation, this translates into the analysis.[109] Obviously, there must be competition to prevent, restrict or distort, as expressed in Article 101(1), making the prevailing market condition essential for the analysis.

4.1 RESTRICTIONS THAT ELUDE BY VIRTUE OF CONCENT

It was established by early practice that not all forms of restrictions would be covered by Article 101(1), giving ground for an understanding that there had to be some substance allowing, e.g., quality-based requirements to fall outside.

In *Société Technique Minière,*[110] the Court of Justice, when reviewing an exclusive agreement, explained the need to take into account the context of the agreement. This was developed further in *Brasserie de Haecht,*[111] also involving exclusivity. Here, the Court of Justice considered it pointless to consider the effect of an agreement dislodged from the market in which it operated and its factual and legal circumstances. In *Prenuptia,*[112] involving a dispute over franchise fees, the Court of Justice refused to hold franchise as anti-competitive in itself, but then went on extending this to restrictions directed at protecting the concept and know-how. A ruling that subsequently has given ground for a presumption that many restrictive elements associated with the franchise and later selective distribution would fall short of infringing Article 101(1).[113]

The doctrine never came into maturity, but was absorbed into the distinction between restrictions by object versus effects, where the latter must be assessed further and against its content and objective. However, the doctrine appears to imply that restrictions of an indirect

[108] See, e.g., *Groupement des cartes bancaires*, (n 1), para 52.
[109] *E.ON Ruhrgas*, (n 26), paras 84, 97-117.
[110] *Société Technique Minière,* (n 40) p. 250.
[111] Case C-23/67, *Brasserie de Haecht* EU:C:1967:54, p. 415.
[112] Case C-161/84, *Prenuptia* EU:C:1986:41, paras 15-23.
[113] *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (2011)*,* recitals 175 and 190.

nature and many intra-brand restrictions would fall short of Article 101(1), but the doctrine is not limited to this and would be applicable broadly provided that the restriction is justifiable.

4.2 RESTRICTIONS THAT ELUDE BY VIRTUE OF DE MINIMIS

Provided that the market functions normally and supports a healthy level of competition, it should be evident that the position of some undertakings would be too trivial to have an appreciable adverse effect on competition, giving ground for the concept of *de minimis*. This was embraced and developed in case law.

In *Völk*,[114] involving an exclusivity agreement, the Court of Justice held that the agreement would fall outside Article 101(1) if having an insignificant effect on the markets, taking into account the weak position of the parties. In *Night Service,*[115] where the European Commission had held a joint venture anti-competitive, the General Court rebutted that a presumption of being anti-competitive could be accepted solely against not being de minimis. Finally, did the Court of Justice in *Expedia*[116] rule that the concept of de minimis did not apply to restrictions by object as these always restricted competition.

While case law had established a concept of de minimis, it would rest with the European Commission to provide further guidance on the matter. This was set out in a series of successive notices, explaining how the concept would be enforced. The current notice (2014)[117] holds a practice de minimis if:

a) The aggregate market share by the parties to the agreement does not exceed 10% on any of the relevant markets affected by the agreement when the parties are *competitors* (horizontal de minimis), or

b) The market share held by each of the parties to the agreement does not exceed 15% on any of the relevant markets affected by the agreement when the parties are *non-competitors* (non-horizontal de minimis).

In the case of mixed agreements or when it is difficult to classify the agreement as either horizontal or non-horizontal, the 10% threshold is applicable. Further, if competition is restricted by the cumulative effect from parallel networks of agreements, covering 30% of the market, the thresholds set out above are reduced to 5%. Exceeding these thresholds does not establish a presumption of appreciable effect nor does it preclude holding an agreement de minimis.[118] For example, the notice, e.g., allows agreements to be covered if only exceeding the thresholds by less than two percentage points for two successive calendar years. Embedded in this, the relevant market must be defined in order to assess the parties' market shares and positions inter partes. Further, de minimis is only applicable outside the scope of restrictions by object,[119] as such restrictions always are considered appreciable.

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[114] Case C-5/69, *Franz Völk* EU:C:1969:35, paras 5-7.
[115] *European Night Services,* (n 26), para 102.
[116] *Expedia*, (n 82) paras 35-37. See also *De Minimis Notice* (n 104), recital 2.
[117] *De Minimis Notice* (n 104), recitals 8-11.
[118] *De Minimis Notice* (n 104), recitals 3 and 11.
[119] *Expedia*, (n 82) paras 35-37.

4.3 RESTRICTIONS THAT ELUDE BY VIRTUE OF CONTEXT

Case law has given rise to a number of doctrines where restrictive elements are seen as ancillary to others, making it meaningless to evaluate them in isolation. Under this doctrine, restrictions might not infringe Article 101(1) by virtue of their context, provided that they are *necessary*. The latter involves establishing whether the restrictions are **a**) objectively necessary for implementing the main operation and **b**) proportionate to this.[120] Below, two possible ancillary restraint doctrines under Article 101(1) are detailed.

4.3[a] Commercial Ancillary

A doctrine has emerged involving certain commercial restrictions and obligations linked to horizontal joint purchase agreements that neither can nor should be appraised in isolation from the underlying arrangement.

In *Gøttrup-Klim – DLG*[121] and *Metropole,*[122] involving partnerships regarding joint purchasing and satellite TV respectfully, different purchase and non-compete clauses had been adopted. While restricting the parties vis-a-vis third parties, they clauses were held necessary for bringing the partnerships about and therefore ancillary to this.

The doctrine of commercial ancillary has been detailed by the Court of Justice,[123] accepting that restrictions might elude Article 101(1) by virtue of being ancillary to a main operation, provided:

> […] that operation would be impossible to carry out in the absence of the restriction in question. Contrary to what the appellants claim, the fact that that operation is simply more difficult to implement or even less profitable without the restriction concerned cannot be deemed to give that restriction the 'objective necessity' required in order for it to be classified as ancillary.

From this follows that restrictions are considered ancillary to the main operation if **i**) directly linked to this, **ii**) necessary for the implementation, and **iii**) proportionate to it.[124] It should also carry some weight if they are **iv**) adopted with the main operation and not subsequently[125] and **v**) confined to the parties, not limiting the commercial freedom of third parties.[126] Finally, **vi**) the main operation must be pro-competitive or neutral as the assessment would ultimately follow this, and **vii**) the evaluation should be made objectively and isolated from the parties' subjective view.[127]

The doctrine on commercial ancillary is not limited to agreements between competitors, but also covers non-horizontal arrangements, e.g., vertical distribution agreements concluded as part of a distribution or sales chain.

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120 See Case T-111/08, *MasterCard* EU:T:2012:260, paras 77-79, and *Metropole*, (n 37), para 106.
121 Case C-250/92, *Gøttrup-Klim DLG* EU:C:1994:413, para 45
122 *Metropole*, (n 37) paras 115-117.
123 *MasterCard*, (n 87), paras 89 and 91.
124 See *Guidelines on the application of Article 81(3) of the Treaty,* recitals 28-31. For further analysis, see Jonathan Faull & Ali Nikpay, *The EC Law of Competition*, 3rd edition, Oxford, 2014, pp. 255-260.
125 *F Hoffmann-La Roche*, (n 23), para 73.
126 *F Hoffmann-La Roche*, (n 23), para 73, para 72.
127 *Guidelines on the application of Article 81(3) of the Treaty,* recital 18 (2).

In *Metro*[128] and *Pronuptia,*[129] where restrictive elements supported a system of selective distribution and franchise, respectively, the Court of Justice held that these eluded separate assessments under Article 101(1) if directed at protecting know-how or the uniformity of the concept.[130] Therefore, the assessment of the restrictions followed the main operation and should not be reviewed separately from this.

A variation of the doctrine on *commercial ancillary* also treated leniently involves being *commercially necessary* for bringing an agreement about or opening new markets for the benefit of competition.

In *Sociéte Technique Miniére*[131] and *Nungesser,*[132] involving the distribution of machines and granting of IP licenses, the Court of Justice expressed understanding for the use of exclusivity provisions if required to open new markets. An understanding most likely bedded in the clauses as unable to thwart competition in an appreciable manner in light of their object – the introduction of a new competitor to the market.

The lenient treatment of restrictions directed at opening new markets is understandable as the alternative might be less rather than more competition. Regardless, it must be appraised under the same principles as set out above for commercial ancillary. However, it is unclear whether the doctrines can be separated from the restriction by object v effect doctrine or have been absorbed into this.[133] Presuming this is not the case, an ancillary defense should mostly have relevance for object restrictions, allowing these to be viewed in their context rather than against their naked appearances. In contrast, would the matter feed into the contrafactual analysis used for restriction by effect and be challenging to separate.

4.3[b] Regulatory Ancillary

It has been contemplated[134] whether a doctrine of regulatory ancillary can be tabled that would allow restrictions directed at implementing regulatory obligations to elude Article 101 by virtue of being unrelated to the operation of economic activities. However, the scope of the doctrine remains open and case law are not consistent.

In *Wouter,*[135] a Dutch ban on interdisciplinary partnerships between lawyers and accountants was presented before the Court of Justice. In contrast to other countries, the ban was not adopted by law, but decided by the national association of lawyers that had been delegated to regulate the matter and opted for a ban. In reply to a request for clarification, the Court of Justice found that this felt outside Article 101, taking into account its objective,

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128 Case C-26/76, *Metro SB* EU:C:1977:167, para 27.
129 *Prenuptia*, (n 112), paras 14, 15, 24 and 27.
130 See also Case C-262/81, *Coditel* EU:C:1982:334, paras 19-20, and Case C-27/87, *SPRL Louis Erauw-Jacquery* EU:C:1988:183, paras 10-11, relating to the exercise of IP rights.
131 *Société Technique Minière,* (n 19) p. 250.
132 Case C-258/78, *L.C. Nungesser KG and Kurt Eisele* EU:C:1982:211, paras 57-58.
133 For further, see Jonathan Faull & Ali Nikpay, *The EC Law of Competition*, 3rd edition, Oxford 2014, pp. 262-263, including a possible limitation to vertical agreements.
134 See, e.g., Richard Whish & David Bailey, *Competition law,* 10th Edition 2021, pp. 139-142 and Jonathan Faull & Ali Nikpay, *The EC Law of Competition*, 3rd edition, Oxford, 2014, pp. 253-255.
135 Case C-309/99, *Wouters*, EU:C:2002:98, paras 97 and 107. Some of the same considerations can be seen in Case T-144/99, *Institute of Professional Representatives* EU:T:2001:105, para 78; Sase C-184/13, *API* EU:C:2014:2147, paras 48 and 55; case AT.40.208 - *ISU*, recitals 210-266; and Joined Cases C-427/16 and 428/16, *CHEZ Elektro Bulgaria* EU:C:2017:890, para 54.

the need to regulate professional services, and the inherent nature of this. In *Meca-Medina,*[136] the General Court applied these principles to a self-regulatory sports body, finding that adopted rules on doping also felt outside Article 101 as the campaign against doping did not pursue any economic objectives and therefore was not covered by EU competition law. The Court of Justice, on appeal, overturned this, holding that the anti-doping rules in question were covered by Article 101, but did not restrict competition in manners conflicting with Article 101(1). In *ISU,*[137] the EU Commission acted against a skating union banning members from participation in tournaments with competing unions. An initiative that served no legitimate purpose but the union's financial interests and could lead to foreclosure of competing unions. By virtue of this, it felt outside any window available from *Wouter* and *Meca-Medina.*

The European Commission[138] has added further to the development of a doctrine on regulatory ancillary by noting that restrictions directed at protecting public safety and health may be permissible under Article 101(1) even when involving restrictions otherwise seen as restrictions by object.

Wouter was a national case tabled before the Court of Justice, leaving it to the national Court to implement the outlined principles.[139] The ruling established a practice allowing some restrictions to elude Article 101 entirely by virtue of being surrogates for regulation. The General Court did in *Meca-Medina* attempt to develop this further, but was overturned on appeal by the Court of Justice, finding the adopted anti-doping rules covered by Article 101, but not infringing Article 101(1). Regardless, *Wouter* and *Meca-Medina* did establish a doctrine allowing restrictions directed at implementing regulatory obligations to elude either Article 101(1) or Article 101 completely. This would cover different self-regulatory bodies, provided that the restrictions are **i**) pursuing legitimate objectives, **ii**) are inherent for the pursuit of these, **iii**) proportionate to them, and **iv**) not directed at protecting fiscal interests.[140] However, the doctrine remains open-ended and subject to lacunas, but appears real and available if warranted.

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136 Case T-313/02, *David Meca-Medina and Igor Majcen* EU:T:2004:282, paras 42-47. Overturned by *Meca-Medina and Igor Majcen,* (n 56) paras 30-34.

137 Case AT.40.208 - *ISU*, recitals 154-160 (principles), 161-188 (restriction by object), 189-208 (restriction by an effect) and 210-266 (not covered by any regulatory exemption). Upheld in substance as Case T-93/18, *International Skating Union* EU:T:2020:610. Pending appeal as Case C-124/21P, *International Skating Union.*

138 See *Guidelines on Vertical Restraints* (2022), recital 180, and Guidance on restrictions of competition 'by object' for the purpose of defining which agreements may benefit from the De Minimis Notice, section 1.

139 For further on possible readings of *Wouter*, see Richard Whish & David Bailey, *Competition law,* 10th Edition, 2021, pp. 141-142.

140 Case AT.40.208 - *ISU*, recitals 210-266. Upheld in substance as Case T-93/18, *International Skating Union* EU:T:2020:610. Pending appeal as Case C-124/21P, *International Skating Union.* See also *Ordem dos Técnicos Oficiais de Contas,* (n 90), paras 54-59, 95-103, and Case C-136/12, *Consiglio nazionale dei geologi* EU:C:2013:489, paras 45 and 53-57.

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WHEN DO AGREEMENTS RESTRICT COMPETITION IN EU COMPETITION LAW?

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Under EU competition law, it is prohibited to conclude agreements distorting competition, but little guidance is available on what to consider anti-competitive. However, case law has given rise to patterns holding some practices anti-competitive by object while others must be assessed in detail and against their effect without providing a workable definition on the lines between these two approaches. Other issues remain equally open-ended, e.g., when the anti-competitive effect is appreciable. In this paper, a possible roadmap for the appraising of restrictive agreements in EU competition law will be provided.

1 INTRODUCTION

It follows directly from the wording of Article 101 of the Treaty on the Functioning of the European Union (Article 101) that agreements, decisions, or concerted practices can be anti-competitive by *object* or *effect*. It also follows from case law that the form, official purpose, or subjective intent is immaterial[1] jointly with ignorance of Article 101.[2] Nor does it matter whether the agreement in question is restrictive in itself or by virtue of specific elements herein, or only by its impact on the market in light of the prevailing market conditions. Only the actual or plausible consequences for competition matter under Article 101(1). Naturally, mitigating factors, e.g., a socially desirable purpose, may be accommodated under Article 101(3), but only subject to the strict conditions here. While indicating some easily applicable principles, the reality is, as always, more complex, and very little can be extracted from the examples provided in the text of Article 101.[3] However, the European Commission has in its guidelines tried to capture the essence of the assessment by explaining that:[4]

> If an agreement is not restrictive of competition by object it must be examined whether it has restrictive effects on competition. Account must be taken of both actual and potential effects… For an agreement to be restrictive by effect it must affect actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable degree of probability. Such negative effects must be appreciable. The prohibition rule of Article [101] does not apply when the identified anti-competitive effects are insignificant. [Neither is it]

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[1] See case C-209/07, *Beef Industry* EU:C:2008:643, para 21; case C-67/13P, *Groupement des cartes bancaires* EU:C:2014:2204, para 54; and case C-32/11, *Allianz Hungária* EU:C:2013:160, para 37.

[2] Case T-61/89, *Dansk Pelsdyravlerforening*, EU:T:1992:79, para 157.

[3] Article 101(1) refers to (a) fixing of prices and trading conditions; (b) limiting of production or developments; (c) share of markets; (d) discrimination; and (e) tying.

[4] *Guidelines on the application of Article 81(3) of the Treaty,* recital 24, and footnote 31.

> sufficient in itself that the agreement restricts the freedom of action of one or more of the parties…. This is in line with the fact that the object of Article [101] is to protect competition on the market for the benefit of consumers.

From case law, it follows that the object of Article 101(1) is not confined to protecting competitors and consumers, as indicated above, but it also encompasses market structure and the notion of consumer welfare.[5] Moreover, in the assessment, regard must be made to the agreement's content, the objectives it seeks to attain, and the economic and legal context of which it forms part,[6] thereby readmitting the issue of intent to the assessment under Article 101(1).

From these principles, it follows that enforcers must start by formulating a theory of harm,[7] outlining how an agreement, decision, or concerted practices (potentially) are detrimental to the object of Article 101(1), and then substantiate this by testing the matter. This can be implemented by contemplating whether the practice in question:

1) Is concluded between two or more undertakings that are directly or indirectly actual or potential competitors, making it a horizontal agreement. Alternately, if their relationship is vertical within a distribution chain or activities attributable to different markets. The latter two are appraised much more leniently compared to the former.

2) Has as its object or effect the restriction of competition, which in practice often comes down to the ability to refer to a legitimate purpose. Formally, restriction by effect requires, in contrast to restriction by object, substantial analysis of the its impact on competition. Typically, such an analysis is performed by comparing competition with and without the practice in question.

3) Has an appreciable adverse effect on competition, or if this can be precluded based on its ancillary nature or insignificant impact. While in principle an extension of the counterfactual analysis outlined above, the questions remain a separate step not to be confused with the issue of finding a restriction by object or effect.

In this paper, these three steps will be developed to outline the notion of anti-competitive agreements under Article 101. The presentation will not touch upon what to consider an agreement, decision, or concerted practices in the first place, nor any of the other requirements[8] embedded in Article 101. E.g., that trade between the EU member states must be affected, and that the conduct in question originates from the undertakings involved. Neither will it explore the matter of exemption under Article 101 (3). Moreover, for

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[5] United cases C-501/06P, C-513/06P, 515/06P, and 519/06, *GlaxoSmithKline Services* EU:C:2009:610, para 63, and *Guidelines on the application of Article 81(3) of the Treaty,* recital 13. For further discussions on the objects of EU competition law, see, e.g., Jonathan Faull & Ali Nikpay, *The EC Law of Competition*, 3rd edition, Oxford, 2014, pp. 5-9 and 228-235, and Massimo Motta, *Competition Policy, Theory and Practice*, Cambridge, 2004, pp. 17-30.

[6] *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (2011), recital 25.

[7] Examples of possible theories can be found in *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (2011), recitals 33-38, and *Guidelines on Vertical Restraints* (2022), recitals 18-20.

[8] For further, see, e.g., Richard Whish, Competition Law, 10th Edition, 2021, pp. 83-120, and Jonathan Faull & Ali Nikpay, *The EC Law of Competition*, 3rd edition, Oxford, 2014, pp. 204-226.

simplicity, the concept of agreements will also encompass decisions and consorted practices unless otherwise specified, regardless of three concepts that are equally open-ended. Finally, the paper pertains to EU competition law, but as the national competition law of the EU members states must be aligned with Article 101,[9] the outlined principle would also apply to national enforcement.

2 THE LINE BETWEEN HORIZONTAL AND NON-HORIZONTAL BEHAVIOUR

Nothing in the wording of Article 101 indicates a division between horizontal and non-horizontal agreements and restrictions. However, it could be argued that the examples listed in Article 101(1) are more horizontal than vertical in nature, making it clear that the former should form the core of enforcement. This has transcended into practice rendering a much more lenient appraisal available for non-horizontal behavior, even involving a presumption of substantial scope for efficiencies associated with these.

In *Allianz Hungária*,[10] involving agreements concluded between Hungarian insurances companies and auto shops, the Court of Justice felt compelled to state that vertical agreements also could infringe Article 101(1) by object or effect. However, vertical agreements would often be less damaging to competition than horizontal agreements by their nature. This was made even more explicit in *Visma,*[11] involving the review of restrictive provisions in a distribution agreement, potentially limiting competition between the distributors. In reply to a preliminary reference, the Court of Justice recalled how vertical agreements, in general, are less likely to be harmful than horizontal agreements and how restrictions of competition between distributors of the same brand (intra-brand competition) would rarely be problematic unless competition between different brands (inter-brand competition) was already weakened. In *Consten and Grundig,*[12] involving the assessment of vertical exclusivity agreements, the parties even argued that Article 101(1) did not apply to vertical agreements but only horizontals. The Court of Justice rebutted this, clarifying that Article 101 was not limited in scope and application to horizontal agreements, but also covered non-horizontal agreements.

The qualification of an agreement is done against the market definition and the parties' position herein. However, the market structure or the senior management's actions may taint the appraisal, transforming a non-horizontal agreement into a horizontal concluded between competitors, with legal consequences for the assessment.

In *Hasselblad,*[13] the EU Commission did not object to the vertical exchange of sensitive price information between a wholesaler and its retailer, but only that the information had also been passed on to the latter, adding a horizontal element to the vertical agreement. In *HFB,*[14] a group of undertakings had colluded in prices and allocation of customers, infringing Article 101(1). In its decision, the EU Commission had included some additional undertakings as these

[9] For further see, e.g., Richard Whish, Competition Law, 10th Edition, 2021, pp. 77-82.
[10] (n 1), para 43. See also *Guidelines on Vertical Restraint*, recital 6.
[11] Case C-306/20, *Visma* EU:C:2021:935, para 78.
[12] United cases C-56/64 and 58/64, *Établissements Consten S.à.r.l. and Grundig-Verkaufs-GmbH* EU:C:1966:41, pp. 339-340.
[13] Case IV/25.757, *Hasselblad*, O.J. 1982L 161/18, recital 49. Partly overturned by case C-86/82 - *Hasselblad.*
[14] Case T-9/99, *HFB* EU:T:2002:70, paras 8-33 (background) and 55-68 (controlled by one entity).

were considered group-affiliated to one of the cartelist. This was done against overlaps in ownership and management, joint representation, and internal documents indicating a single common strategy.

The undertakings in question does not have to be actual competitors although they would compete in the same market and for the same customers. It is sufficient that they could qualify as *potential* competitors. Nor is it material if the restrictions in question affected competition between different brands and products (inter-brand competition) or between different suppliers (intra-brand competition). All types of conduct are covered by the scope of Article 101(1) if anti-competitive.

2.1 ACTUAL AND POTENTIAL COMPETITORS AND THIRD PARTIES

Following the process of defining the market, it can then be decided if the parties are, as a minimum, potential competitors. Usually, this is accepted if both are active in the same market,[15] even where the agreement involved is in principle non-horizontal, and the overlap is related to different but associated markets, e.g., up- or downstream.

In *Screensport/EBU,*[16] a group of broadcasters had established a consortium directed at buying sports rights and, at the same time, a transnational satellite-based sports channel directed at utilizing these. However, one of the members was at the same time engaged in establishing its own transnational satellite-based sports channel potentially competing with the consortium, creating a horizontal overlap at a downstream market. In *Cekacan,*[17] a Swedish and a German company had formed a joint venture to market a new packing technology currently only utilized by the latter for the German market. The coorporation was exclusive and included the underlying machines and production facilities. The European Commission held it anti-competitive that the agreement had de facto eliminated the German company as a separate competitor.

In particular, associations of undertakings can blur the lines as some members might compete against each other. Decisions made by the governing bodies of associations of undertakings can therefore blend horizontal and non-horizontal elements, requiring separate assessments of these.[18] It is not even required that all members to an anti-competitive practice should be competitors, provided that a minimum of two would qualify as such, as detailed later. Further, in a vertical distribution chain, the lines become even more blurred as undertakings might be customers on the upstream (wholesale) market, but competitors on the downstream retail or aftermarket, giving what is in principle a vertical agreement a horizontal twist.

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[15] *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (2011), recital 10.
[16] Case IV/32.524 - *Screensport/EBU,* O.J.1991L 63/32, recitals 52-66.
[17] Case IV/32.681 - *Cekacan,* O.J. 1990L 299/64, recitals 34-39.
[18] Pursuant to *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (2011), recital 12, the horizontal elements are to be assessed first followed by the verticals.

2.1[a] Potential Competitors

As outlined above, Article 101(1) does not require direct and imminent competition between the involved undertakings. It is sufficient that this could emerge following market entry, expanding the concept to potential competitors.

In *Toshiba*[19] and *Franco-Japanese ball-bearings agreement,*[20] the parties had concluded gentleman agreements directed at shielding their respective home markets. In the assessment, it was considered irrelevant that none of these actually competed there as they could have entered the markets void of the understanding. The General Court even referred to the understanding as evidence of their status as potential competitors.

An undertaking would qualify as a potential competitor if market entry was feasible without the agreement in question as a reaction to a small, but significant and non-transitory increase in price (this is known as the SSNIP test).[21] If relevant, matters can be taken into account following investments or procurements of resources or termination of restrictive agreements.

In *VISA,*[22] involving the condition for being accepted into the VISA credit card system, the General Court was called to clarify when to consider an undertaking a potential competitor. To challenge this, the parties i.a. submitted that the European Commission had rested its conclusion on an intention to enter the market in question rather than actual facts. The Court refuted this, but also declared that the assessment could not be made in the abstract. Instead, it had to be based on evidence or an analysis of the relevant market structures where declared intentions were one factor and market structure void of the involved agreements another. Further, an undertaking could not be described as a potential competitor if entry was not an economically viable strategy or if entry would not take place with sufficient speed to exert a competitive constraint on market participants. In *Roche,*[23] the reversed situation was presented as the activities, and thus market entry, of one of the parties rested on an IP license granted by the other. It could therefore be submitted that void of the agreement, it would not be possible to enter, nor remain, in the market. However, the Court of Justice did not accept this but identified the parties as competitors under Article 101(1).

Guidance on when to consider undertakings as potential competitors can be found in the principles used when defining the relevant market and the concept of potential competition.[24] Here, an undertaking would normally be considered a potential competitor if entry would be possible within 2 to 3 years.[25] However, the legal standard was formulated in *VISA,* requiring entry to take place with sufficient speed to exert a competitive constraint

[19] Case T-519/09, *Toshiba* EU:T:2014:263, paras 230-232. Upheld with case C-373/14P, *Toshiba* EU:C:2016:26
[20] Case IV/27.095 - *Franco-Japanese ball-bearings agreement,* OJ. 1974L 343/19.
[21] *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (2011), recital 10. Other possible tests are available, including e.g. the GUPPI test where entry would occur with a General Upwards Pressure on Pricing Indicies.
[22] Case T-461/07, *VISA* EU:T:2011:181, paras 162-176 and 189-190.
[23] Case C-179/16, *F Hoffmann-La Roche* EU:C:2018:25, paras 35 and 75. In contrast, the Advocate General had rebutted this in his Opinion in Case C-179/16, *F Hoffmann-La Roche* EU:C:2017:714, para 94.
[24] See, e.g., *VISA*, (n 22) para 170, referring to the definition of 'potential competitor' in the *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (2011). Recital 10, footnote 3, of this refers to less than three years.
[25] In *Guidelines on Vertical Restraints* (2022), recitals 90 within one year is used a benchmark.

on market participants. In this the market structure also plays a role as entry might be prevented by legal restraints.

In *E.ON Ruhrgas,*[26] the European Commission had intervened against a supply agreement between the German and French gas incumbents stipulating that the latter could not enter the German market directly. A clause considered restrictive by object. However, there was no competition between the companies at the time of the agreement as the German market was reserved for Ruhrgas by law precluding entry. Therefore, the General Court overturned the decision, holding that Article 101(1) only applied to sectors open to competition.

A special practice has been developed and applied to the pharmaceutical sector. Here the question must be decided against the background of the underlying IP rights and the different license agreements potentially concluded between the parties.

In *Roche,*[27] a company was granted an IP license to sell medical drugs for specific purposes under the marketing authorization held by the licensor. Consequently, market entry was made possible solely by virtue of that agreement, which did not preclude the status as competitors. Neither did it matter to the Court of Justice that the use was outside the issued marketing authorization, potentially making it punishable, but not illegal, to sell the drug. In *Lundbeck,*[28] the European Commission had labeled a patent settlement between the original manufacturer and a potential infringer as a hidden market sharing agreement involving pay for delay. The former argued unsuccessfully that competition between the parties was precluded by virtue of the patent. While not accepted for the specific case, perhaps influenced by the fact that production had already been initiated, the argument appears to have carried some weight in *Teva/Cephalom.*[29] Here it was rebutted to include a generic competitor as a potential competitor if market entry infringed valid patents. Further, does *Roche* indicate a reading where market entry would not be accepted if illegal. These principles were developed further in *Generics,*[30] also involving pay for delay settlements, where the Court of Justice focused on the existence, or lack of, insurmountable barriers for entry and whether different forms of prepatory steps had been taken which indicated entry as plausible. In this, circumstantial evidence could be useful, e.g., if that payment was made in exchange for delaying market entry, making it plausible that the parties viewed themselves as competitors. Against these cases, it appears that IP rights formulate a rebuttable presumption that must be further substantiated before a conclusion can be rendered.

2.1[b] Non-Competitors' Participation in a Horizontal Agreement

An anti-competitive agreement infringing Article 101(1) may encompass undertakings with different roles where some act as ring leaders while others play a passive role. Newer practice

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[26] Case T-360/09, *E.ON Ruhrgas* EU:T:2012:332, para 84, 97-117. See also Joined Cases T-374/94, T-375/94, T-384/94, and T-388/94, *European Night Services* EU:T:1998:198, para 139, and Case C-307/18, *Generics and others* EU:C:2020:52, para 36.

[27] *F Hoffmann-La Roche*, (n 23), paras 35, 52-59, 67 and 75.

[28] Case T-472/13, *Lundbeck* EU:T:2016:449, para 121. Upheld as case C-591/16P, *Lundbeck*. EU:C:2021:243. The outcome cannot be fully aligned with *European Night Services,* (n 26), para 139 referring to regulatory obstacles as precluding market entry.

[29] Case COMP/M.6258 - *Teva/Cephalom,* recitals 98-99. See also case *F Hoffmann-La Roche*, (n 23), para 52, and case AT.39.612 - *Perindopril (servier)*, recitals 1156-1183.

[30] *Generics and others,* (n 26), paras 36-39, 42-56.

has taken this a step up by introducing a concept of *cartel facilitation*[31] under which third parties may be deemed to enter a horizontal agreement if they are somehow instrumental in bringing it about.

In *AC-Treuhand II,*[32] an intermediary had coordinated the operation of a cartel concluded between groups of undertakings. As the intermediary's activities felt outside the sector, it could in principle not be considered a full cartel member, but rather complicity to this. However, this concept, originated in criminal law, and had no place in administrative law, why the Advocate General preparing the case recommended precluding the company from responsibility.[33] This was not accepted by the Court of Justice, having no problem in including the undertaking giving ground for the concept of cartel facilitation. In *Yes Interest Rate Derivatives,*[34] also involving a facilitator, a group of financial institutions had manipulated the pricing of financial instruments linked to the Japanese yen through a strategy of information exchange and incorrect reporting to the market. After concluding the main cases, the European Commission directed its interest at a company that had acted as an intermediary between the cartel members inter partes and vis-vis third parties. More importantly, the company had knowingly assisted and should therefore be held liable jointly with the full cartel members. The General Court accepted the concept of cartel facilitation and joint responsibility, but rebutted the facts supporting knowledge of the (entire) infringement and thus application to the specific case.

From *AC-Treuhand II* and *Yes Interest Rate Derivatives* follows that undertakings can become members of, e.g., a cartel if they have knowledge about this and are instrumental in bringing it about. Even where their activities must be allotted to completely different markets and segments and thereby precluded from contributing to the reduction in competition directly. It is sufficient that others can provide this, implementing the anti-competitive understanding. From this, it follows that while an anti-competitive horizontal agreement per definition must involve two undertakings that can be considered competitors, this is not a requirement for the remaining parties. Moreover, it is even possible to be 'sucked' into a cartel by association, making it dangerous to be associated with these.

2.2 RESTRICTIONS IN INTER-BRAND VERSUS INTRA-BRAND COMPETITION

As already indicated, the assessment of anti-competitive effects should encompass the context of the agreements in question and how the competition would develop void of this. This involves taking account of the likely impact on **a**) inter-brand competition, i.e., competition between suppliers of competing brands, and on **b**) intra-brand competition, i.e., competition between distributors of the same brand. Where the first group of restrictions can foreclose third parties, the second would predominately victimize the producers in the short term, making it likely they have balanced its effect, seeing it as positive in the longer perspective. Regardless of that, Article 101(1) covers both, but accepts intra-brand restrictions to be (significant) less capable of distortion.

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[31] For further on this concept, see Lukas Solek, *Passive Participation in Anticompetitive Agreements*, Journal of European Competition Law & Practice, 2017, vol 8 (1), pp. 15-24.
[32] Case C-194/14P, *AC-Treuhand (II)* EU:C:2015:717, paras 33-47.
[33] See Advocate General Wahl's Opinion in Case C-194/14P, *AC-Treuhand (II)* EU:C:2015:350, paras 78-84.
[34] Case AT.39.861 - *Yen Interest Rate Derivatives (YIRD),* recitals 77-179 (behavior) and 206-209 (knowledge). Partly uphold with Case T-180/15, *Icap* EU:T:2017:795, and case C-39/18P, *Commission v Icap* EU:C:2019:584

In *Consten and Grundig,*[35] the parties had concluded an exclusive distribution agreement covering part of France and subsequently attempted to prevent parallel imports from outside the allotted territory. On appeal, the Court of Justice held that Article 101(1) was not confined to restrictions in inter-brand competition, but also covered restrictions in intra-brand competition. Therefore, it was not possible to grant absolute territorial protection preventing all forms of sales into allotted areas. In *Visma,*[36] the Court of Justice was called to offer guidance on the appraisal of a distribution system in which six months of priority were granted to the first distributor approaching a potential customer. Regardless of some confusion on the precise effect and scope of the priority clauses, it remained clear how they only restricted the distribution of the company's own products and thus were intra-brand restrictions. In its reply, the Court of Justice recalled how vertical agreements, in general, were less likely to be harmful and how restrictions of competition between distributors of the same brand (intra-brand competition) would rarely be problematic unless competition between different brands (inter-brand competition) was already weakened.

The concepts of inter- and intra-brand restrictions are not considered mutually exclusive as an agreement could influence both, e.g., if suppliers restrict their distributors from competing both with each other (intra-brand competition) and with third parties (inter-brand competition). Neither can restrictions in one be offset by increases in the other.

In *Metropole*,[37] the European Commission had intervened against a partnership directed at establishing a new pay TV channel in France and obligations tying the parents to supply certain channels exclusively to this. The clauses thereby restricted access to the channels and thus intra-brand competition, but were purportedly required to bring about the partnership and thus introduce a new competitor for the benefit of the inter-brand competition. The General Court did not accept this and held that agreements restricting intra-brand competition did not elude Article 101(1) merely because they increased inter-brand competition. This would entail a pro and con analysis outside the scope of Article 101(1).

While the segmentation does not influence the assessment of horizontal agreements, the treatment of vertical differs. As already indicated, the theory of harm associated with *intra-brand* restrictions is weaker as the direct victim is the producer, restricting access to own products and services. Presumably, against a careful balancing of different interests making it imprudent to intervene without a solid theory of harm. This explains why distribution forms confined to intra-brand restrictions as franchise, exclusive and selective distribution are treated leniently under Article 101(1)[38] and void of other factors should elude this completely.

3 A RESTRICTION BY OBJECT OR EFFECT

Pursuant to the text of Article 101(1), this covers agreements having as '…*their object or effect the prevention, restriction or distortion of competition*…', making it apparent that testing for this involves considering if:

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[35] (n 12), pp. 339-340. See also *Guidelines on the application of Article 81(3) of the Treaty,* recital 17.
[36] (n 11), para 78.
[37] Case T-112/99, *Metropole* EU:T:2001:215, paras 64, 70 and 77.
[38] See, e.g., Simon Bishop and Mike Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement,* Sweet & Maxwell, 2010, pp. 195-196, citing the EU Commission 1997 Green Paper and subsequent vertical guidelines.

a) The *object* of the agreement in question appears to be of an anti-competitive nature, making it less pivotal to include and undertake a careful balancing of different interests, as these, at the core, are incompatible with the object of Article 101.

b) The *effect* of the agreement in question might be anti-competitive, but this is not the object of this, making it pivotal to include, and undertake, a careful balancing of different interests, as these comply with the object of Article 101.

The segregation between object and effect is rooted in the factual wording of Article 101(1) as outlined above and is observable in foundational case law.

In *Consten and Grundig,*[39] the parties had concluded an exclusive distribution agreement covering part of France and subsequently attempted to prevent parallel imports from outside the allotted territory. The agreement thereby attempted to create absolute territorial protection detrimental to Article 101(1) objects, making further analysis redundant. In *Société Technique Minière,*[40] also involving an exclusive distribution agreement, the Court of Justice added further by stating that restriction by object or effect was not cumulative but alternative requirements. If an analysis of a clause did not reveal the effect on competition to be sufficiently deleterious, its effect could be evaluated as an alternative.

Restrictions by object or effect are alternatives and not cumulative requirements. Thus, if an agreement restricts competition by object, it is unnecessary to show that it is also restrictive by effect and vice versa. However, assuming the doctrine to be fully developed from the beginning would be manifestly wrong.[41] Rather, decisional practice in the early years leaned heavily on the impact on the freedom of action of firms and a rather mechanic appraisal of restrictions in these. Looking back, it is more likely that the doctrine did not come about in its own right before the turn of the millennium and is still subject to lacunas and ambiguity. This descends into the use of older cases as these might not represent the current reading of the doctrine. Further, as detailed later, this, rather than a list of object infringements, involves a case-by-case approach where restrictive elements, depending on the context, may be either object or effect infringements, complicating the matter further.[42]

3.1 WHAT TO CONSIDER RESTRICTIVE BY OBJECT

Restrictions by object cover classic cartel infringements of Article 101(1). This includes agreements between competitors (active or potential) on prices, output, and sharing of markets and customers and when it comes to non-competitors (e.g., vertical arrangements) fixing (minimum) resale prices and (some) territorial restrictions. Beyond these classic

[39] (n 12), p. 340.
[40] Case C-56/65, *Société Technique Minière* EU:C:1966:38, p. 249. See also case C-234/89, *Delimitis* EU:C:1991:91, para 13, and Case C-228/18, *Budapest Bank* EU:C:2020:265, para 44.
[41] For an outline of early practice, see e.g., D. Waelbroeck & D Slater, *The Scope of object vs. effect under Article 101 TFEU*, contribution to Jacques Bourgeois and Denis Waelbroeck, *Ten Years of the Effects-Based Approach in EU Competition Law Enforcement*, Bruylant, 2012, pp. 131-157. See also Opinion by Advocate General Bobek in case C-228/18, *Budapest Bank* EU:C:2020:265, paras 1, 2 and 49, for some notable considerations on the lack of clarity and simple applicable principles.
[42] In principle, an agreement stripped of restrictive clauses can still restrict competition, e.g., by virtue of information exchange as detailed later.

examples, what to consider inappropriate conduct becomes blurred, and even restrictions by effect are unclear, making it challenging to apply the correct test. However, a justification[43] for having a category of object infringements has been provided by referring to the concept of 'risk offenses' in general criminal law, e.g., driving under the influence of alcohol or drugs. Here, punishment is warranted wholly irrespective of whether actual danger or accident is endured. The Court of Justice has also provided justification by noting how:[44]

> […] certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition …., in order to determine whether an agreement between undertakings reveals a sufficient degree of harm that it may be considered a 'restriction of competition by object' within the meaning of Article 101(1) TFEU, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms part.

To make the concept clearer and help identify by object infringements, the European Commission has explained how:[45]

> Restrictions of competition by object are those that by their very nature have the potential of restricting competition. These are restrictions which in light of the objectives pursued by the Community competition rules have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article [101(1)] to demonstrate any actual effects on the market. This presumption is based on the serious nature of the restriction and on experience showing that restrictions of competition by object are likely to produce negative effects on the market and to jeopardise the objectives pursued by the Community competition rules. Restrictions by object such as price fixing and market sharing reduce output and raise prices, leading to a misallocation of resources, because goods and services demanded by customers are not produced. They also lead to a reduction in consumer welfare, because consumers have to pay higher prices for the goods and services in question.

Further elements to the mosaic have been provided by two rulings from 2020 essentially establishing that an agreement would amount to a restriction by object when it has no plausible purpose but the restriction of competition. Moreover, it rested with the enforcers to establish this.

In *Budapest Bank,*[46] the Court of Justice was requested to clear up if a national agreement on interbank fees was restrictive by object and if the concepts of restriction by object and effect were mutually exclusive. In reply, the Court rebutted the latter and held that an agreement that was cable of having a pro-competitive effect should not be considered restrictive by object. Even when the latter was found, the actual effect could still be relevant

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[43] Opinion by Advocate General Kokott in Case C-8/08, *T-Mobile Netherlands* EU:C:2009:110, para 47.
[44] *Toshiba*, (n 19), paras 26-27. See also *Groupement des cartes bancaires*, (n 1), para 51, and *Guidelines on the application of Article 81(3) of the Treaty,* recital 21.
[45] *Guidelines on the application of Article 81(3) of the Treaty,* recital 21.
[46] *Budapest Bank,* (n 40), paras 44 and 82-83.

for the final evaluation under Article 101(1). In *Generics,*[47] also involving the matter of when to accept an agreement as restrictive by object, the Court of Justice essentially held that this could be assumed when the agreement served no other purpose but the restriction of competition.

In preparing *Budapest Bank*, Advocate General Bobek[48] even recommended that the concept of by object infringements was reserved to obvious infringements easily identifiable, noting that:

> […] if it looks like a fish and it smells like a fish, one can assume that it is fish. Unless, at the first sight, there is something rather odd about this particular fish, such as that it has no fins, it floats in the air, or it smells like a lily, no detailed dissection of that fish is necessary in order to qualify it as such. If, however, there is something out of the ordinary about the fish in question, it may still be classified as a fish, but only after a detailed examination of the creature in question.

Budapest Bank and *Generics* were national cases referred to the Court of Justice, but their principles, including the need to check for a commercial explanation, are also observable in cases challenging a decision by the EU Commission.

In *Krka,*[49] the European Commission had acted against a set of agreements closing a patent conflict. Under the terms of these, the (alleged) infringer accepted the validity of the patent and divested certain overlapping IP rights, and was in return granted a license. To the European Commission, this masked a market sharing understanding, and in particular the low royalty (3%) indicated how the infringer was paid for stopping the infringement. The General Court did not agree on this. First and foremost, did patent settlements per see involve a form of market sharing where one party accepts the other party's rights. Secondly, did internal documents indicate how the 'infringer' was concerned about the merits of his claims and how this motivated the decision to settle. Thirdly, it had not been established that the royalty was suspiciously low why all elements of the settlement appeared commercially based to the extent they were linked or unusual.

Against this, it becomes apparent that restriction *by object* does more than table a presumption of unlawfulness that can be rebutted,[50] but relates to actions that by their very nature are harmful to the proper functioning of normal competition, reducing the need for further investigations. This encompasses behavior where the anti-competitive effect can be expected from **i**) their serious nature, **ii**) experience, or **iii**) high potential for damage.[51] An assessment to be undertaken against the objective content, purpose, legal context, and background[52] of the behavior in question, including any alternative explanation than the

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47 *Generics and others* (n 26), paras 82 and 87-90.
48 Opinion of Advocate General Bobek in *Budapest Bank* (n 40) para 51.
49 Case T-684/14, *Krka Tovarna Zdravil* EU:T:2018:918, paras 19-25 (the agreements), 140 (settlements imply a form of market sharing), 221, 250, 268, 293 and 298 (not by object), 425 and 451, 453, 470 (not by effect) and 471-473 (conclusion). Pending appeal as Case C-151/19P, *Commission v Krka.*
50 See the Opinion by Advocaet General Kokott in *T-Mobile Netherlands* (n 43), para 45.
51 *Guidelines on the application of Article 81(3) of the Treaty,* recital 21.
52 See Joined Cases C-29/83 & 30/83, *Compagnie royale asturienne des mines SA and Rheinzink GmbH* EU:C:1984:130, paras 25-26; Case C-67/13P, *Groupement des cartes bancaires*, (n 1), paras 53-54; and *Budapest Bank,* (n 40) para 76.

pursuit of an anti-competitive aim.[53] In contrast, it is immaterial **iv**) what the parties subjectively intended,[54] or **v**) if they lacked commercial interest in limiting competition,[55] **vi**) pursued another and more acceptable purpose,[56] and **vii**) acted in full public[57] with consent from, e.g., the buyers.[58] However, **viii**) the elements in question should not be considered restrictive by object if ancillary to an (unproblematic) agreement[59] allowing even horizontal price agreements to elude. Moreover, while **ix**) less likely to be problematic, vertical agreements can also be restrictive by object.[60] Finally, the concept should be used restrictively[61] and would most likely be unwarranted if **x**) a pro-competitive rationale only can be excluded by studying the actual effects[62] or **xi**) if the organization of the market excludes any potential for competition.[63]

3.1[a] Two Readings of the Concept of Object Restrictions

Regardless of some colorful metaphors providing justifications for the concept of by object infringements, no operative definition, that can be applied directly has been developed.[64] However, two readings have emerged, centered on:

a) *A two-step analysis* where regard first must be made to the *content* of the practice in question and then its economic and legal *context*. Although the parties' intention is not a necessary factor, there is nothing precluding it from being taken into account. Under this analysis, even horizontal price agreements could fall short of being restrictive by object, and normally benign agreements could be included. Of particular relevance would be the ability (or inability) to refer to a legitimate explanation for the practice and how competition would have developed void of this.

b) Segregation between *obvious and less obvious* by object infringements, where the latter requires more substantial examinations, including reviewing the parties' subjective

[53] See Advocate General Saugmandsgaard Øe in Case C-179/16, *F Hoffmann-La Roche* EU:C:2017:714, para 148.
[54] *Beef Industry* (n 1), para 21; Case C-67/13P, *Groupement des cartes bancaires*, (n 1), para 54; and Case C-32/11, *Allianz Hungária,* (n 1), para 37.
[55] Case C-403/04P, *Sumitomo Metal Industries Ltd* EU:C:2007:52, paras 45-46.
[56] Case C-551/03P, *General Motors BV* EU:C:2006:229, para 64; *Beef Industry Development Society Ltd*, (n 1), para 21; and Case T-587/08, *Del Monte* EU:T:2013:129, para 425. However, Case C-519/04P, *David Meca-Medina and Igor Majcen* EU:C:2006:492, para 45, might be read differently.
[57] *Toshiba*, (n 19), para 26, which, in contrast to older practice does not refer to secret agreements as a special trait of cartels.
[58] *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (2011), recital 22.
[59] See e.g. Advocate General Wahl in *Groupement des cartes bancaires*, (n 1), para 56; Case E-3/16, *Ski Follo Taxidrift AS,* para 99; and further in section 3.3.
[60] See e.g., *Visma* (n 11), para 61.
[61] *Groupement des cartes bancaires* (n 1), para 58.
[62] Opinion of Advocate General Bobek in *Budapest Bank* (n 40), para 81.
[63] *E.ON Ruhrgas* (n 26), para 84.
[64] Unless accepted that restriction by object is agreements that have no plausible purpose but the restriction of competition. Attempts to provide operative guidelines can be found with Advocate General Trstenjak in Case C-209/07, *Beef Industry* (n 1), paras 50-52, and Advocate General Saugmandsgaard Øe in *F Hoffmann-La Roche* (n 53), paras 145-150.

> intent.[65] This reading is of particular attractiveness by feeding directly into the sanctioning as the fine can be graduated accordantly, but does provide for a problematic expansion of the concept and the introduction of three categories of infringements deprived of support in the text of Article 101(1). Not to mention additional blurring of the lines and mingling of what should be alternatives; restrictive by object or by effect.[66]

More references have been made to **i**) the hardcore lists incorporated in the different block exemptions,[67] **ii**) the absence of a legitimate purpose,[68] and **iii**) the examples offered in Article 101(1).[69] This would, e.g., cover different forms of market sharing and price-fixing arrangements and allow any agreements attaining to secure this to be held restrictive by object. However, the concept of object infringements is not confined to these,[70] but covers also surrogates if pursuing such objects as demonstrated by the approach to pay-for-delay arrangements. Further, even traditional hardcore infringements of Article 101(1) as price agreements could elude labeling as anti-competitive by object if concluded within joint production, research, purchase arrangements,[71] or for the purpose of public safety or health.[72] The same would apply to market sharing that follows from a trademark assignment.[73] The only solid and persistent elements to the concept of restriction by object are the call for a restrictive application[74] and the matter of alternative explanations. It then rests with the enforcers to provide a plausible link between the tabled theory of harm and the agreement in question.

3.1[b] What Not to Consider as Object Infringements

Across the two possible readings of what to consider a restriction by object, a number of practices have been reviewed and considered outside the scope, including **i**) exclusive elements in a lease contract,[75] **ii**) award of exclusivity in a vertical relationship,[76] and **iii**) prohibiting internet sales in selective distribution.[77] However, in particular the *two-step analysis* indicates that the true objectives of an agreement trump legal structure and form, extending the concept of a restriction by object to surrogates. Under this, there is, in principle, no safe

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65 The idea of two categories is advanced by Advocate General Wathelet in case C-373/14P, *Toshiba* EU:C:2015:427, paras 87-90, where the first would cover the examples provided in Article 101(1) and the second would require a more thorough analysis of the economic and legal context.
66 See, e.g., Advocate General Saugmandsgaard Øe in *F Hoffmann-La Roche* (n 53), para 148.
67 See 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), recital 13.
68 See, e.g., Advocate General Saugmandsgaard Øe in *F Hoffmann-La Roche*, (n 53), para 148.
69 *Toshiba*, (n 19), paras 89-90.
70 See *Beef Industry Development Society Ltd*, (n 1), para 23.
71 Guidance on restrictions of competition 'by object' for the purpose of defining which agreements may benefit from the De Minimis Notice, section 2.
72 See Guidelines on Vertical Restraints (2022), recital 180, and Guidance on restrictions of competition 'by object' for the purpose of defining which agreements may benefit from the De Minimis Notice, section 1.
73 See C-9/93, *IHT Internationale Heiztechnik GmbH* EU:C:1994:261, para 59.
74 *Groupement des cartes bancaires*, (n 1), para 58, and case E-3/16 - *Ski Follo Taxidrift AS,* para 62.
75 See Case C-345/14, *Maxima Latvija*, EU:C:2015:784, para 24.
76 *Football Association Premier League Ltd,* (n 55) para 137, and Case C-262/81, *Coditel* EU:C:1982:334, para 15. *Visma*, (n 11), paras 60-61 would probably fit into this. However, the fact of the case was blurred, and the Court of Justice did not provide a clear answer to the request for clarification.
77 Case C-230/16, *Coty* EU:C:2017:941, para 58. However, this might not apply to all forms of selective distribution.

harbor, and while horizontal agreements are more likely to be caught by the restrictive concept of restriction by object, this is by no means confined to these. Also, vertical arrangements can fall within the by object concept.[78]

3.2 RESTRICTION BY OBJECT AND REQUIRED ANALYSIS

In contrast to the ambiguity dominating the lines between being anti-competitive by object or effect, a consensus has emerged on the legal implications as the former is considered covered by Article 101(1) per se. Instead, any positive or pro-competitive elements would be referred to Article 101(3),[79] providing for exemptions if warranted. Newer practices appear to have modified the first to a context analysis inducing some analysis requirements even for by object infringements.

In *Groupement des cartes bancaires,*[80] both the European Commission and the General Court had labeled horizontal agreements on interbank fees as restrictions by object and in defiance of Article 101(1). However, the Court of Justice did not accept this, overturning and remanding the decision back to the General Court. In addition to commanding a restrictive use of the concept, it was also required to make regard to the content of the agreement in question, its provisions, objectives, and the economic and legal context of which it forms part, including the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question. In short, the agreements had to be viewed broader than against their naked content, commanding some analysis.

Against *Groupement des cartes bancaires,* it appears that in order to determine if an agreement reveals a sufficient degree of harm to competition, warranting labeling as restriction of competition by object, regard must be made to its content and context. Embedded in this, some analysis of its effects might be warranted. Further, as even traditional hardcore infringements of Article 101(1) could elude labeling as anti-competitive by object if pursuing certain objects, as outlined above, this context analysis does, in reality, readmit the subjective intent of the agreement to the analysis. In contrast, it is immaterial if the agreement had not been implemented[81] or concluded between undertakings normally considered too small to thwart competition (*de minimis)*.[82] Neither is it required to provide a full and final market definition[83] past the need to establish the parties' positions inter partes (competitors v non-competitors).

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[78] See, e.g., *Visma*, (n 11) para 61.
[79] See, e.g., *Beef Industry*, (n 1), paras 19-21; case C-439/09, *Pierre Fabre* EU:C:2011:649, paras 49 and 59; and Guidance on restrictions of competition 'by objectä for the purpose of defining which agreements may benefit from the De Minimis Notice, section 1.
[80] *Groupement des cartes bancaires*, (n 1), paras 53 and 58. See also *Budapest Bank,* (n 40) para 82.
[81] See COMP/36.545/F - *PO/Amino acids,* recital 376.
[82] See case C-226/11, *Expedia* EU:C:2012:795, para 37, and Guidance on restrictions of competition 'by object' for the purpose of defining which agreements may benefit from the De Minimis Notice, section 1.
[83] Case C-439/11P, *Ziegler* EU:C:2013:513, para 63.

3.3 RESTRICTION BY EFFECT AND REQUIRED ANALYSIS

Practices not having as their object to restrict competition must be considered further[84] and would only be covered by Article 101(1) if:[85]

> […] factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent. The competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute; the interference with competition may in particular be doubted if the agreement seems really necessary for the penetration of a new area by an undertaking […].

This involves an objective analysis of the agreement's impact on the competitive situation where restraints are not to be viewed in isolation or abstractly, but under the existing conditions for market entry and prevailing market forces.[86] An approach that essentially involves a counterfactual analysis where the effect is compared to the competition in the absence of the restriction in dispute. Only where this involves a tangible reduction in the parameters of competition, such as price, the quantity and quality of goods and services,[87] would Article 101(1) be applicable. Moreover, the anti-competitive effect should neither be confused with a pro and con analysis[88] nor a loss of consumer welfare.[89] It is not even required that the effect is imminent or have already materialized, only that it appears plausible.[90]

3.3[a] Anti-Competitive Effect Must be Established or Indicated

Void of analysis and evidence making the anti-competitive effect plausible, decisions have been suspended and remanded.[91] Further, the General Court has dictated that the effect analysis[92] must be real and substantiated by the facts and the market structure rather than different presumptions. Therefore, an investigation should initiate with outlining a theory of harm followed by explaining and if, relevant, testing how consumers, competitors and the structures in the market are impacted negatively by the agreement in accordance with this. Case law offers some examples of this.

In *Servier,*[93] five patent settlements involving pay for delay were held anti-competitive by object as they appeared to serve no other purpose than to prevent potential competitors from entering the market. However, the European Commission did not rest its finding

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[84] See *Guidelines on the application of Article 81(3) of the Treaty,* recital 24 and note 31.
[85] Case T-328/03 - *O2*, para 69; case T-111/08, *MasterCard* EU:T:2012:260, para 128; and *Société Technique Minière,* (n 40) pp. 249-250.
[86] Case AT.40.208 - *ISU*, recital 190, and the cited case law.
[87] Case C-382/12P, *Mastercard* EU:C:2014:2201, para 93.
[88] *Metropole*, (n 37), para 77, and section 2.4. below.
[89] See, e.g., Case C-8/08, *T-Mobile Netherlands* EU:C:2009:343, para 38.
[90] Case C-1/12, *Ordem dos Técnicos Oficiais de Contas mod Autoridade da Concorrência* EU:C:2013:81, para 71, and *Maxima Latvija* (n 75) para 30.
[91] See *European Night Services* (n 26), paras 139-147. See also case *O2* (n 85), paras 65-117.
[92] *VISA* (n 22), para 167.
[93] Case AT.39.612 - *Perindopril (Servier)*, recitals 1125-1211 (restriction by object), 1212-1269 (restriction by effect) and 1270-2061 (assessment of the five settlements). Partly upheld with Case T-691/14, *Servier* EU:T:2018:922. Pending appeal as case C-176/19P and C-201/19 P, *Servier* EU:C:2022:577.

merely on the agreement being anti-competitive by object, but also undertook to consider its effect. This involved establishing market power, lack of effective competition, and how the payments altered the incentives of potential competitors. Further, the absence of a legitimate purpose and an overall foreclosure strategy had already been established. In *ISU,*[94] the European Commission acted against a skating union banning members from tournaments outside the union. The European Commission held this to be an infringement by object, but also found it restrictive by effect as it served no legitimate purpose but the financial interests of the union and could foreclose competing unions by denying them access to sources of supply (skaters).

Elements of the contrafactual analysis can be found with the European Commission decisions,[95] referring to: if **a**) the parties have market power and **b**) how the agreement potentially contributes to creating, maintaining or strengthening this. Further, this must involve an objective analysis of the plausible impact on the competitive situation[96] at the time of the conclusion of the agreement.[97] Again, case law offers some examples of these considerations.

In *Night Service,*[98] the European Commission had intervened against a joint venture, arguing that it could foreclose third parties, but failed to substantiate this further. Moreover, the parties' market shares were negligible, and the rendered market description somewhat superficial. The General Court therefore decided to overturn the decision. In *Van den Bergh Foods,*[99] the use of freezer exclusivity, reserving these for the supplier's products, was held anti-competitive. Not by virtue of the individual agreements, but of the cumulative effects of these tying a substantial part of the market and foreclosing it for competition. In *Servier,*[100] the patent settlements had to be assessed based on the fact at the time of the settlement and not against the later factual development as claimed by the parties. In *UK Tractor,*[101] the parties had established an extensive information exchange system that created a high degree of market transparency in an already concentrated market, limiting any competition. The system did not involve internal sensitive information, e.g., on prices, why the anti-competitive effect did not follow from the adopting specific restrictions as traditional but rather the market as highly concentrated.

These considerations indicate an analysis based on **i**) the competitors' abilities to remain viable alternatives, **ii**) market power with the parties, **iii**) penetration of the agreements in question, **iv**) their cumulative effects joint with others, and **v**) other prevailing

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[94] Case AT.40.208 - *ISU*, recitals 154-160 (principles), 161-188 (restriction by object), 189-208 (restriction by effect). Upheld in substance as case T-93/18, *International Skating Union* EU:T:2020:610. Pending appeal as case C-124/21P, *International Skating Union.*

[95] See *Guidelines on the application of Article 81(3) of the Treaty,* recital 25.

[96] *O2*, (footnote 85), para 77.

[97] Case AT.39.612 - *Perindopril (servier)*, recital 1220. Partly upheld with *Servier,* (n 93). Pending appeal as Case C-176/19P and C-201/19P, *Servier* EU:C:2022:577.

[98] See *European Night Services,* (footnote 26), paras 97 and 139-160. See also case*O2*, (footnote 85), paras 65-117.

[99] Case T-65/98, *Van den Bergh Foods* EU:T:2003:281, para 83. See also Case C-23/67, *Brasserie de Haecht* EU:C:1967:54, p. 416.

[100] Case AT.39.612 - *Perindopril (servier)*, recitals 1125-1211 (restriction by object), 1212-1269 (restriction by effect) and 1270-2061 (assessment of the five settlements). Partly upheld with *Servier,* (n 93). Pending appeal as case C-176/19P and C-201/19P, *Servier*,

[101] Case IV/31.370 and 31.446 - *U.K. Agricultural Tractor Registration Exchange,* O.J. 1992L 68/19*,* recitals 36-37. Uphold with Case C-7/95P - *John Deere* and C-8/95P, *New Holland* EU:C:1998:256.

conditions in the market commanding a restrictive approach. Moreover, it must be explained how the agreements influence these by creating a plausible link between the tabled theories of harm and submitted evidence. In contrast, pro-competitive elements would only be relevant for exemption under Article 101(3) as the counterfactual analysis does not encompass these.[102]

The European Commission[103] has summarized this into a two-step test where it can be contemplated if:

1) the agreement or practice in question would be *capable of restricting competition* assessed against a counterfactual analysis of its impact for inter-and intra-brand competition, and

2) this would be a *plausibility,* taking into consideration whether the parties have market power and how the agreement influence the exercise of this in light of prevailing market conditions. Moreover, the impact must be appreciable.

This is supplemented by different forms of presumptions, e.g., that market power could not be identified merely against market shares: **a**) exceeding what is considered de minimis (< 10-15%) under *EU de minimis notice*,[104] or **b**) the thresholds in the different block exemptions (> 20-30%) issued under Article 101(3). Neither would it establish a presumption of anti-competitive effect that the block exemptions are unavailable unless caused by infringing their incorporated hardcore lists, as these traditionally are seen as mirroring the concept of restrictions by object.[105] Finally, it can be noted that as case law[106] does not require implementation of the agreements in question, both the effect and contrafactual analysis may be somewhat abstract and hypothetical. The essential part is establishing a link between the theory of harm and realities, making the former plausible.

3.4 THE US RULE OF REASON

US antitrust law, which has historically served as an inspiration for EU competition law, has adopted a distinction between restrictions *per se anti-competitive* and those subject to a *rule of reason* approach where the former are condemned rather mechanically. A doctrine that appears to mirror the EU's by object doctrine at first glance, but involving balancing pro- and anti-competitive elements of the restrictions. Any transfer of this to EU law has clearly and irrevocably been refused in case law.[107] Moreover, what to consider *per see* infringements in the US involve a limited catalog of actions whereas the EU's by object concept is more dynamic and decided on a case-by-case basis as outlined above.

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[102] *Metropole*, (n 37), para 72.
[103] See *Guidelines on the application of Article 81(3) of the Treaty,* recitals 18 and 24-25. For further, see Jonathan Faull & Ali Nikpay, *The EC Law of Competition*, 3rd edition, Oxford, 2014, pp. 281-288.
[104] See *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),* recital 8. For further on the concept of *de minimis,* see section 3.2 below.
[105] See *De Minimis Notice* (n 104)*,* recital 13.
[106] See *HFB Holding,* (n 14), paras 193 and 200-201; case C-199/92P, *Hüls* EU:C:1999:358, paras 163-165; and Case T-25/95, *Cimenteries CBR v Commission* EU:T:2000:77, paras 1864-1865.
[107] See, e.g., *Metropole*, (n 37), para 77. However, practice is not consistent, making the matter more open, as detailed by Jonathan Faull & Ali Nikpay, *The EC Law of Competition*, 3rd edition, Oxford, 2014, pp. 269-278.

4 HAVING AN APPRECIABLE NEGATIVE EFFECT ON COMPETITION

Article 101(1) refers to agreements that prevent, restrict or distort competition by object or effect, which by case law[108] has been read to include that this must be *appreciable*. Conceptually, the latter can be segmented into:

1) Restrictions that by their *content* do not appear capable of restricting competition, allowing, e.g., quality-based requirements to elude.

2) Restrictions that by their *limited impact* do not appear capable of restricting competition, precluding agreements held to be *de minimis*.

3) Restrictions that by their *context* do not appear capable of restricting competition, permitting different forms of ancillary restraint.

The assessments are made against the agreements, incorporated restrictions, and the position of the undertaking involved, but if competition is already reduced or eliminated through regulation, this translates into the analysis.[109] Obviously, there must be competition to prevent, restrict or distort, as expressed in Article 101(1), making the prevailing market condition essential for the analysis.

4.1 RESTRICTIONS THAT ELUDE BY VIRTUE OF CONCENT

It was established by early practice that not all forms of restrictions would be covered by Article 101(1), giving ground for an understanding that there had to be some substance allowing, e.g., quality-based requirements to fall outside.

In *Société Technique Minière,*[110] the Court of Justice, when reviewing an exclusive agreement, explained the need to take into account the context of the agreement. This was developed further in *Brasserie de Haecht,*[111] also involving exclusivity. Here, the Court of Justice considered it pointless to consider the effect of an agreement dislodged from the market in which it operated and its factual and legal circumstances. In *Prenuptia,*[112] involving a dispute over franchise fees, the Court of Justice refused to hold franchise as anti-competitive in itself, but then went on extending this to restrictions directed at protecting the concept and know-how. A ruling that subsequently has given ground for a presumption that many restrictive elements associated with the franchise and later selective distribution would fall short of infringing Article 101(1).[113]

The doctrine never came into maturity, but was absorbed into the distinction between restrictions by object versus effects, where the latter must be assessed further and against its content and objective. However, the doctrine appears to imply that restrictions of an indirect

[108] See, e.g., *Groupement des cartes bancaires*, (n 1), para 52.
[109] *E.ON Ruhrgas*, (n 26), paras 84, 97-117.
[110] *Société Technique Minière,* (n 40) p. 250.
[111] Case C-23/67, *Brasserie de Haecht* EU:C:1967:54, p. 415.
[112] Case C-161/84, *Prenuptia* EU:C:1986:41, paras 15-23.
[113] *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (2011)*,* recitals 175 and 190.

nature and many intra-brand restrictions would fall short of Article 101(1), but the doctrine is not limited to this and would be applicable broadly provided that the restriction is justifiable.

4.2 RESTRICTIONS THAT ELUDE BY VIRTUE OF DE MINIMIS

Provided that the market functions normally and supports a healthy level of competition, it should be evident that the position of some undertakings would be too trivial to have an appreciable adverse effect on competition, giving ground for the concept of *de minimis*. This was embraced and developed in case law.

In *Völk*,[114] involving an exclusivity agreement, the Court of Justice held that the agreement would fall outside Article 101(1) if having an insignificant effect on the markets, taking into account the weak position of the parties. In *Night Service,*[115] where the European Commission had held a joint venture anti-competitive, the General Court rebutted that a presumption of being anti-competitive could be accepted solely against not being de minimis. Finally, did the Court of Justice in *Expedia*[116] rule that the concept of de minimis did not apply to restrictions by object as these always restricted competition.

While case law had established a concept of de minimis, it would rest with the European Commission to provide further guidance on the matter. This was set out in a series of successive notices, explaining how the concept would be enforced. The current notice (2014)[117] holds a practice de minimis if:

a) The aggregate market share by the parties to the agreement does not exceed 10% on any of the relevant markets affected by the agreement when the parties are *competitors* (horizontal de minimis), or

b) The market share held by each of the parties to the agreement does not exceed 15% on any of the relevant markets affected by the agreement when the parties are *non-competitors* (non-horizontal de minimis).

In the case of mixed agreements or when it is difficult to classify the agreement as either horizontal or non-horizontal, the 10% threshold is applicable. Further, if competition is restricted by the cumulative effect from parallel networks of agreements, covering 30% of the market, the thresholds set out above are reduced to 5%. Exceeding these thresholds does not establish a presumption of appreciable effect nor does it preclude holding an agreement de minimis.[118] For example, the notice, e.g., allows agreements to be covered if only exceeding the thresholds by less than two percentage points for two successive calendar years. Embedded in this, the relevant market must be defined in order to assess the parties' market shares and positions inter partes. Further, de minimis is only applicable outside the scope of restrictions by object,[119] as such restrictions always are considered appreciable.

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[114] Case C-5/69, *Franz Völk* EU:C:1969:35, paras 5-7.
[115] *European Night Services,* (n 26), para 102.
[116] *Expedia*, (n 82) paras 35-37. See also *De Minimis Notice* (n 104), recital 2.
[117] *De Minimis Notice* (n 104), recitals 8-11.
[118] *De Minimis Notice* (n 104), recitals 3 and 11.
[119] *Expedia*, (n 82) paras 35-37.

4.3 RESTRICTIONS THAT ELUDE BY VIRTUE OF CONTEXT

Case law has given rise to a number of doctrines where restrictive elements are seen as ancillary to others, making it meaningless to evaluate them in isolation. Under this doctrine, restrictions might not infringe Article 101(1) by virtue of their context, provided that they are *necessary*. The latter involves establishing whether the restrictions are **a**) objectively necessary for implementing the main operation and **b**) proportionate to this.[120] Below, two possible ancillary restraint doctrines under Article 101(1) are detailed.

4.3[a] Commercial Ancillary

A doctrine has emerged involving certain commercial restrictions and obligations linked to horizontal joint purchase agreements that neither can nor should be appraised in isolation from the underlying arrangement.

In *Gøttrup-Klim – DLG*[121] and *Metropole,*[122] involving partnerships regarding joint purchasing and satellite TV respectfully, different purchase and non-compete clauses had been adopted. While restricting the parties vis-a-vis third parties, they clauses were held necessary for bringing the partnerships about and therefore ancillary to this.

The doctrine of commercial ancillary has been detailed by the Court of Justice,[123] accepting that restrictions might elude Article 101(1) by virtue of being ancillary to a main operation, provided:

> […] that operation would be impossible to carry out in the absence of the restriction in question. Contrary to what the appellants claim, the fact that that operation is simply more difficult to implement or even less profitable without the restriction concerned cannot be deemed to give that restriction the 'objective necessity' required in order for it to be classified as ancillary.

From this follows that restrictions are considered ancillary to the main operation if **i**) directly linked to this, **ii**) necessary for the implementation, and **iii**) proportionate to it.[124] It should also carry some weight if they are **iv**) adopted with the main operation and not subsequently[125] and **v**) confined to the parties, not limiting the commercial freedom of third parties.[126] Finally, **vi**) the main operation must be pro-competitive or neutral as the assessment would ultimately follow this, and **vii**) the evaluation should be made objectively and isolated from the parties' subjective view.[127]

The doctrine on commercial ancillary is not limited to agreements between competitors, but also covers non-horizontal arrangements, e.g., vertical distribution agreements concluded as part of a distribution or sales chain.

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120 See Case T-111/08, *MasterCard* EU:T:2012:260, paras 77-79, and *Metropole*, (n 37), para 106.
121 Case C-250/92, *Gøttrup-Klim DLG* EU:C:1994:413, para 45
122 *Metropole*, (n 37) paras 115-117.
123 *MasterCard*, (n 87), paras 89 and 91.
124 See *Guidelines on the application of Article 81(3) of the Treaty,* recitals 28-31. For further analysis, see Jonathan Faull & Ali Nikpay, *The EC Law of Competition*, 3rd edition, Oxford, 2014, pp. 255-260.
125 *F Hoffmann-La Roche*, (n 23), para 73.
126 *F Hoffmann-La Roche*, (n 23), para 73, para 72.
127 *Guidelines on the application of Article 81(3) of the Treaty,* recital 18 (2).

In *Metro*[128] and *Pronuptia,*[129] where restrictive elements supported a system of selective distribution and franchise, respectively, the Court of Justice held that these eluded separate assessments under Article 101(1) if directed at protecting know-how or the uniformity of the concept.[130] Therefore, the assessment of the restrictions followed the main operation and should not be reviewed separately from this.

A variation of the doctrine on *commercial ancillary* also treated leniently involves being *commercially necessary* for bringing an agreement about or opening new markets for the benefit of competition.

In *Sociéte Technique Miniére*[131] and *Nungesser,*[132] involving the distribution of machines and granting of IP licenses, the Court of Justice expressed understanding for the use of exclusivity provisions if required to open new markets. An understanding most likely bedded in the clauses as unable to thwart competition in an appreciable manner in light of their object – the introduction of a new competitor to the market.

The lenient treatment of restrictions directed at opening new markets is understandable as the alternative might be less rather than more competition. Regardless, it must be appraised under the same principles as set out above for commercial ancillary. However, it is unclear whether the doctrines can be separated from the restriction by object v effect doctrine or have been absorbed into this.[133] Presuming this is not the case, an ancillary defense should mostly have relevance for object restrictions, allowing these to be viewed in their context rather than against their naked appearances. In contrast, would the matter feed into the contrafactual analysis used for restriction by effect and be challenging to separate.

4.3[b] Regulatory Ancillary

It has been contemplated[134] whether a doctrine of regulatory ancillary can be tabled that would allow restrictions directed at implementing regulatory obligations to elude Article 101 by virtue of being unrelated to the operation of economic activities. However, the scope of the doctrine remains open and case law are not consistent.

In *Wouter,*[135] a Dutch ban on interdisciplinary partnerships between lawyers and accountants was presented before the Court of Justice. In contrast to other countries, the ban was not adopted by law, but decided by the national association of lawyers that had been delegated to regulate the matter and opted for a ban. In reply to a request for clarification, the Court of Justice found that this felt outside Article 101, taking into account its objective,

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128 Case C-26/76, *Metro SB* EU:C:1977:167, para 27.
129 *Prenuptia*, (n 112), paras 14, 15, 24 and 27.
130 See also Case C-262/81, *Coditel* EU:C:1982:334, paras 19-20, and Case C-27/87, *SPRL Louis Erauw-Jacquery* EU:C:1988:183, paras 10-11, relating to the exercise of IP rights.
131 *Société Technique Minière,* (n 19) p. 250.
132 Case C-258/78, *L.C. Nungesser KG and Kurt Eisele* EU:C:1982:211, paras 57-58.
133 For further, see Jonathan Faull & Ali Nikpay, *The EC Law of Competition*, 3rd edition, Oxford 2014, pp. 262-263, including a possible limitation to vertical agreements.
134 See, e.g., Richard Whish & David Bailey, *Competition law,* 10th Edition 2021, pp. 139-142 and Jonathan Faull & Ali Nikpay, *The EC Law of Competition*, 3rd edition, Oxford, 2014, pp. 253-255.
135 Case C-309/99, *Wouters*, EU:C:2002:98, paras 97 and 107. Some of the same considerations can be seen in Case T-144/99, *Institute of Professional Representatives* EU:T:2001:105, para 78; Sase C-184/13, *API* EU:C:2014:2147, paras 48 and 55; case AT.40.208 - *ISU*, recitals 210-266; and Joined Cases C-427/16 and 428/16, *CHEZ Elektro Bulgaria* EU:C:2017:890, para 54.

the need to regulate professional services, and the inherent nature of this. In *Meca-Medina,*[136] the General Court applied these principles to a self-regulatory sports body, finding that adopted rules on doping also felt outside Article 101 as the campaign against doping did not pursue any economic objectives and therefore was not covered by EU competition law. The Court of Justice, on appeal, overturned this, holding that the anti-doping rules in question were covered by Article 101, but did not restrict competition in manners conflicting with Article 101(1). In *ISU,*[137] the EU Commission acted against a skating union banning members from participation in tournaments with competing unions. An initiative that served no legitimate purpose but the union's financial interests and could lead to foreclosure of competing unions. By virtue of this, it felt outside any window available from *Wouter* and *Meca-Medina.*

The European Commission[138] has added further to the development of a doctrine on regulatory ancillary by noting that restrictions directed at protecting public safety and health may be permissible under Article 101(1) even when involving restrictions otherwise seen as restrictions by object.

Wouter was a national case tabled before the Court of Justice, leaving it to the national Court to implement the outlined principles.[139] The ruling established a practice allowing some restrictions to elude Article 101 entirely by virtue of being surrogates for regulation. The General Court did in *Meca-Medina* attempt to develop this further, but was overturned on appeal by the Court of Justice, finding the adopted anti-doping rules covered by Article 101, but not infringing Article 101(1). Regardless, *Wouter* and *Meca-Medina* did establish a doctrine allowing restrictions directed at implementing regulatory obligations to elude either Article 101(1) or Article 101 completely. This would cover different self-regulatory bodies, provided that the restrictions are **i**) pursuing legitimate objectives, **ii**) are inherent for the pursuit of these, **iii**) proportionate to them, and **iv**) not directed at protecting fiscal interests.[140] However, the doctrine remains open-ended and subject to lacunas, but appears real and available if warranted.

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136 Case T-313/02, *David Meca-Medina and Igor Majcen* EU:T:2004:282, paras 42-47. Overturned by *Meca-Medina and Igor Majcen,* (n 56) paras 30-34.

137 Case AT.40.208 - *ISU*, recitals 154-160 (principles), 161-188 (restriction by object), 189-208 (restriction by an effect) and 210-266 (not covered by any regulatory exemption). Upheld in substance as Case T-93/18, *International Skating Union* EU:T:2020:610. Pending appeal as Case C-124/21P, *International Skating Union.*

138 See *Guidelines on Vertical Restraints* (2022), recital 180, and Guidance on restrictions of competition 'by object' for the purpose of defining which agreements may benefit from the De Minimis Notice, section 1.

139 For further on possible readings of *Wouter*, see Richard Whish & David Bailey, *Competition law,* 10th Edition, 2021, pp. 141-142.

140 Case AT.40.208 - *ISU*, recitals 210-266. Upheld in substance as Case T-93/18, *International Skating Union* EU:T:2020:610. Pending appeal as Case C-124/21P, *International Skating Union.* See also *Ordem dos Técnicos Oficiais de Contas,* (n 90), paras 54-59, 95-103, and Case C-136/12, *Consiglio nazionale dei geologi* EU:C:2013:489, paras 45 and 53-57.

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THE CJEU VALIDATES IN C-156/21 AND C-157/21 THE RULE OF LAW CONDITIONALITY REGULATION REGIME TO PROTECT THE EU BUDGET

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This contribution aims to introduce the reader to a judgment from the Court of Justice of the European Union on the rule of law conditionality regulation in the two cases of Hungary v Parliament and Council (C-156/21) and Poland v Parliament and Council (C-157/21). The judgment expands our understanding of the legality and application of the regime of conditionality for the protection of the European Union budget provided by the Regulation (EU, Euratom) 2020/2092. On the other hand, the Court of Justice of the European Union in C-156/21 and in C-157/21 has now defined how the European Union can legally cut funds to Member States in the case of an established violation of the rule of law, if this violation endangers the EU budget. Despite having a new tool to sanction violations of the rule of law by its Member States, the European Union still lacks the political will to do so. This contribution discusses the importance of the rule of law conditionality regulation in C-156/21 and C-157/21, and what it means to not only to uphold the rule of law, but also fight against corruption in areas associated with Union's budget and financial interests.

1 INTRODUCTION

On 16 February 2022, the Court of Justice of the European Union (CJEU) delivered a highly anticipated and important judgment on the legality of the rule of law conditionality regime to protect the European Union budget, in the event of breaches of rule of law principles in the two cases of *Hungary v Parliament and Council* (C-156/21)[1] and *Poland v Parliament and Council* (C-157/21).[2] The CJEU fully dismissed Hungary's and Poland's legal actions for annulment against the general regime of conditionality for the protection of the European Union (EU) budget provided by the Council Regulation (EU, Euratom) 2020/2092 (Regulation).[3] The CJEU ruled that the Regulation allows the EU to cut funds awarded to EU Member States in case of an established violation of the rule of law by those EU Member States, if this violation endangers the EU budget.

Hungary and Poland both strongly opposed the Regulation and argued before the CJEU for its annulment. Both countries argued against the adoption of the Regulation by

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[1] Case C-156/21, *Hungary v Parliament and Council*, ECLI:EU:C:2022:97.

[2] Case C-157/21, *Poland v Parliament and Council*, ECLI:EU:C:2022:98.

[3] Council Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ L 433I/1.

claiming that there is an absence of appropriate legal basis in the EU Treaties; in particular, the circumvention of the procedure laid down in Article 7 of the TEU according to Hungary and Poland, which provides for the possibility of instituting a procedure against an EU Member State in the event of a serious breach of the EU's values, or where there is a clear risk of such a breach.[4] Thereby, according to the arguments presented by Hungary and Poland, the EU has exceeded its powers, on a breach of the principle of legal certainty. In preparation for their legal arguments, Hungary and Poland referred to a confidential opinion of the EU Council Legal Service concerning the initial proposal which led to the Regulation, which the CJEU allowed – despite the EU Council's objections, on the basis of the overriding public interest in the transparency of the legislative procedure.[5]

However, in its judgment published on 16 February 2022, the CJEU held that the Regulation was adopted on an appropriate legal basis and is compatible with the procedure laid down in Article 7 TEU.[6] Moreover, it is consistent with the limits of the EU competences and fully in line with the principle of legal certainty. Thereby, the CJEU dismissed Hungary and Poland's actions against the conditionality regime, which makes the receipt of financing from the EU budget subject to the respect by the EU Member States for the principles of the rule of law.[7] This contribution first presents a background discussion on the adoption of the Regulation, and examines the reasoning behind the EU's development of new protective measures to suspend payments from the EU budget, in the case of one of the EU Member States' breaches of the principles of the rule of law.

The contribution discusses some of the opposition to the Regulation, in particular Hungary and Poland's legal and political actions to block the Regulation. Secondly, the contribution presents the Opinions of the Advocate General Manuel Campos Sánchez-Bordona, issued on 2 December 2021, and discusses his legal assessment on C-156/21 and C-157/21.[8] Thirdly, the contribution presents and discusses the CJEU ruling on C-156/21 and C-157/21. The final part of the contribution provides a commentary in regard to the CJEU judgment,[9] and discusses how the Regulation could be pivotal – not only in sanctioning violations of the rule of law by EU Member States, but also supporting the EU anti-corruption efforts in addressing corruption related to the Union's budget and financial interests.

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[4] Court of Justice of the European Union, Judgments in Cases C-156/21*, Hungary v Parliament and Council* and C-157/21, *Poland v Parliament and Council*, Press Release No 28/22, Luxembourg, 16 February 2022 <https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-02/cp220028en.pdf> accessed 5 June 2021.

[5] Sarah Progin-Theuerkauf and Melanie Berger, 'ECJ confirms Validity of the Rule of Law Conditionality Regulation' (*European Law Blog,* 11 March 2022) <https://europeanlawblog.eu/2022/03/11/ecj-confirms-validity-of-the-rule-of-law-conditionality-regulation/> accessed 5 June 2021.

[6] Sarah Progin-Theuerkauf and Melanie Berger (n 5).

[7] Anna Zemskova, 'Analysis: 'Rule of Law Conditionality: a Long-Desired Victory or a Modest Step Forward? *Hungary v Parliament and Council* (C-156/21) and *Poland v Parliament and Council* (C-157/21)" (*EU Law Live*, 18 February 2022) <https://eulawlive.com/analysis-rule-of-law-conditionality-a-long-desired-victory-or-a-modest-step-forward-hungary-v-parliament-and-council-c-156-21-and-poland-v-parliament-and-council-c-157-21-by/> accessed 5 June 2021.

[8] Benedikt Gremminger, 'The New Rule of Law Conditionality Mechanism clears its first hurdle – Analysis of AG Campos Sánchez-Bordona Opinions in *Hungary v Parliament and Council* (C-156/21) and *Poland v Parliament and Council* (C-157/21)' (*European Law Blog*, 14 December 2021) <https://europeanlawblog.eu/2021/12/14/8043/> accessed 5 June 2021.

[9] Court of Justice of the European Union (n 4).

2 BACKGROUND

In 2017, the European Commission presented a 'proposal for a Council Decision' to determine if there is a 'clear risk of a serious breach' of the rule of law in Poland.[10] In 2018, a similar proposal was presented by the European Parliament for Hungary, calling on the Council to determine the serious breach by Hungary of the values on which the EU is founded and, in particular, the rule of law.[11] According to Pech, Wachowiec, and Mazur,[12] the rule of law and the independency of the judiciary has been systematically attacked and violated by the Polish and Hungarian authorities, since Viktor Orbán came into power in Hungary in 2010, and the Law and Justice party, led by Jarosław Kaczyńsk, came into power in Poland in 2015. Furthermore, the rule of law backsliding has not only threatened the democratic and rule of law system of Poland and Hungary, but the functioning of the EU legal order itself, according to Bárd.[13]

The severity of the situation reached a boiling point on 7 October 2021, when the Polish Constitutional Tribunal issued a judgment that struck at the heart of the primacy of EU law – it ruled that various provisions of the EU Treaties are incompatible with the Polish Constitution, expressly challenging the primacy of EU law.[14] In response, the EU imposed a fine against Poland of 1 million EUR a day, for breaching the general principles of autonomy, primacy, effectiveness and the uniform application of EU law, and the binding effect of CJEU rulings – and in particular, for their refusal to comply with the interim measures of the recent infringement proceedings.[15] This is the first time such a large fine has been imposed by the CJEU on an EU Member State for violating the rule of law and challenging the primacy of EU law.

According to Łacny, EU Member States with a lengthy history of infringements of the rule of law (such as Poland and Hungary) usually receive huge amounts of EU funds, which are significant drivers for their social and economic growth and an important contributor to their GDP.[16] For instance, in the MFF 2014–2020, Poland was allocated 86 billion EUR from a number of the European Structural and Investment Funds (ESIF) and in the MFF 2021–2027, Poland is scheduled to receive 124 billion EUR from the EU budget, and up to 160 billion EUR in loans – this makes Poland the largest overall recipient.[17] Similarly, Hungary is

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[10] 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)0835 final – 2017/0360 (NLE).
[11] European Parliament Resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)).
[12] Laurent Pech, Patryk Wachowiec and Dariusz Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' (2021) 13 Hague Journal on the Rule of Law 1.
[13] Petra Bárd, 'In courts we trust, or should we? Judicial independence as the precondition for the effectiveness of EU law', (2022) European Law Journal 1.
[14] Jakub Jaraczewski, 'Gazing into the Abyss: The K 3/21 decision of the Polish Constitutional Tribunal' (*Verfassungsblog*, 12 October 2021) <https://verfassungsblog.de/gazing-into-the-abyss/> accessed 5 June 2021.
[15] Daniel Boffey, 'Poland fined €1m a day over controversial judicial system changes'(*The Guardian*, 12 October 2021) <https://www.theguardian.com/world/2021/oct/27/poland-fined-1m-a-day-over-controversial-judicial-reforms> accessed 5 June 2021.
[16] Justyna Łacny, 'The Rule of Law Conditionality Under Regulation No 2092/2020—Is it all About the Money?' (2021) 13 Hague Journal on the Rule of Law 79.
[17] ibid.

the largest recipient of EU funds on a per capita basis, with more than 95 per cent of all public investments in the MFF 2014–2020 co-financed by the EU.[18]

Against this backdrop, calls for the establishment of rule of law conditionality instrument to suspend EU funds to EU Member States breaching the rule of law have grown; as a result 'the rule of law conditionality under Regulation 2020/2092'[19] was adopted at the European Council's conclusions in July 2020. This gives the EU the necessary tools (under Article 5 of the Regulation) to suspend the approval of one or more programmes financed by the EU budget to any of its EU Member States in the event of breaches of the rule of law.[20] According to Łacny, the Regulation has two objectives: to protect the EU budget, and to safeguard the rule of law in EU Member States.[21] Thus, the EU can now withhold payments (under Articles 4 to 6 of the Regulation) to any EU Member States if the violation of the rule of law directly affects the EU's budget or its financial interests.[22] The underlying objective for this tool is to ensure that the respect for the rule of law is a prerequisite for sound financial management and effective financing of the Union budget.

The limits of the Regulation will be discussed in the commentary part of the contribution – but nevertheless, the EU now has a new tool at its disposal. Poland and Hungry have opposed the Regulation since its proposal, objecting to linking the EU budget 2021-2027 to the respect of the rule of law,[23] even going so far as to block COVID-19 aid (in total 1.8 trillion EUR at the end of 2020).[24] Although Poland and Hungary later agreed to linking the EU funds to the respect of the rule of law, they strongly maintained that the Regulation was not lawful, and in March 2021, Hungary and Poland filed their actions for annulment against the Regulation, arguing that neither TEU nor TFEU provide an appropriate legal basis for the Regulation, that the procedure of Article 7 TEU is circumvented, and the competences of the EU are exceeded – thus, there is a violation of the principle of legal certainty.[25] This is the backdrop of the C-156/21 and C-157/21, and in the next section, this contribution presents the legal arguments put forward by Poland and Hungary against Regulation 2020/2092 and the Opinions of Advocate General Manuel Campos Sánchez-Bordona.

3 THE ADVOCATE GENERAL'S OPINIONS

On 11 March 2021, Hungary and Poland jointly introduced their actions of annulment against the Regulation. Their case was based on four principal arguments: (1) the Regulation lacks an adequate legal basis in the EU Treaties; (2) the Regulation is incompatible with Article 7 TEU and Article 269 TFEU; (3) the Regulation is incompatible with Article 4(2) TEU; and (4) Hungary and Poland raised objections about the legal certainty of provisions in the Regulation.

[18] ibid.
[19] Council Regulation (EU, Euratom) 2020/2092 (n 3).
[20] ibid.
[21] Łacny (n 17).
[22] Council Regulation (EU, Euratom) 2020/2092 (n 3).
[23] Zemskova (n 7).
[24] Progin-Theuerkauf and Berger (n 5).
[25] Court of Justice of the European Union (n 4).

On 2 December 2021, Advocate General (AG) Manuel Campos Sánchez-Bordona delivered his Opinions on the actions of annulment brought by Hungary and Poland against the Regulation; below is an illustration of some of the main questions assessed by the Advocate General to determine the Regulation's legality.

3.1 THE LEGAL BASIS OF THE RULE OF LAW CONDITIONALITY REGULATION

The Advocate General Manuel Campos Sánchez-Bordona started his legal analysis by looking into the question of the legal basis for the Regulation.[26] The EU legislature considered Article 322(1)(a) TFEU as an adequate legal basis for the Regulation, and this provision of the Article gives the EU the competence to set financial rules, i.e., establishing and implementing the budget of the EU. Poland and Hungary challenged this, by arguing that the Regulation did not contain financial rules and by introducing a new sanction instrument for breaches of the rule of law – thus, in their view, the EU had no competence to be able to do this.

However, the Advocate General's Opinions strongly refuted this argument and suggested that the new Regulation establishes a specific conditionality mechanism for the protection of the EU budget from breaches of the rule of law in an EU Member State.[27] Furthermore, the Advocate General viewed that the Regulation serves not as an additional rule of law sanction mechanism, but rather as an instrument for the protection of the EU budget from the specific threat of rule of law breaches – thereby withholding any EU funds[28] until the risk of the breach of the rule of law is addressed. The Advocate General clarified that the Regulation establishes a conditionality mechanism, which links payments from the EU budget to the observance of rule of law principles. Moreover, the Advocate General extensively emphasised the role of the criterion of a 'sufficiently direct' link of breaches of the rule of law to the sound financial management of the EU's budget, for measurements taken under the Regulation to underline the centrality of the protection of the EU budget.[29] The Advocate General's view is further supported by the strict requirement that the measures under the Regulation are proportionate to the impact that breaches have on the EU budget.[30]

On this point, the Advocate General concluded that the Regulation acts as a financial rule for the implementation of the EU budget, and that Article 322(1)(a) TFEU serves as an appropriate legal basis. Thus, the Advocate General refuted Poland and Hungary's claims that the Regulation lacks an adequate legal basis in the EU Treaties.

3.2 COMPATIBILITY WITH ARTICLES 7 TEU AND 269 TFEU

The second argument presented by Poland and Hungary was that the Regulation is a means to implement the budget; they claimed an infringement of Article 7 TEU and Article 269 TFEU,[31] arguing that the Regulation introduced a more specific and, in particular, a more

[26] Opinion of Advocate General Campos Sánchez-Bordona in Case C-156/21, *Hungary v Parliament and Council,* ECLI:EU:C:2021:974, paras 117-201.
[27] ibid para 131.
[28] ibid paras 138-139.
[29] ibid paras 149-169.
[30] ibid paras 177-182.
[31] ibid paras 202-256.

accessible rule of law sanction instrument, which would undermine the sanction mechanism for systemic breaches of the values of the Union (Article 2 TEU) set out in Article 7 TEU. Furthermore, according to Poland and Hungary, the CJEU's unrestricted review of the Regulation undermines the strict limitation of its jurisdiction in case of an Article 7 procedure, as defined by Article 269 TFEU. This argument was also rejected by the Advocate General.

In his Opinions, the Advocate General understands the interplay between the existing rule of law mechanism in Article 7 TEU and the Regulation to be fundamentally different. He expanded this point by first rejecting the *lex specialis* argument that Article 7 TEU would be bypassed by the Regulation, maintaining that the new conditionality mechanism is significantly different both in its application, as well as in its overall objective. Furthermore, the Advocate General laid out that the Regulation has the objective of protecting the EU budget from serious breaches of the rule of law in EU Member States. Article 7 TEU offers a political procedure which is subject to different conditions and offers for a number of possible sanctions, including the suspension of certain EU membership rights.[32]

Furthermore, the Advocate General also clarified the non-exclusivity of Article 7 TEU as an instrument for the protection of the rule of law, explaining that only the introduction of an exact similar mechanism for the protection of the rule of law – but one that carries weaker requirements for its application – would in fact undermine Article 7 TEU.[33] Thus, the Advocate General found that the Regulation does not infringe Articles 7 TEU or 269 TFEU, and considered the Article 7 TEU procedure remarkably distinct from the Regulation.

3.3 COMPATIBILITY WITH ARTICLE 4(2) TEU

Poland and Hungary argued that under the Regulation, the European Commission can neither guarantee nor ensure that is fully objective, impartial and fair when determining the breach of the rule of law, and therefore decisions would be subjective towards some Member States. Furthermore, Poland argued that the Regulation would lead to discrimination against smaller EU Member States, and feared the usage of the qualitative majority voting system (QMV). Poland also argued that the Regulation would be incompatible with the principle of equal treatment of Member States under the Article 4(2) TEU.

However, the Advocate General rejected these arguments on the Regulation being incompatible with Article 4(2) TEU, and argued that the Regulation contains several safeguards, which require the Commission to make a 'thorough qualitative assessment and it should be objective, impartial and fair, and must take into account relevant information from available sources.[34] In regard to the usage of QMV, the Advocate General referred to Article 16(3) TEU, which makes QMV the regular voting procedure of the Council. Lastly, the Advocate General stated that the Regulation does not introduce a new sanction mechanism, dismissing this assertion made by Poland and Hungary.[35]

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[32] ibid paras 227-229.
[33] ibid para 208.
[34] Opinion of Advocate General Campos Sánchez-Bordona in Case C-157/21, *Poland v Parliament and Council*, ECLI:EU:C:2021:978, paras 90-93.
[35] ibid paras 94-98.

3.4 LEGAL CERTAINITY AND DEFINING THE RULE OF LAW

Finally, the Advocate General dismissed Poland and Hungary's objections about the precision and clarity of the Regulation in light of the established principle of legal certainty.[36]

Poland and Hungary had questioned whether the concept of the rule of law can be defined uniformly for the purpose of EU law. They argued that the rule of law must be specifically concretised for the legal system of each EU Member State, and thus, viewed the descriptions of a breach of the rule of law in Article 4(2) of the Regulation to be too broad and abstract – thereby infringing the principle of legal certainty.

In his Opinions, the Advocate General clarified, and noted that 'there is nothing to prevent the EU legislature from defining the rule of law more precisely. However, the regulation does not sufficiently define the nature and scope of the appropriate measures which may be adopted when the rule of law is breached'.[37] In other words, the Advocate General observed that leaving the definition of the rule of law to EU Member States – in regard to how the Regulation should be applied when there is a breach of the rule of law – might threaten the uniform application of the Regulation.[38]

Whilst accepting that the rule of law is a broad concept, nonetheless the Advocate General found that it can be sufficiently concretised for the purpose of the Regulation,[39] and to this effect, the Advocate General referred to the CJEU's case-law, which provides for many of these concretisations.[40]

The Advocate General further clarified that, in its object and overall purpose to protect the EU budget from any future and current breaches of the rule of law by the EU Member States, the Regulation by its very nature includes some level of 'abstraction' – but that does not directly result in a breach of the requirement of legal uncertainty,[41] as claimed by Poland and Hungary.

In closing, the Advocate General's Opinions concluded that Poland and Hungary's call for absolute legal certainty for the Regulation is next to impossible for any legal rule which concerns a future risk or threat.[42] The section below explains the CJEU's judgment on the Advocate General's Opinions.

4 THE CJEU JUDGEMENT

Since Hungary and Poland rejected the idea of EU funds being tied to the respect of the rule of law and announced an action for annulment of the Regulation – thereby blocking COVID-19 aid and the EU budget framework – the Commission had no choice but to suspend the application of the new rule of law conditionality mechanism, which has officially been in force since 1 January 2021, pending the CJEU's ruling. Following the Opinions of

[36] Opinion of Advocate General Campos Sánchez-Bordona in Case C-156/21, *Hungary v Parliament and Council;* ECLI:EU:C:2021:974, paras 271-300.
[37] ibid para 272.
[38] ibid para 273.
[39] ibid paras 272-300.
[40] ibid para 278.
[41] ibid paras 279-285.
[42] ibid para 291.

Advocate General Manuel Campos Sánchez-Bordona, the CJEU fully dismissed Hungary's and Poland's actions for annulment of the Regulation.

4.1 THE LEGAL BASIS OF THE RULE OF LAW CONDITIONALITY REGULATION

Hungary and Poland's first main argument was that Article 322(1)(a) TFEU is not a sufficient legal basis for the Regulation – Article 322(1)(a) TFEU covers the competence of the EU to set financial rules establishing and implementing the EU budget. Amongst others, Hungary and Poland pleaded that a condition to cut financial means must be linked to one of the aims of a programme or of an explicit EU action, or to the sound financial management of the EU budget.

The CJEU disagreed with the reasoning presented by Hungary and Poland, and argued that the EU is founded on values such as the rule of law, as stated under Article 2 TEU and under Article 49 TEU; respecting those values is a pre-requisite for joining the EU.[43] Therefore, the shared values as stated under Article 2 TEU define and lay out the very identity of the European Union as a common legal order; upholding the rule of law in central to those values. In its reasoning, the CJEU stated that the EU, in case of breach, should be able to defend these values as stated in the EU Treaties.[44]

Furthermore, the CJEU stated that the EU's budget is an important instrument for giving practical effect to the principle of solidarity, as stipulated under Article 2 TEU, and the implementation of the principle of solidarity is based on mutual trust through the EU budget between the EU Member States – in other words, the responsible use of common resources must be protected under the budget, and therefore, be able to fulfil the principle of solidarity.[45] The CJEU went further, stating that the rule of law forms the basis for a conditionality mechanism which falls under the concept of 'financial regulation' within the meaning of Article 322 (1) (a) TFEU.[46] The CJEU concluded that the Regulation has a sufficient legal basis,[47] and therefore dismissed the first main argument made by Hungary and Poland – that the TFEU does not offer a sufficient legal basis for the Regulation.

4.2 THE CIRCUMVENTION OF ARTICLE 7 TEU AND ARTICLE 269 TFEU

Poland and Hungary's second main argument was that the procedure introduced under the Regulation circumvents the procedure under Article 7 TEU, because Article 7 TEU regulates the sanction mechanism in case of a serious violation of the fundamental values stated in Article 2 TEU. Furthermore, Poland and Hungary argued that the procedure under the Regulation limits and restricts the CJEU's jurisdiction in relation to Article 7 TEU proceedings, as defined in Article 269 TFEU, and therefore would overall undermine Article 7 TEU. The CJEU rejected these arguments, and ruled that the rule of law can be protected by other legal instruments, other than Article 7 TEU.[48]

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[43] Case C-156/21, *Hungary v Parliament and Council*, ECLI:EU:C:2022:97, para 124.
[44] ibid para 127.
[45] ibid para 129.
[46] ibid paras 145-146.
[47] ibid para 153.
[48] ibid para 163.

The CJEU clarified that the purpose and objectives of the procedure provided by Article 7 TEU are to enable the Council to sanction serious and persistent breaches of each of the common values of Article 2 TEU. Furthermore, Article 7 TEU seeks to encourage the EU Member State(s) in question to address and terminate violations of the rule of law.[49] Therefore, the CJEU acknowledged that the main purpose of the Regulation is to safeguard and protect the EU budget, in accordance with the principle of sound financial management, in case of a violation of the rule of law in an EU Member State.[50] Moreover, the CJEU stated that Article 7 TEU refers to all values of Article 2, which includes the rule of law, while the Regulation relates specifically to the rule of law, whereby there must be reasonable grounds to consider those violations which have a budgetary implication.[51]

The CJEU concluded that the procedures of Article 7 TEU and the procedure established by the Regulation pursue different objectives, which each have a distinct subject matter to address and raise with an EU Member States (C-156/21, paras 175 – 179). Furthermore, the CJEU concluded that the allegation of a circumvention of Article 7 TEU and Article 269 TFEU is unfounded (C-156/21, para 197) and thus dismissed Poland and Hungary's second main argument.

4.3 COMPATIBILITY WITH ARTICLE 4(2) TEU

The third argument from Hungary and Poland was that the application of the Regulation resulted in a violation of Article 4(2) TEU – in particular, the Regulation breaches the principle of equality of the EU Member States before the Treaties, and does not respect national identities. Poland and Hungary claimed that decisions concerning Regulation measures adopted by the Council must be made by a qualified majority, as otherwise small and medium-sized EU Member States would be exposed to a risk of discrimination.

The CJEU dismissed this argument as well – the court highlighted that the evaluations and assessments of the Commission and the Council are subject to procedural requirements, specified in the Regulation (Articles 6(1) to (9)). Furthermore, the CJEU stated that the Commission is obliged to follow an evidence-based approach and to respect the principles of objectivity, non-discrimination, and equal treatment of the EU Member States before the Treaties. Therefore, evaluations and assessments under the Regulation should and can be objective, impartial, and fair; compliance with all these obligations is subject to full judicial review by the Court,[52] and therefore no EU Member States will be treated unfairly. Furthermore, the CJEU affirmed that according to Article 16(3) TEU, the Council votes with a qualified majority – this does not imply a violation of the principle of equality of an EU Member States.[53] In concluding, the CJEU stated that the third main argument was unfounded and dismissed Poland and Hungary's allegation that the Regulation breaches the principle of equality of the EU Member States.[54]

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[49] ibid paras 169-170.
[50] ibid para 171.
[51] ibid paras 173-174.
[52] ibid para 286.
[53] Case C-157/21, *Poland v Parliament and Council*, ECLI:EU:C:2022:98, paras 307–308.
[54] ibid para 310.

4.4 LEGAL CERTAINTY AND EU NOTIONS OF THE RULE OF LAW

Poland and Hungary's fourth argument was that the Regulation does not meet requirements of legislative clarity and legal certainty, and furthermore, that there is no precise definition or uniform interpretation of the rule of law principle, due to national identity of each of the EU Member States. However, the CJEU dismissed these arguments on the definition and interpretation of the rule of law principle.

The CJEU stated that for the conditionality mechanism to apply under the Regulation, it first must establish a 'real link' between violations of the principles of the rule of law and the impact or serious risk of impact on the sound financial management or the protection of the EU's financial interests.[55] A breach of the principles listed in Article 2(a) of the Regulation must be attributable to a public authority of an EU Member State and be linked to the sound financial management of the EU budget. In particular, this breach must affect, or seriously risk affecting the budget's sound financial management.[56]

Furthermore, the CJEU stated that a sufficient 'direct link' – namely a *genuine link* – should be established between a breach of one of the principles of the rule of law when it is at a serious risk.[57] The CJEU also emphasised that measures under the Regulation must be proportionate to the impact of the breaches of the rule of law principles on the EU budget[58]– and especially that these measures may target other EU measures, exclusively within the limits of what is necessary to protect the EU budget.[59] In closing, the CJEU suggested that the Commission should comply with strict procedural requirements[60] and thus, the CJEU dismissed the Poland and Hungary's fourth argument.[61]

5 COMMENTARY

On 16 February 2022, the Court of Justice delivered the highly anticipated and important ruling on the rule of law conditionality regulation in the two cases of *Hungary v Parliament and Council* (C-156/21) and *Poland v Parliament and Council* (C-157/21), in which the court fully validated the legality of the general regime of conditionality for the protection of EU budget provided by the Regulation. The CJEU fully dismissed Hungary's and Poland's actions for annulment against the Regulation, and cleared the EU to cut funds awarded to any of its EU Member States in case of an established violation of the rule of law, in the case that this violation endangered the Union budget.

The CJEU followed quite closely the Opinions of Advocate General Manuel Campos Sánchez-Bordona of 2 December 2021. However, it is worth placing the Advocate General's Opinions and the CJEU judgment in context, as well as to consider the political developments within the EU in the aftermath of the Russian invasion of Ukraine[62] and its

[55] ibid para 244.
[56] Case C-156/21, *Hungary v Parliament and Council*, ECLI:EU:C:2022:97, para 253.
[57] ibid para 267.
[58] ibid para 271.
[59] ibid para 275.
[60] ibid paras 280-288.
[61] ibid para 289.
[62] Zemskova (n 7).

possible impact in regard to the Regulation's application, and challenges to its implementation.

The Advocate General's Opinions helped to clarify that, in its defence against rule of law violation, the EU has more than one weapon to deploy – the EU is not restricted to utilising only Article 7 TEU in its protection of the rule of law. The Opinions acknowledge that under the Regulation, the EU can offer a broader protection of the rule of law, and also shed light on the limitations of the Regulation in this regard, and on the criteria that it needs to meet in order to be activated. The Advocate General clarified that the Regulation cannot sanction all breaches of the rule of law, but only those specific breaches that have a direct impact on the EU budget. Therefore, for the Regulation to be activated, it must be clearly established that there is a clear link to the protection of the Union budget.[63]

The Advocate General's interpretation speaks to the broader concerns about the nature of many rule of law breaches, and what the Regulation can cover. In particular, the Regulation only applies insofar as an EU Member State has a direct impact on the EU budget, and not any other breaches, such as the lack of an independent judiciary. Baraggia and Bonelli note that the Regulation was initially proposed to be more comprehensive, to address general problems with the rule of law that started to emerge in 2017 in Poland and Hungary.[64] However, creating a link between EU funds and the rule of law was seen as the most effective instrument to tackle rule of law backsliding in Poland and Hungary – and any future EU Member States – where EU funding helps sustain the same regimes that are threatening democracy and the rule of law. Therefore, the validation of the CJEU is key to the future application of the Regulation and to the overall EU rule of law arsenal.[65]

As expected, the Court of Justice followed the legal arguments presented by the Advocate General in his Opinions. This judgment represents a very important step towards strengthening the rule of law principle in the EU, and moreover, the EU now has additional instruments to protect its core principles, alongside the procedures of Article 7 TEU. Thus, this judgment has paved the way to introduce further conditionality measures, and certified that the Commission now has at its disposal a new weapon to tackle violations of the rule of law in EU Member States. However, whilst the actions for annulment brought by Hungary and Poland were dismissed in their entirety, and the legality of the Regulation was confirmed by the CJEU, it must be noted that the threshold to apply the Regulation is limited to cases wherein there is a strong link between the breach of the rule of law and a threat to the sound financial management of the EU budget.[66] Furthermore, measures must be proportionate, thus limiting the scope of the Regulation's application. In future case law, the CJEU may be asked to clarify to what extent the 'direct link' must be made.

The impact of Regulation measures may be significant, if a reduction of financial resources hits an affected EU Member State hard. For example, in the case of Poland, around

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63 Progin-Theuerkauf and Berger (n 5).
64 Antonia Baraggi and Matteo Bonelli, 'Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges', (2022) 23(2) German Law Journal 131,
65 ibid.
66 András Jakab and Lando Kirchmair, 'How to Quantify a Proportionate Financial Punishment in the New EU Rule of Law Mechanism?' (*Verfassungsblog*, 22 December 2020) <https://verfassungsblog.de/how-to-quantify-a-proportionate-financial-punishment-in-the-new-eu-rule-of-law-mechanism/> accessed 5 June 2021.

140 billion EUR of EU funds are at stake; in Hungary, it is about 40 billion EUR.[67] Therefore, according to Mavrouli,[68] it is difficult to make a prediction with regard to the extent the Commission will apply the Regulation after the CJEU judgment. After the judgment was issued in February, Commission President Ursula von der Leyen emphasised that the Commission will analyse the reasoning behind the judgement, and assess the possible consequences for applying the Regulation.[69] It must be noted that the Regulation will only be applied once the guidelines for its application have been detailed in the light of the judgment, and since this time, the Commission has not been very proactive in enforcing it, even though von der Leyen expressed her Commission's determination to protect the EU budget and funds.

Poland and Hungary's public reactions to the CJEU judgment have been somewhat different from one another. Hungarian Justice Minister Judith Varga called the decision 'politically motivated', stating that the EU was abusing its power.[70] Meanwhile, Polish Prime Minister Mateusz Morawiecki indicated a rapprochement between Poland and the EU Commission, after meeting with von der Leyen.[71] Since Hungary scheduled its parliamentary elections in April 2022, the Commission did not apply the Regulation, as it was viewed that it might be interpreted as interference in the election campaign.[72] This delay has led to harsh criticism from the European Parliament; a number of MEPs have threatened to sue the Commission for failing to act on Poland and Hungary, when there has been a clear violation of the rule of law based on the CJEU ruling.[73]

However, since Russia's invasion of Ukraine, the Commission has not taken proper action in applying the Regulation after the CJEU ruling clarified its legal mandate, as Hungary has used its veto in the Council to block the EU in imposing sanctions against Russia on the oil embargo, unless the payouts from the COVID-19 recovery fund EU are released to Hungary. The EU finds itself in a position where it must negotiate the application of the Regulation in order to have unanimity at the European Council in responding to Russia's invasion of Ukraine with a new round of sanctions – but this contribution would argue it would be counterproductive to reduce or abandon the use of the rule of law conditionality to EU funds,[74] as it is about upholding EU fundamental values, at the cost of reaching

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[67] Gabriela Baczynska, 'Top EU court throws out Polish, Hungarian challenge to "money for democracy"' (*Reuters*, 16 February 2022) <https://www.reuters.com/world/europe/poland-hungary-test-eu-cash-for-democracy-powers-court-2022-02-15/> accessed 5 June 2021.

[68] Roila Mavrouli, 'The Dark Relationship Between the Rule of Law and Liberalism. The New ECJ Decision on the Conditionality Regulation' (2022) 7(1) European Papers 252.

[69] European Commission, 'Statement by European Commission President Ursula von der Leyen on the judgments of the European Court of Justice on the General Conditionality Regulation' (*European Commission*, 16 February 2022) <https://ec.europa.eu/commission/presscorner/detail/en/statement_22_1106> accessed 5 June 2021.

[70] Reuters Staff, 'EU court ruling shows Brussels "abusing its power", Hungary justice minister says' (*Reuters*, 16 February 2022) <https://www.reuters.com/article/eu-democracy-ruling-hungary-idUSS8N2SG04M> accessed 5 June 2021.

[71] Euronews Staff, 'ECJ rules in favour of making EU cash handouts conditional on a country's respect for rule of law' (*Euronews*, 16 February 2022) <https://www.euronews.com/my-europe/2022/02/16/ecj-to-rule-on-whether-eu-cash-handouts-can-be-made-conditional> accessed 5 June 2021.

[72] Baraggi and Bonelli (n 67).

[73] Bárd (n 14).

[74] Bea Bakó, 'How Hungary might avoid the suspension of EU funds' (*BalkanInsight*, 31 May 2022) <https://balkaninsight.com/2022/05/31/how-hungary-might-avoid-the-suspension-of-eu-funds/> accessed 5 June 2021.

consensuses in the European Council on sanctions. Although the Commission has sent a letter to Hungary outlining its concerns about the use of funds in specific EU-funded projects based on the Regulation, its slow action to date since the CJEU ruling suggests that Hungary will be given more time to compromise the application of the Regulation. Whereas in the case of Poland, on 1 June 2022, the Commission approved 23.9 billion EUR in grants and 11.5 billion EUR billions of the COVID-19 economic recovery[75]– an approach which has been met with much criticism given the CJEU ruling. Petra Bárd and Dimitry Kochenov observe that the Commission – by approving the COVID-19 economic recovery for Poland, and likely for Hungary in light of the ongoing Russia's invasion of Ukraine to help these countries' economies, which are currently hosting millions of refuges from Ukraine – is jeopardising not only the internal discussion about the rule of law in responding to the violation of European values, but also damaging the application of the newly established Regulation and the uniformity of EU law overall.[76]

That said, money will not flow until Poland makes reforms to the judiciary, in particular dismissing the disciplinary chamber for judges. In October 2021, the CJEU ordered a fine of one million EUR per day against Poland, finding the disciplinary chamber for judges to be illegal (because it fails to provide safeguards against political meddling); the state must begin reinstalling judges dismissed by the contested chamber before any money is paid out. In other words, funds are conditions towards dismantling a disciplinary chamber for judges within Poland's supreme court; changing the judicial disciplinary system; and reinstating judges suspended under current rules. [77]

However, the EU and a number of EU Member States are keen to end the dispute with Poland in particular, as the country is sheltering about 3.6 million Ukrainians who have fled since Russia invaded Ukraine. The EU argues that approving the recovery plan in Poland and Hungary, in light of the ongoing war in Ukraine, would help Ukrainians in the EU labour market.[78] However, this is at the cost of making concessions about the rule of law in the EU. In closing, after the CJEU verdict, the Regulation has equipped the EU with another important tool in its rule of law toolbox. In Article 3, the Regulation lists corruption amongst the rule of law deficiencies that may trigger a pause in the payment of EU funds. However, in the future, it is important that the EU uses the Regulation rule of law conditionality mechanism; this will strengthen the overall anti-corruption efforts in the EU.

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[75] European Commission, 'NextGenerationEU: European Commission endorses Poland's €35.4 billion recovery and resilience plan' (*European Commission*, 1 June 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3375> accessed 5 June 2021.

[76] Petra Bárd and Dimitry V Kochenov, 'War as a pretext to wave the rule of law goodbye? The case for an EU constitutional awakening', (2022) European Law Journal 1.

[77] Jakub Jaraczewski, 'Just a Feint? President Duda's bill on the Polish Supreme Court and the Brussels-Warsaw deal on the rule of law' (*Verfassungsblog*, 1 June 2022) <https://verfassungsblog.de/just-a-feint/, DOI: 10.17176/20220602-062115-0> accessed 5 June 2021.

[78] Jan Strupczewski and Gabriela Baczynska, 'EU approves Polish recovery plan, but no payouts before judiciary fixed' (*Reuters*, 1 June 2022) <https://www.reuters.com/world/europe/eu-commission-likely-unblock-polands-recovery-plan-wednesday-2022-06-01/> accessed 5 June 2021.

6 CONCLUSION

The CJEU upheld the validity of Regulation 2020/2092 in two judgments on 16 February 2022 by closely following the Opinions of the Advocate General Manuel Campos Sánchez-Bordona delivered on 2 December 2021. The CJEU judgement to annul Poland and Hungary's arguments on the validity of the Regulation serves not only as an excellent opportunity to examine the legality of the individual provisions of the Regulation to establish the conditionality mechanism, but it also provides a strong statement on the instruments and powers of the EU to protect its financial interests, as well as on the meaning of the common values enshrined in Article 2 TEU – in particular, the value related to the rule of law. However, it will not be easy to demonstrate a genuine and direct link between breaches of the rule of law and sound financial management of the EU budget, as emphasised several times by the CJEU in its judgment. However, the validation of the Regulation is welcome, and can only serve to strengthen both the rule of law toolbox in the EU, and also its anti-corruption efforts in cases of EU fund mismanagement. The Commission has taken the position that it must first establish guidelines for the application of the Regulation. The ongoing Russian invasion of Ukraine, and the political challenges for the EU in unanimity for sanctions against Russia have led the EU to delay the application of the Regulation to Poland and Hungary. Thus, in conclusion, much will depend on how the Commission wants to proceed with the Regulation. It is evident that the Commission will now be under immense pressure in light of the CJEU ruling by the European Parliament and some of the EU Member States to make use of the Regulation without further delay.

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BOOK REVIEW

Susanna Lindroos-Hovinheimo, *Private Selves: Legal Personhood in European Privacy Protection*, Cambridge University Press 2021, ISBN: 9781108781381

Hoda Hosseiny*

Data privacy law has become a significantly important area for law and yet, the main research in this field of law has focused primarily on the doctrinal analysis and remains mainly under-theorised. *Private Selves* written by Professor Susanna Lindroos-Hovinheimo, however, gives us a novel view on the philosophical underpinnings of the EU data protection law, drawing on continental philosophy and contemporary political philosophy. It is within this context that the author distances herself from the idea that there is a pre-existing person whose privacy rights should be protected and starts her elegantly constructed study of legal subjectivity in the EU privacy law with a brilliant question: What kind of persons does European Union (EU) law think we are? To answer this question, Lindroos-Hovinheimo uncovers the philosophical foundations of the European privacy law and it is based on an analysis of the General Data Protection Regulation (GDPR), as well as a thorough analysis of the case law of the European Court of Justice (ECJ) that the main argument of the book is presented. Situated within the field of critical legal scholarship, the book explores in detail the ways in which human beings are constructed through privacy rights. The author engages with the kinds of presuppositions regarding the concept of legal personhood that lie at the heart of EU privacy regulations. Thus, the book doesn't concern criticising privacy right per se. In addition, it does not advocate a lesser level of privacy protection by the European legislature or courts. In the context of the European Union, the author's analysis emphasises the concern that the liberal economic paradigm, upon which the integration project mostly rests, threatens to privatise not only services and administration, but also citizens. The author aims not to show what privacy rights fail to accomplish, but rather to analyse the various things they do at all times. This book, as its title implies, is devoted to the study of how privacy rights and personal data regulations individualise people in Europe. Central to book's argument is that both the case law as well as the interpretations of the GDPR suggest some individualist tendencies. Even though the emerging individual in European privacy law is in no way uniform or unambiguous, they still align mostly with individualistic views and the view of the individual as autonomous is at the core of the current regulation of privacy rights. Throughout the book, the author explores how such tendencies can undermine community values such as solidarity and equality.

The book is divided into chapters based on the various kinds of persons that derive from the material under study. Lindroos-Hovinheimo walks us through certain forms of personhood that arise from the GDPR and ECJ case law. Yet, according to the author, to differentiate between their paradigmatic appearances is not an easy task. They often overlap

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and, in addition, seem to have contradictory logics. Despite this, there are various types of persons that can be discerned. The person in control is the first such form of personhood. As the author suggests, an emphasis on the control of data, which is integral to the current privacy law, implies that there are individuals who control, can control, and should control their data. A law that seeks to empower is usually in line with a specific view of personhood. The existence of competent persons is presupposed and is sought in legal mechanisms of empowerment.[1] Individual empowerment is particularly evident in the self-management ideology of the GDPR whereby consent is emphasized. According to law, there exist individuals who are aware of themselves, their preferences, and their opinions. As such, the law presupposes and consistently produce an autonomous person.[2] One explanation, according to Lindroos-Hovinheimo, for the prevalence of privacy concerns could be found in the rise of an increasingly individualistic society in which people have become independent actors rather than group members or citizens. Individualism in this sense makes each individual solely responsible for the decisions they make. Control is of great significance in data protection law, which is in line with individualism.[3] The author demonstrates that privacy rights construct the person first and foremost as an individual in control.

The next chapter makes the starting point that the aim of enhancing individual control is consistent with the widely shared belief that privacy is valuable because it is an integral part of individual autonomy.[4] The predominant interpretation of privacy rights emphasises on the autonomous, self-determining individual, as appears to be the next person constructed by the EU data privacy law. It is the concept of a self-same and autonomous individual that is at the core of privacy rights. Since humans contain an autonomous core, they are not completely defined by external forces. This core, however, as Lindroos-Hovinheimo argues is neither concrete nor substantial. It is the power structures that impose on us the way we behave, the lives we live, and the values we hold dear.[5] Such view is premised on a rather simplistic and self-contrary understanding of what it means to be a human being. Currently, the privacy regulation finds it difficult to accommodate the inevitability of the fact that we are all incomplete and uncontrollable members of society. Privacy regulation, in her opinion, both produces autonomy by emancipation, and presupposes it while protecting the person in control. Accordingly, the autonomous individual constitutes both the assumption and the goal of the privacy law.[6]

In the following chapter, Lindroos-Hovinheimo, examines the construction of personhood in terms of immunisation logic. She discusses the ways in which privacy rights seek to protect individuals by making them immune. Therefore, privacy can be seen as akin to immunisation: the individual has the right to withdraw and resist intrusions. The right to privacy can be viewed as an instrument of individualisation, through which the law draws the boundaries of each individual's personal domain.[7]

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[1] Susanna Lindroos-Hovinheimo, *Private Selves: Legal Personhood in European Privacy Protection* (Cambridge University Press 2021) 44.
[2] ibid 37.
[3] ibid 51.
[4] ibid 71.
[5] ibid 81.
[6] ibid 171.
[7] ibid 97.

immunisation: the individual has the right to withdraw and resist intrusions. The right to privacy can be viewed as an instrument of individualisation, through which the law draws the boundaries of each individual's personal domain.[7]

Next, Lindroos-Hovinheimo explores the economic agent created by privacy law. According to the author, the free-moving economic agent has been a dominant form of legal personhood in the Union historically.[8] The link between data protection and economic liberty as the author demonstrates is clearly evident. The purpose of data protection rules, therefore, is not only to protect fundamental rights but also to facilitate the enjoyment of free movement rights by individuals. Although there is no clear consensus on the ideological underpinnings of privacy regulation, the purpose of privacy law is not merely that of protecting individuals. It also aims to ensure the free flow of data within the internal market. In any case, even if the primary objective of data protection is the development of rules that are beneficial to individuals, the Regulation does harmonise the market. Therefore, the fourth person is certainly the one formed by the economy.

Following an analysis of how privacy is connected with political personhood and is a prerequisite for a democratic society, the author provides insights into alternative approaches to counteract individualistic tendencies within EU privacy law in the final chapter – although the purpose is not to advance any normative claims. Throughout her investigation, singular plurality has served as the framework.[9] In light of that, being-in-common defines the person, which suggests that persons are not primarily autonomous and self-same agents. The singularity of a person can only exist in the context of a community, and community can only exist if the singular plurality of its members is respected.[10] One of the most important aspects of privacy rights, as she remarkably demonstrates, is that they provide means of regulating relations between people, and human beings as relational beings. As such, privacy should not be used to protect individuals alone, but rather as part of sharing a world. In this sense, privacy rights can influence how the world is shared and how a community is upheld. The author suggests that when this kind of thinking prevails, and if the relational aspects of these rights are considered in their entirety, balancing will need to be considered in most cases. The ECJ should consider other rights and values to a greater extent than it usually does. It is essential to evaluate privacy claims on the basis of a spectrum encompassing many values, not just individualistic ones.[11]

One of the greatest strengths of *Private Selves* is that it sheds light on how privacy rights are of substantial value since they provide opportunities for regulating the relations between individuals as incomplete beings. Alternatively, one might see privacy not as an individual right, but rather as something that is born in relations. Privacy should therefore be regulated based on its relational nature.

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[7] ibid 97.
[8] ibid 117.
[9] The author draws on Nancy's theory of singular plurality to explore personhood as intertwined with community. See Jean-Luc Nancy, *Being Singular Plural* (Stanford University Press 2000).
[10] Lindroos-Hovinheimo (n 1) 160.
[11] ibid 169.

On the whole, Lindroos-Hovinheimo's work is a convincing defence of the role of viewing privacy rights as born-in relations as opposed to individual entitlements. Such relations define the person and are the basis of rights. Consequently, a community must be presupposed simultaneously with a person.[12] An important contribution to one of the fundamental debates in political and legal philosophy is made by this book. *Private Selves* is beautifully written, novel, innovative, and traverses a wide range of legal, political, and philosophical issues within 175 pages. *Private Selves* is an essential read for anyone seeking to reconcile doctrinal analysis of this realm of law with theoretical insights into the nature of legal subjectivity offered by the author.

[12] ibid 80.

COMPETITION LAW'S SUSTAINABILITY GAP? TOOLS FOR AN EXAMINATION AND A BRIEF OVERVIEW

JULIAN NOWAG*

The aim of this paper is two-fold. First, the paper aims to provide tools for a structured examination of competition law's perceived inability to address sustainability. The EU framework is chosen as a case study since EU competition law is embedded in the EU's constitutional framework. As a result, EU competition law is subject to the requirement of Article 11 TFEU and 39 of the Charter of Fundamental Rights. Article 11 mandates that 'environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.' The paper provides tools for a closer examination of this required integration. The second aim of this paper is modest. It aims to provide the reader with a brief overview of the perceived gap. While some gaps remain, the paper shows that EU competition law has developed tools that can be used to foster sustainability in a competition law context. As these tools are often not EU specific they could equally inspire other jurisdictions.

1 INTRODUCTION

This paper was originally written for the 2019 'Competition Law and Sustainability' conference at Sciences Po Law School in Paris and the 2019 Brussels conference 'Sustainability and Competition Policy: Bridging Two Worlds to Enable a Fairer Economy.' These conferences marked the start of a time of growing interest in the interaction between competition law and sustainability. These days, the European Commission is revising its horizontal guidelines and a number of initiatives in the field can be observed such as those by the Dutch[1] and Greek competition authorities,[2] the ICN,[3] and the OECD.[4]

Often the debates focus on the perceived inability of competition law to address problems of sustainability. This issue might be even more pressing in other jurisdictions. For example, in the US -under the Trump administration- an antitrust investigation had been

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[1] The second version of their draft Guidelines 'Sustainability agreements: Opportunities within competition law' was published in 26 Jan 2021, available at <https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf> (accessed 7 Dec 2021).

[2] See Staff Discussion Paper On Sustainability Issues And Competition Law (2020) available at <https://www.epant.gr/files/2020/Staff_Discussion_paper.pdf> (accessed 7 Dec 2021).

[3] Hungarian Competition Authority, Special project for the 2021 ICN Annual Conference: Sustainable development and competition law (Sep 2021) available at <https://www.gvh.hu/en/gvh/Conference/icn-2021-annual-conference/special-project-for-the-2021-icn-annual-conference-sustainable-development-and-competition-law> (accessed 7 Dec 2021).

[4] See Julian Nowag, OECD (2020), Sustainability and Competition, OECD Competition Committee Discussion
Paper, available at http://www.oecd.org/daf/competition/sustainability-and-competition-2020.pdf (accessed 7 Dec 2021).

launched against car makers because of their commitment to higher emission standards than those required by federal law.[5] What may fundamentally distinguish EU competition law from other jurisdictions is its embeddedness in the EU's constitutional framework. As a result, EU competition law is subject to the sustainability requirement of Article 11 TFEU.[6] This provision mandates that 'environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.' As such, this requirement also applies to the field of competition law as one of the EU's policies.[7]

To investigate whether and how such integration can take place and whether the perceived sustainability gap in competition law exists, tools are required. This paper aims at providing such tools to offer a framework for a closer examination of the perceived gap. Moreover, it provides a cursory examination of the perceived gap. It shows that EU competition law has developed some means that can be used to foster sustainability in a competition law context. Moreover, these tools are often not so EU specific so that these could not equally inspire other jurisdictions. However, some areas might still be open to debate and might well be classified as gaps.

2 FRAMEWORK FOR EXAMINATION

When examining the perceived sustainability gap in competition law it is helpful to map out instances where and how sustainability could feature within the competition analysis. In this regard the following framework developed elsewhere[8] may provide a first point of entry for a structured examination and deliberation.

As the EU's function in competition law is one of supervision (of compliance with the competition provisions of the Treaties), the EU is not actively designing the measures which impact sustainability. This reduces the flexibility because the EU's main option is to interpret and apply the relevant legal provisions to either allow or prohibit a measure.[9] Slightly more flexibility and influence on the relevant measures seems to be possible in commitment decisions.[10] Yet, even within this procedure the Commission is bound by the legal framework of the competition provisions but has a broad margin of discretion.[11] Thus, the main limits for considering sustainability are the wording and relevant interpretations of the competition provisions.

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[5] On this debate see e.g. Julian Nowag and Alexandra Teorell, 'The Antitrust Car Emissions Investigation In The U.S. – Some Thoughts From The Other Side Of The Pond' 1 (2) CPI Antitrust Chronicle (2020) 56-61. This investigation was later dropped.

[6] Also found in Art 39 of the EU Charter.

[7] See e.g. Case T-210/02 *British Aggregates v Commission* EU:T:2006:253, para 117; Case C-513/99 *Concordia Bus v Helsingin Kaupunki* EU:C:2002:495, para 57; and recently Case C-594/18 P *Austria v Commission* EU:C:2020:742 para 39-46. On the scope of Article 11 TFEU, the Member States' debates, and their intention to makes this requirement binding in *all* areas of EU law, see Julian Nowag, 'The Sky is the Limit: on the drafting of Article 11 TFEU's integration obligation and its intended reach' in Beate Sjåfjell and Anja Wiesbrock, The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously, (2014 Routledge) 15-30.

[8] See Julian Nowag, Environmental Integration in Competition and Free-Movement Laws (OUP 2017) 1-12.

[9] Another option is a change of the competition law provisions in the Treaty, however as such a change is considered unlikely in the near future it is not covered in this paper.

[10] The most flexibility is offered by (non-binding) informal advice.

[11] See Case T-76/14 *Morningstar v Commission* EU:T:2016:481

First, the competition provisions are interpreted so that a measure that is harmful from a sustainability point of view is prevented/prohibited. Second, the provisions are interpreted so that measures that support sustainability are allowed. These situations can be termed[12] preventative and supportive integration. This important distinction has also been taken up by Simon Holmes, who uses the metaphor sword and shield.[13] In the first case, competition law is used as a sword to *prevent* for example a degradation of the environment. In the second case, sustainability provides a shield for measures that support sustainability against 'attacks' by competition law.

For analytical accuracy this basic distinction between preventative and supportive integration can be further clarified. Integration can take two forms: cases where no conflict exists and those where conflict exists and thus balancing takes place. In other words, the first form of integration is characterised by the possibility of bringing sustainability in line with the competition provisions. In other words, sustainability and the protection of competition can be pursued simultaneously without creating a conflict. In such a case the measure pursuing sustainability could for example be outside of the scope of the competition provisions. Of importance in this context is the outcome. Sustainability is achieved without the need to balance sustainability against competition. The second form of integration is only needed where the just described first form is not possible. This (second) form of integration is characterised by 'balancing' sustainability and competition. Yet, it is important to note that such a balancing is not a 'wild balancing' exercise which occurs in an abstract fashion. Instead, the balancing has to take place within the boundaries set by the relevant competition provisions.[14]

This distinction is a functional one. It scrutinises whether a balancing between sustainability and competition is needed/takes place or whether explicit balancing is avoided. And while this distinction typically overlaps with the scope of the competition provisions, on the one hand, and justifications of restrictions of competition, on the other, it does not have to. For example, the *Wouters*[15] case - which involved balancing - can be read as finding that a restriction of competition did not exist in the first place because the measure was outside the scope of the prohibition of Article 101 TFEU. Similarly, the *Metro I*[16] test for selective distribution which involves a balancing test might be seen as setting out the scope of Article 101 TFEU.[17] Yet, given that necessity is examined as part of that test it might be better to consider it as part of the second form of integration, ie balancing. This distinction leads us to the following options for integrating sustainability.

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[12] This terminology is developed in Nowag (n 8) 1-12.

[13] See Simon Holmes, 'Climate change, sustainability and competition law' (2020) 8 Journal of Antitrust Enforcement 355. This metaphor is elegant and focuses on how sustainability is used. This is the minor difference to the preventative/supportive distinction which focuses more on the outcome, ie whether an unstainable situation is prevented or a sustainable one supported by the relevant application of competition law.

[14] The structure of the provisions, in particular, with regard to justifications of restrictions might suggest a certain hierarchy because sustainability can only justify an exception to the general rule. Yet, this hierarchy follows merely from the structure of the provision and cannot change the general constitutional balance between the different aims of the EU. On the constitutional balance between competition and environmental protection and their equivalence in terms of constitutional weight, see in Nowag (n 8) 27-31.

[15] Case C- 309/99 *Wouters and others* EU:C:2002:98.

[16] Case 26/76 *Metro v Commission* (*Metro I*) EU:C:1977:167.

[17] See Nowag (n 8) 1.

In terms of *supportive* integration (*shield*): a) a close examination of a sustainability measure shows that it does not restrict competition (first form of integration). This form or integration should be the preferred option for integration as it means that competition authorities would not engage with the measure and the often more difficult balancing exercise can be avoided. b) Where a sustainability measure is subject to the competition provisions it might still be 'justified' where the benefits outweigh the restrictions on competition. However, as the brief analysis below shows, such a balancing takes places within the framework of competition law, so that sustainability benefits may need to be 'translated into the language of competition law'.

In terms of preventative integration (*sword*), the picture looks partly different: In cases where a measure leads to, for example, environmental degradation, the questions is to what extent can the competition law provisions be used to prevent such degradation. Here the question would be: to what extent can the scope of the competition provisions be interpreted, possibly more extensively, to subject such measures to the competition assessment (first form of integration). The second form of integration would then ask: can the competition provisions be interpreted in a way that the balancing leads to the outcome that the measure resulting in e.g. environmental degradation is prevented? Thus, the benefits of the agreement on the one hand would be weighed against the restriction of competition *plus* the negative effect for the environment.[18]

Overall, an examination of the possible sustainability gap of competition law can be structured according to following matrix:

Supportive Integration (*shield*)	**Preventative Integration (*sword*)**
(Interpretation of the competition provisions in order to allow sustainability measures)	(Interpretation of the competition provisions in order to prevent measures harming sustainability)
First Form of Integration: Questions of Scope Is the sustainability measure not subject to the competition law prohibitions?	*First Form of Integration: Questions of Scope* Is the measure detrimental to sustainability subject to the competition law prohibitions?
Second Form Integration: Balancing Does the (sustainability) benefit outweigh the restriction of competition?	*Second Form Integration: Balancing* Does the harm to competition and sustainability outweigh the benefits of the measure?

3 A BRIEF OVERVIEW OF POSSIBILITIES FOR INTEGRATION

Analysing competition law through this lens for integration, the main debates currently concern supportive integration of sustainability (shield). In other words, the questions of 1) whether sustainability measures are designed in a way that either does not trigger the

[18] For more details see *ibid* Chapters 2, 6, 13, and 14.

application of the competition provisions (first -and preferable- form of integration) or 2) whether the balancing exercises contained in the competition analysis leads to the conclusion that the measure's negative impact on competition is 'justified' by its positive effects in terms of sustainability. Cases of preventative integration are fewer and present more challenges for several reasons as this brief analysis show.

3.1 SUPPORTIVE INTEGRATION (SHIELD)[19]

Supportive integration of sustainability (the shield) in EU competition law can take the form of the first and second form of integration.

3.1[a] First Form of Integration (Questions of Scope)

The first form, in other words questions of scope (without a balancing exercise[20]) primarily[21] can take place a) within the definition of undertaking, b) certain social matters along the *Albany*[22] case law c) within the context of the state action defence, and d) in the assessment of effect on competition in Article 101 (1) TFEU e) platform models. Within the context of Article 102 TFEU such integration has not yet been observed in the case law. But it is conceivable that the same patterns observed under Article 101 (1) TFEU would apply to Article 102 TFEU cases where an *effect* on competition needs to be shown.[23]

a) The defining factor of an undertaking within the meaning EU competition law is an economic activity.[24] This concept, in turn, is defined as offering goods and services on the market, bearing a financial risk, and in turn having the opportunity to make a profit.[25] There are a number of activities that are considered to be non-economic such as state authority. Such a non-economic task could for example be the supervision of compliance or in other words the policing of environmental protection rules, like in *Diego Calì*.[26] Moreover, the General Court in *Germany v Commission* highlighted that certain core environmental protection tasks are non-economic and of a social nature.[27] This case involved the transfer of national environment heritage sites to environmental NGOs. However, it made also clear that the assessment examines the tasks very closely and scrutinises whether they are core environmental protection tasks or at least directly linked to these within the meaning of the *SELEX*[28] criteria. Similar points can be made about sustainability. In particular, with regard to the social aspects of sustainability, the cases regarding workers and social care might be

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[19] As depicted in on the left side of the matrix above.
[20] For a detailed analysis see Nowag (n 8) chapter 2.
[21] For a detailed examination see also Julian Nowag and Alexandra Teorell, 'Beyond Balancing: Sustainability and Competition Law' (2020) Concurrences N° 4-2020 On-Topic Sustainability and competition law, 34-39.
[22] See Case C-67/96 *Albany* EU:C:1999:430.
[23] For more details see Nowag (n 8) chapter 2.
[24] Case C- 41/ 90 *Höfner and Elser v Macrotron* EU:C:1991:161 para 21 more recently Case C- 280/06 *ETI and Others* EU:C:2007:775 para 38; Case C-350/07 *Kattner Stahlbau* EU:C:2009:127 para 34.
[25] Okeoghene Odudu, 'The Meaning of Undertaking Within 81 EC' (2004–05) 7 CYELS, 214; Okeoghene Odudu, The Boundaries of EC Competition Law: The Scope of Article 81 (OUP 2006), 26.
[26] Case C- 343/ 95 *Diego Calì & Figli v Servizi Ecologici Porto di Genova* EU:C:1997:160.
[27] Case T- 347/ 09 *Germany v Commission* (12 September 2013), EU:T:2013:418 para 31-32.
[28] Case C- 113/ 07P *Selex Sistemi Integrati v Commission* EU:C:2009:191. For more details see Julian Nowag, 'Case C- 113/ 07P *Selex Sistemi Integrati SpA. v Commission* [2009] ECR I- 2207: Redefining the Boundaries between Undertaking and the Exercise of Public Authority' (2010) 31(12) ECLR 483.

equally important. In *Becu*[29] the ECJ found that workers are subject to competition law as they are incorporated into undertakings rather than being themselves undertakings. And with regard to e.g. health care systems, the Court held that these are non-economic activities when they are run based on principles of solidarity.[30] Thus even traditional companies active in such systems based on principles of solidarity are not subject to competition law.

b) Closely related to the questions of the definition of undertaking and the scope of competition law are situations where social aspects of sustainability is achieved by means of collective bargaining; more precisely collective bargaining between employers and employees. In *Albany*[31] the Court held that competition law does noy apply to such situations of collective bargaining. This approach was confirmed in *FNV Kunsten*[32] where the Court clarified that this reasoning also applied to workers who are 'false self-employed', that is to say are workers but classified (eg by their employers) as self-employed. This approach has been criticised for its vagueness and not providing sufficient security to platform workers.[33] It is in this social context where possible sustainability gaps can exist, as long as the second form of integration[34] cannot close those gaps. It will also be relevant to see if, and how, the Commission will treat such situations under its upcoming guidance.

c) Supportive integration by means of the State action defence[35] is also possible. In such a case a State requires a certain sustainability enhancing behaviour from undertakings. These are thereby forced to take those actions. Yet, mere encouragement is not enough. In this regard it is important to note that the decisive factor is whether the undertakings are in fact *forced* to take that specific measure. The state action defence is, thus, not available where the undertakings have room to manoeuvre and are therefore able to adopt, for example, a different measure: A measure that would not restrict competition but that would still be compliant with the requirements imposed by the State.

d) Where these tools for the first form of integration are not available possibly the most important tool is the assessment of effects on competition.[36] The draft of the new guidelines[37] highlights the importance of the effects analysis and first explains the assessment with regard to object and effect classification. A classification that affects the burden of proof. The draft, in this regard, explains that in cases where a sustainability objective exists, this objective is considered as part of the legal and economic context. Thus, where parties can show a genuine sustainability objective doubt is raises as to the classification as object

[29] Case C- 22/98 *Becu and others* EU:C:1999:419, para 26.
[30] Joined Cases C-159/91 and C- 160/91 *Poucet and Pistre v AGF and Cancava* EU:C:1993:63, para 12.
[31] Albany (n 23).
[32] Case C-413/13 *FNV Kunsten Informatie en Media* EU:C:2014:2411.
[33] See Ioannis Lianos, Nicola Countouris, and Valerio De Stefano, 'Re-Thinking the Competition Law/Labour Law Interaction Promoting a Fairer Labour Market' (8 October 2019) available at SSRN: https://ssrn.com/abstract=3465996 (accessed 5 December 2021).
[34] See below under II. a) 2).
[35] Developed in Joined Cases C- 359/ 95P and C- 379/ 95P *Commission and France v Ladbroke Racing* EU:C:1997:531.
[36] Such an assessment only takes place where the restriction is not considered to be a restriction by object, see eg Case C-68/12 *Slovenská sporiteľňa* EU:C:2013:71 para 17 and the cases cited therein.
[37] Communication From the Commission - Guidelines On The Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-Operation Agreements DRAFT.

restriction. In turn, even issues such as price fixing, market or customer allocation, limitation of output or innovation will be assessed under the effects standard.[38]

This assessment under the effect analysis is important and should not be overlooked in the debate about sustainability and competition.[39] For example it allows for the application of the De Minimis Notice[40] to agreements that do not cover more than 10% of the affected markets.[41]

In the older[42] Guidelines[43] the Commission provided a futher, helpful distinction. It distinguished between agreements that 'almost always', that 'may', and that are 'not likely to' have the effect of restricting competition. The draft of the new Guidelines partly takes up this distinction in Section 9.2 and sets out an 'illustrative and not exhaustive'[44] list of examples of sustainability agreements that are unlikely to raise any competition concerns. These agreements are said to neither restrict competition by object, nor have any appreciable effect[45] on competition and thus fall outside the scope of Article 101(1) TFEU. The examples contained in that list are: 1) agreements that related to the internal corporate conduct, such as reducing the use of single use plastic, or limit the printed material per day; 2) agreements to create databases about suppliers and their sustainability performance[46] 3) industry wide awareness campaigns about e.g. the environmental footprint.[47] Furthermore the Commission explain that a broad set[48] of standards can be seen as typically not having an effect on competition (*soft safe habour)*, if they comply with a number of conditions.

It also explains that sustainability standards differ from the standards (mainly ITC) that are covered in chapter 7 of the guidelines.[49] First, sustainability standards often combine certain requirements and conditions with the ability to carry a label/logo that certifies compliance. Second, compliance with these requirements can be costly and thus lead to higher prices. Third, interoperability and compatibility questions that are important in technical standards are usually irrelevant. Fourth, sustainability standards do not prescribe specific technologies or production methods but are rather performance or process based, thereby leaving it open to the adopters who to achieve the outcome. For these reasons, the

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38 Ibid para 559-560. The Commission for example explains with regard to a joint purchasing agreement where competitors agree to purchase from supplies with a more limited environmental impact that such an agreement would not be an object restriction in form of a collective boycott, see para 333, 334.
39 For more details on this option, see Nowag and Teorell (21) 37-39.
40 Commission 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 291/13.
41 See Draft Guidelines (n 37) fn 326.
42 Although this distinction has disappeared in the current Horizontal Guidelines, the classification offers a good first reference point and is based in decisional practice. The main reason for the disappearance seems to be that the broader examination of environmental agreements has altogether been abandoned in the current Guidelines.
43 Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements (2001 Horizontal Guidelines) [2001] OJ C3/02*,* para 184.
44 Draft guidelines (n 37) para 551.
45 The draft also contains a small list of object restriction, including agreements on how to pass on increased costs, or agreements to 'pressure on third parties to refrain from marketing products' that are not compliant with the standard, see ibid para 571.
46 Where these are only created but each company is free to decide how to use that database in making decision about from whom to buy/to whom to sell.
47 As long as they do not amount to joint adverting.
48 ibid para 561 and 562.
49 ibid 563.

Commission highlights that sustainability standards are often pro-competitive leading to qualitative and distribution improvements or the development of new products and markets, for example by informing consumers and thereby helping in developing markets for sustainable products.[50]

For sustainability standards to benefit from the soft safe harbour seven conditions must be fulfilled.[51] These conditions are aimed at ensuring non-discriminatory access to the standard, preventing foreclosure of alternative standards, and at reducing the risk that the exchange of information as part of the standards will lead to the formation of a cartel.[52] The first condition requires transparent and open procedures in setting the standard, ensuring that all competitors can take part if they wish to. Second, the obligation to comply should not be imposed on companies that do not wish to participate in the standard, in other words the standard should be voluntary. Third, participants should be able to adopt more stringent requirement than required by the standard, thereby ensuring that they can 'over-comply' with the aim of the standard. Forth, commercially sensitive information can only be exchanged where it is necessary for the development, adoption, or modification of the standard. The fifth condition requires non-discriminatory and effective access to the standard so that competitor which did not take part in the development of the standard can also participate. Sixth, there should be an effective monitoring system in place that ensure compliance with the standard. The seventh and final condition for the safe harbour to apply is that the standard does not significantly increase price or significantly reduce choice.

The draft adopts a very broad definition of sustainability standards and it seem not so easy to imagine cases that would not fit this definition. Yet, some standards developed by the industry might struggle with the seven conditions imposed. In contrast, many standards that are developed with the help of NGOs and are aimed at inclusion of a broad range of stakeholders would readily fufill the conditions. In this regard, it is also noteworthy that the Commission highlights that while sustainability standards might lead to price increases, standards covering significant parts of the market might lead to significant economies of scale. These economies of scale might in turn allow the undertakings to increase the price only insignificantly or even keep them stable.

Where the standard dose not fulfil the conditions the effect on competition needs to be assessed in more detail. In that context, the restraining effect of potential competition needs to be taken into account. This effect might be sufficient even where the market coverage of the standard is significant, but the standard only establishes a label and undertakings are able to operate without the label. In such a situation consumers have a choice between compliant products and non-compliant products, and it is therefore not likely that competition is restricted.[53] Only where this is not the case and an effect on competition can be established, the question of balancing comes into play for such sustainability standards.

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[50] See para 568 which also highlights the fact that they can level the playing field between producers subject to different regulatory requirements.
[51] ibid para 572.
[52] ibid 573. For example, the washing powder cartel, as well as the emissions cartel result from legitimate cooperation in the context of standards.
[53] Draft Guidelines (n 37) para 575.

e) As discussed elsewhere[54] a final, not yet tested, area that might exclude the application of competition law in particular Article 101(1) TFEU are sustainability platforms. Platforms can determine a number of conditions regarding the sale of between the seller and the buyer. They might even set the relevant price thereby preventing price competition between sellers.[55] While this is a largely underexplored area, no competition agency has taken action against such platform practices. Thus, as long as there are no cases where larger platforms such as Uber, Lift, Gojack, Didi and others have been prohibited from setting prices and other selling conditions, it seems that such a model can also be employed to provide sustainability improvements.

Thus, the first form of integration allows quite a number of activities to escape the application of competition. This view is also backed up by anecdotal evidence from the Dutch competition authority: The majority of cases that were brought to the attention of the agency were found not the restrict competition.

Only where this first form of integration is not possible, it is necessary to examine the second form, balancing. In other words, it is ***only*** where it has been established that a measure by one or more undertakings is adopted voluntarily and restricts competition by object or effect, that it needs to be asked whether the benefits outweigh the harm.

3.1[b] Second Form of Integration (Balancing)

This second form of integration is the exception. Yet, it is what competition lawyers and economists like to debate, and it is the areas where questions about sustainability gaps can be raised.

Without going into too much detail[56] as this area has been and is[57] extensively debated the following might be stated. The European Rule of Reason (along the *Wouters* case law) under Article 101 (1) TFEU, Article 101 (3) TFEU and their equivalents of objective justification and efficiency defence under Article 102 TFEU provide some, but limited, rooms for such integration. Similarly, Article 106 (2) TFEU can provide such balancing in some cases.

a) The balancing under Article 101 (1) seems to be broad enough to encompass sustainability concerns. Yet, the Article 101 (1) European Rule of Reason/objective justification route is not available in all cases. A certain link to the State is needed.[58] Only

[54] See Nowag & Teorell (n 21).
[55] For a detailed and critical analysis see Julian Nowag, 'When Sharing Platforms Fix Prices for Sellers' (2018) 6:3 Journal of Antitrust Enforcement 382–408.
[56] For an overview see Nowag (n 8) Chapter 13.
[57] See the e.g. contribution to this issue and eg Holmes (n 13).; Anna Gerbrandy, 'Solving a Sustainability-Deficit in European Competition Law' (2017) 40 World Competition 539; Giorgio Monti and Jotte Mulder, 'Escaping the clutches of EU competition law: pathways to assess private sustainability initiatives' (2017) 42 European law review 635; Klaudia Majcher and Viktoria H.S.E. Robertson, 'Doctrinal Challenges for a Privacy-Friendly and Green EU Competition Law (2021) available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3778107> (accessed 14 February 2022); Cristina Volpin, 'Sustainability as a Quality Dimension of Competition: Protecting Our Future (Selves)' (July 2020). available at https://ssrn.com/abstract=3917881 (accessed 5 Dec 2021); Simon Holmes, Dirk Middelschulte and Martijn Snoep, *Competition Law, Climate Change & Environmental Sustainability* (Concurrences 2021) Marios Iacovides and Christos Vrettos, 'Falling through the cracks no more? Article 102 TFEU and Sustainability: the Relation between Dominance, Environmental Degradation, and Social Injustice' (2022) 10 JAE 32-62.
[58] See Nowag (n 8) Chapter 13.

where such a link exists sustainability matters can be balanced against restrictions of competition. Such balancing is an abstract balancing,[59] that is to say that a proportionality assessment applies and the sustainability benefits must be proportionate to the restriction of competition.

b) In contrast, the Article 101 (3) TFEU/efficiency defence is available for all measures, yet it imposes more stringent criteria. It is in this context that the sustainability gap is most often talked about. The gap concerns the questions of whether sustainability as such and without benefits that compensate the individual consumer (of the product in question) fully is enough to satisfy Article 101 (3) TFEU, or whether the way that compensation is measured is the appropriate one. In other words, how broad the interpretation of 'benefits for the consumers' should be and whether 'consumer' should be read more like 'citizen' so that benefits that are not only enjoyed by the 'consumer of the product' can be taken into account. However, as suggested, elsewhere,[60] such a question is only relevant when:

1) all the options for the integration of sustainability described above are not sufficient *and*
2) the benefits *cannot even* be understood as qualitative improvements that benefit the consumers of the product in question (which most of the sustainability benefits can).[61] Or where such qualitative improvements in terms of sustainability are not valued enough, for reasons of informational deficiencies or behavioural biases.

In this smaller subset of the overall discussion of the gap in terms of sustainability can be perceived. This perception has to do with the way that competition authorities -as opposed to courts-[62] apply Article 101 (3) TFEU, the economic measurement preformed and the related question of what counts as benefits to consumer/user within the meaning of Article 101 (3) TFEU. The Dutch and Greek competition authorities have taken the lead and started substantive steps to address any gap in this area by means of guidelines and their joint Technical Report on Sustainability and Competition.[63] This approach sets out ways to quantify externalities and bring them into the competition assessment. The Commission has partly taken up this work in its draft guidelines on horizontal co-operation and also relied on a study it commissioned.[64] Primarily, the Commission highlights that Article 101(3) TFEU allows for a broad range of sustainability benefits to be taken into account as efficiencies which encompass not only reductions in production and distribution costs but equally

[59] See Nowag (n 2) 23.
[60] See Nowag (n 8), page 1-12 and chapter 13.
[61] There is then the further (and rather difficult) question of how to assess quality improvements in the competition context. The assessment of such does not seems to be every sophisticated yet. For one of the best accounts see OECD Round Table Discussion on The Role and Measurement of Quality in Competition Analysis DAF/COMP(2013)17.
[62] Whether the EU courts would use the same econometric tools where they have to assess benefits under Article 101 (3) TFEU, remains questionable, see Holmes (n 13).
[63] Roman Inderst, Eftichios Sartzetakis, Anastasios Xepapadeas, 'Technical Report on Sustainability and Competition' (Jan 2021) <https://www.acm.nl/sites/default/files/documents/technical-report-sustainability-and-competition_0.pdf> (accessed 5 Dec 2021).
[64] Roman Iderst, *Incorporating Sustainability into an Effects-Analysis of Horizontal Agreements - Expert advice on the assessment of sustainability benefits in the context of the review of the Commission Guidelines on horizontal cooperation agreements* (Luxembourg: Publications Office of the European Union, 2022).

improvements with regard to quality, variety of products, innovation or improvement in processes of production and distribution.[65]

The main development of the new draft can be observed with regard to the assessment of whether a fair share of these benefits is passed on to consumers. While the Commission sticks to its main principle of that the affected consumers in the relevant market must be compensated to the extent that the overall effect is at least neutral,[66] it offers more flexibility in terms of measurement. It also notes that a detailed assessment of this condition might not always be needed because either the sustainability benefits are clearly unrelated to the affected consumers or, in the opposite case, because the competitive harm is insignificant when compared to the potential benefits.[67]

In terms of measurement, the draft distinguishes between 'individual use value benefits', 'individual non-use value benefits' and 'collective benefits' and then explains how each might contribute to the assessment of whether consumers are not worse off and that 'any of the different benefits or any combination of them can be presented to satisfy the fair share condition'.[68] The individual use value is the most commonly found benefit. It is the value of the individual consumers' experience in form of improved quality of the product, greater variety, or reduced price.[69] As an example of individual non-use value, the Commission mentions consumers that opt to buy a certain cleaning product not because it cleans better but because it is better for the environment.[70] The 'individual non-use value' benefits is the value that the consumers in the relevant market place on the impact of their choices, on others. In other words, effects that their choice of a more sustainable product has on other.[71] In can, thus, be said the value these consumers place on the benefit for society or future generation.[72]

The trickiest and potentially most controversial benefits are collective benefits. The Commission defines these as benefits that go beyond the 'voluntary (altruistic) choices of individual consumer'[73] and 'occur irrespective of the consumers' individual appreciation of the product. These benefits can objectively accrue to the consumers in the relevant market,'[74] for example cleaner air and water, or CO2 reductions. These benefits can only be taken into account if a number of conditions[75] are fulfilled that ensure that consumers of the relevant market benefit and are in the end not worse off. The Commission explains that such benefits and the beneficiaries need to be clearly described and evidence[76] of benefit's occurrence or

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[65] Draft Guidelines (n 37) para 577. As examples of efficiencies the Commission lists in para 578 'the use of cleaner production or distribution technologies, less pollution, improved conditions of production and distribution, more resilient infrastructure or supply chains, better quality products, etc. [Sustainability agreements] can also avoid supply chain disruptions, reduce the time it takes to bring sustainable products to the market and can help to improve consumer choice by facilitating the comparison of products.'

[66] ibid para 588.

[67] ibid para 589.

[68] ibid para 609.

[69] ibid para 590.

[70] ibid para 595.

[71] ibid para 594.

[72] ibid para 596.

[73] ibid para 601.

[74] ibid.

[75] See ibid para 606.

[76] In this regard, public authorities' reports and academia are particularly valuable, see para 607. And where no quantitative data can be provided, a more than marginal benefits that is clearly foreseeable must be shown, see para 608.

likely occurrence needs to be provided. It also needs to be shown that the beneficiaries and consumers in the relevant market substantially overlap and that any benefit occurring outside the relevant market still accrue to the consumers in the relevant market. In an example, the Commission explains that while drivers as affected consumers may benefit as part of the society from reduced emissions, buyers of clothing produced abroad in a way that is less polluting to the local water ways would not substantially overlap with the beneficiaries. Hence the consumers in the relevant market would not accrue the collective benefit of reduced water pollution.[77]

After having set out what benefits can be taken into account to show that consumers in the relevant market are not worse off, the Commission also explains that sustainability agreement need to pass the indispensability and non-elimination of competition test. Such agreements are indispensable of they are needed to reach the sustainability goal - whether set by regulation or by the agreement - in a more cost-efficient way by providing, for example, economies of scale.[78] Moreover, companies may be able to show that the agreement is needed to align incentives for implementation of the sustainability agreement[79] or because consumers have difficulties with information and knowledge relating to the product or future benefits.[80] In terms of the non-elimination of competition principle, the Commission highlights that it is competition in the relevant market that is important.[81] Thus, not all competition needs to be maintained it is sufficient if at least one element of vigorous competition is maintained[82] and that this condition can even be fulfilled where certain products disappear.[83] Equally, elimination of competition over a limited time period does not mean that the agreement would fail the test.[84]

Overall, this approach in the draft guidelines certainly has the potential to narrow any gap substantially. While a certain gap is obvious with regard to collective benefits that occure outside the affected market and don't accrue to the consumers in that market,[85] the gap has certainly been narrowed. To what extent the gap can be considered reduced by this approach depends however on a number of factors. For example, one might question whether the same principles are equally applicable to questions of social sustainability. While the report suggests that 'its concepts and tools are also more broadly applicable to other aspects of sustainability,'[86] the Dutch draft guidelines seem to limit the more generous approach to environmental matters.[87] While it remains to be seen how the final horizontal guidelines by the Commission but also by the Dutch competition authority will look like and how they

[77] ibid para 604, yet the Commission also highlight that these benefits might still be part of the individual non-use value.
[78] ibid para 583, 585.
[79] ibid para 585.
[80] ibid para 586.
[81] ibid para 612.
[82] ibid para 611.
[83] ibid para 612
[84] ibid para 614.
[85] Think of the example of water pollution abroad, similar things could possibly be said about improvements of labour conditions or the human rights situation abroad..
[86] ibid 53.
[87] Draft Guidelines (n 1).

deal with this issue of social sustainability, the current draft seems certainly a substantive improvement that narrows perceived gaps.[88]

c) Finally, even where Article 101(3) TFEU or the equivalent under Article 102 does lead to the conclusion that a measure is justified, the option of balancing under Article 106 (2) TFEU may be available. Article 106 (2) TFEU sets out that the competition rules do not apply to undertakings entrusted with services of general economic interest where the application might hinder the performance of these tasks. The balancing under Article 106 (2) is a broad proportionality. It might well apply where the service is one that fosters sustainability and thereby one of general interest. . Yet, it only applies where the undertaking(s) has been specifically 'entrusted' with that task by the State.[89]

3.2 PREVENTIVE INTEGRATION (SWORD)[90]

As mentioned above, the more common form of environmental integration is to ensure that competition law supports rather than obstructs sustainability measures (shield). Preventative integration (sword), that is to say integration by means of interpreting competition law in a way that leads to the prevention of, for example, a deterioration of the environment, is less frequently encountered. While this author has previously argued that the room for such integration is limited,[91] the area seems to be developing, albeit slowly.[92]

3.2[a] First Form of Integration (Questions of Scope)

It is in particular the first form of integration (the scope of competition law) where the debate and developments take place. In terms of enforcement activity, competition authorities have been active where sustainability, in particular environmental sustainability, has been parameter of competition. For example, the French competition authority has pursued a cartel between companies that agreed not to compete on the environmental performance of their product by not mentioning this performance to the customers.[93] Similar enforcement action can be seen in the context of innovation improving the environmental sustainability of products. For example, in *BMW, Daimler and VW*[94] the Commission fined the investigated undertakings for a cartel to reduce innovation competition while in *Bayer/Monsanto*[95] it looked at potential innovation harms resulting from the merger. These enforcement actions focused on innovation harms which then, in turn, led to environmental harm. Such an approach,

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[88] Given that national competition authorities (and courts) are only bound by the EU Courts' case law and limited only to the extent that they cannot adopt decisions 'which would run counter to the decision adopted by the Commission' (Art 16 Reg 1/2003), interesting questions might arise. Questions concerning the different standards and tools at different levels of the EU.

[89] For details see Nowag (n 8) Chapter 3 and 12.

[90] As depicted in on the right side of the matrix above.

[91] See Nowag (n 8) Chapter 6 and chapter 14

[92] See Marios Iacovides and Christos Vrettos, 'Radical For Whom? Unsustainable Business Practices as Abuses' in Simon Holmes, Dirk Middelschulte and Martijn Snoep, *Competition Law, Climate Change & Environmental Sustainability* (Concurrences 2021) 91-103.

[93] Autorite de la Concurrence, Décision 17-D-20 relative à des pratiques mises en œuvre dans le secteur des revêtements de sols résilients (18 October 2017), available at <https://www.autoritedelaconcurrence.fr/fr/decision/relative-des-pratiques-mises-en-oeuvre-dans-le-secteur-des-revetements-de-sols-resilients>. (accessed 5 Dec 2021).

[94] See Case AT.40178 – *Car Emissions*.

[95] Case M.8084 - *Bayer/Monsanto* C/2018/1709 [2018] OJ C 459/10.

based on the existence[96] of innovation harms, seems to be a viable route by which sustainability can be achieved *indirectly*.[97]

Some go further to address the perceived gap. They argue that e.g. Article 102 TFEU could be used to address for example unfair prices paid to farmers;[98] or even that unsustainable business practices can in themselves be abusive under Article 102 TFEU.[99] However, so far we have not seen such actions in practice.

3.2[b] Second Form on Integration (Balancing)

When exploring the second form of integration, that is to say, balancing in the context of preventative integration (the sword), the gap becomes more obvious. It is not only a (potentially justified[100]) gap in achieving sustainability but also a gap of academic engagement and discussion. The questions that one would ask is the following: if a situation is covered by the competition prohibitions -in other words within the scope of competition law- how can the relevant balancing be applied so as to prevent unsustainable outcomes? Normally the assessment explores whether benefits outweigh the restriction of competition e.g. in the context of Article 101 (1) or 101 (3) TFEU.[101] In the context of preventative integration, the questions would go a step further and ask whether the benefits are sufficient given that this action causes a restriction of competition and is damaging from a sustainability perspective. In other words, the benefits would need to outweigh not only the harms to competition but also the sustainability harms. Such a balancing has not yet been observed in the traditional areas of competition law. Yet, one might point to e.g. the rules on superior bargaining power of supermarkets,[102] or the EU unfair trading terms directive.[103] In that context, it might not be far-fetched to argue that the harm to competition between supermarkets was not particularly great and there were price benefits for the consumer. However, these benefits, while outweighing the harm to competition between supermarkets, were not enough to ensure that supermarkets could continue to exercise their bargaining power in that way. In other words, from a purely competition law perspective there was nothing illegal happening and the consumers obtained a price benefit. Yet, the UK Competition Commission and the European legislature still felt that they needed to step in in order to protect the often small-scale producers.

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96 And the ability to prove such harm.
97 See also Nowag (n 4).
98 Holms (n 13) 384-387.
99 Iacovides and Vrettos (n 57).
100 See below under III. b) 4).
101 See above under II. a) 2).
102 See e.g. the UK Competition Commission, The Groceries (Supply Chain Practices) Market Investigation Order 2009, available at https://webarchive.nationalarchives.gov.uk/ukgwa/20111108202701/http://competition-commission.org.uk/inquiries/ref2006/grocery/pdf/revised_gscop_order.pdf (access 22.11.2021).
103 Directive 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in in business-to-business relationships in the agricultural and food supply chain [2019] OJ L 111/25.

3.2[c] The Gap in the Area of Preventive Integration or What the Sword Can't Reach

A gap in terms of sustainability can most likely be identified in the area of preventative integration. And while some developments can be observed with regard to the first form or integration, that is to say the scope of competition law, the gap is bigger for the second form. Preventive integration of sustainability concerns in the balancing of benefits against the restriction and the sustainability harm seems indeed absent from practice and even academia. However, this specific gap, but similarly also the general caution in the areas of preventative integration, may not be surprising. Any action in this area needs to be taken with utmost care. Where the Commission expands the scope of competition law capturing unsustainable practices, it may similarly expand its own competence beyond its remit.[104] The risk in such cases is one of breaching the separation of powers. The Commission needs to be mindful not to be seen as (in effect) setting a new environmental standard by means of competition law. Such environmental standards are set by the relevant legislature. Thus, in particular, where the relevant legislature has set a lower-level environmental standard or even purposefully not adopted a standard, dangers regarding overstepping the competence exist. It needs to be ensured that any expansion in the scope of competition law can be related back to protecting competition and its outcomes. The danger of overstepping that line might be even higher where the second form of integration, namely balancing, is concerned. This is so as preventative integration when balancing is involved would mean that activities that result in benefits that would usually outweigh the harm to competition would not be allowed (only) due to their impact on sustainability.

4 CONCLUDING REMARKS: AVOIDING COMMON MISCONCEPTIONS

So far, this paper has investigated the integration of sustainability into competition law as demanded by Article 11 TFEU/Article 39 of the Charter of Fundamental Rights (CFR). However, it would be a misunderstanding to see the requirement of Article 11 TFEU/39 CFR as making sustainability or environmental protection the primary goal or even a goal of competition law, in the same way as the respect for rights of defence or other fundamental rights of undertakings does not mean that fundamental rights protection becomes an aim of competition law. It simply requires respect, or as possibly more frequently used in the context of international competition law, comity. In this sense, Article 11 TFEU/39 CFR prohibit in particular the (wilful) exclusion[105] of environmental or sustainability concerns in order to maintain the 'purity of competition law'.[106]

A second misconception relates to the conceived problems of legitimacy.[107] One common argument is that a competition agency or court does not possess sufficient legitimacy to make complex value judgments (also with regard to sustainability) and that these should be made by the legislature. In this regard, two things must be pointed out.

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[104] On this risk as a limit to preventative integration see also Nowag (n 8) Chapter 6 and 14.
[105] Yet, there will be a level of discretion, for further details see ibid 273ff.
[106] See in this regard also the rejection of such a purity argument in e.g. Case C-594/18 P *Austria v Commission* EU:C:2020:742. The ECJ contrary to the GC and its AG reject to argument that the competition provisions, in this case State aid, would be immune from the application of Article 11 TFEU as it was applied to an area exclusively covered by the EURATOM.
[107] For more details on this and related questions see Nowag (n 8) 31-48.

First, only the second form of integration requires balancing so that integration *as such* cannot be rejected based on such an argument.

Second, agencies and courts possess sufficient legitimacy to make such decisions where the constitutional framework requires them to do so. It seems inconceivable that someone would make the argument that an agency or a court does not possess the legitimacy to take account of the fundament rights of companies in competition proceedings. The constitutional framework requires agencies and courts to take account of fundamental rights implications and for sustainability it requires this by means of Article 11 TFEU/Article 39 CFR. Claiming that agencies or courts do not possess sufficient legitimacy implies a rejection of the binding force of constitutional provisions in the area of competition law. Such an argument would in same way also mean rejecting all fundamental rights of companies in competition proceedings and apply purely those protections already explicitly enshrined in the existing written text of competition laws, such as e.g. Reg 1/2003.

Third, where integration occurs -as above suggested- within the established framework of competition law, these value judgments are not complex but follow the usual competition law logic.

More importantly, if one is concerned about the 'purity of competition law',[108] one needs to be particularly mindful not to abuse competition law. Competition law (under most of the current standards) should not be (ab)used to protect the legislature. In other words, competition law is not a tool to protect the legislature against companies 'making judgments and decisions' that will improve sustainability, in particular decisions and judgments that the legislature has not (yet) decided on. This is so for two reasons.

The first reason relates to the relevant standard of a 'pure' competition law. Where a 'pure' competition law requires a focus on e.g. consumer welfare this should be the relevant benchmark for assessment. Whether it is the task of the legislature to make a certain decision in a given legal framework should have no bearing on whether the measure is legal or illegal under competition law. The focus needs to be on the effect on consumer welfare. Thus, it should only matter whether the integration of environmental protection/sustainability fits within that consumer welfare framework. The analysis above suggests that it does to a considerable extent.

The second reason relates to constitutional requirements: agencies or courts should not second-guess the (constitutional) legislature. Competition agencies and courts need to be mindful not to substitute the view of the legislature with their view about what is for the legislature to do and what is for the companies or (competition) agencies/courts to do. This is particularly true in jurisdictions where courts and agencies are required by the same legislature (or even the constitutional legislature) to take account of sustainability concerns, e.g. by means of Article 11 TFEU/39 CFR.

5 CONCLUSION

This mapping exercise has set out a framework for the integration of sustainability in EU competition law. This framework, in turn, can be used to examine the perceived sustainability gap in EU competition law. The paper highlighted the importance of preventing conflicts

[108] See for example Ariel Ezrachi, 'Sponge' (2017) 5 JAE 49-75.

between sustainability and competition in the first place. It has shown which tools EU competition provides to prevent such conflicts by means of excluding certain situations from the scope of competition law. Then, it briefly looked at the tools available for balancing competition and sustainability once such a conflict has been established. If one is looking for a gap, it is certainly in this area that the limitations are found. While these limitations might justify the use of the term sustainability gap in specific instances, the overall picture seems more nuanced and provides room for undertakings to foster sustainability. The question that remains is how large this gap is. In terms of the environmental aspects of sustainability it has certainly narrowed with the latest activities by competition authorities. But it remains possibly a bit wider where the social aspects of sustainability are concerned. Finally, the paper highlighted the possibly biggest gap: the area of promoting sustainability by using competition law to target behaviour of undertakings that is harmful from a sustainability perspective. It seems that sustainability concerns in this area can so far only be tackled by means of other harms,such as harms to innovation which in turn lead to sustainability concerns. While this is certainly the biggest gap in terms of sustainability, the gap seems mainly the result of the difference between competition law (aimed at competition harms) and e.g. environmental law (aimed at environmental harms) or other laws fostering sustainability. Overall, the requirement to integrate environmental and sustainability concerns might be something specifically European, based on the EU Treaties. Yet, there are no reasons why other jurisdiction could not pursue similar routes where the legal framework is structured in a comparable way.

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THE RIGHT TO REPAIR IN EU COMPETITION LAW

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The Right to Repair-movement focuses on a fairly simple goal: an increase of sustainability through a consumer's right to repair a good instead of disposing it and buying a replacement. However, this thought has yet to be comprehensively anchored in European legislation. In US law, for example, the Right to Repair movement has already achieved some developments in copyright law and even is pursuing its goals in antitrust. These measures frequently revolve around the automotive industry (especially regarding agricultural vehicles) as well as the electronic aftermarket. In contrast, EU law has – despite ambitiously efforts for sustainability goals – not given the right to repair the most prominent place in its environmentally-friendly toolbox yet. Still, the Right to Repair has left some marks in the EU and its traces can be found in the current legal framework – even in competition law.

1 THE RIGHT TO REPAIR MOVEMENT

The term *Right to Repair* ('R2R') summarizes the efforts to give a consumer the legal ability to repair a product once it ceases to function – rather than to buy a new one – a voice. Thus, not only the reparability of goods themselves is a demand but facilitating their reparation. This thought follows economical concerns, yet it is based mainly on reasons of sustainability.

In the last few years, R2R proactively advocated the possibility of reparation and sought to increase legislative endorsement. Especially since 2012 the movement is more operational and quite well-established in organisations for example with 'The Repair Association'[1] or 'FIGIEFA'[2] but mainly pursuing its goals overseas.

1.1 LEGISLATIVE MEASURES IN THE US

Having its roots in the US, the *Right to Repair* Movement has already achieved great progress in terms of US Copyright Law.

Section 1201 of the Digital Millennium Copyright Act ('DMCA')[3] stipulates the unlawfulness of the circumvention of technological measures that prevent unauthorized access to copyrighted work. In other words, the DMCA prohibits taking apart and repairing electronic devices, since breaking the software locks (which is an imminent step when replacing parts of a gadget) is considered to be unauthorized access to copyrighted work. However, every three years US citizens can propose exemptions to Section 1201 of the DMCA. In 2018, an organization focusing on the repair of electronic goods petitioned, inter

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[1] See for example The Repair Association, <www.repair.org > accessed 19 28 February 2022.

[2] See for example FIGIEFA, 'The new competition law framework for the automotive aftermarket – Right to Repair Campaign' (FIGIEFA, July 2010) <www.figiefa.eu/wp-content/uploads/r2rc-newberframeworkbrochure.pdf> accessed 28 February 2022.

[3] Digital Millennium Copyright Act, H.R.2281 (US).

alia, for a general exemption for the repair of smartphones and home appliances.[4] In essence, this exemption was granted for voice assistant devices, new phones, motorized land vehicles including tractors, but dismissed, *inter alia*, for game consoles.[5]

For last year's exemption, the same organization took another leap forward and proposed to generally exempt the reparation of all software-enabled devices including medical devices, smart litter boxes, and video game consoles.[6] At the end of last year, the Copyright Office granted the desired exemption for the most part. Unfortunately, this exemption does not apply to the distribution of repair tools, which considerably weakens the exemption.[7] 2021 was an important year for the R2R movement in US antitrust: in July, US President Joe Biden singed an executive order aimed at limiting unfair anticompetitive restrictions on third party-repair and also self-repair. The Federal Trade Commission ('FTC') was encouraged to address such practices preventing farmers from repairing their own agricultural equipment.[8]

Additionally, the FTC issued a statement confirming to take unlawful restrictions of the right to repair on its agenda. And even before that, the FTC issued its 'Nixing the Fix' report in May 2021, explaining in detail how the possibilities of product repairs are being limited by manufacturers. Again, electronic goods such as smartphones and agricultural equipment were in the spotlight.[9]

The outcome is that on the one hand electronic goods and on the other hand motor vehicles and especially vehicles for agriculture are included in the important fundamental demands of the R2R movement and in US antitrust law. This leads to the question of how the repair of those goods is treated in EU competition law.

1.2 LEGISLATIVE MEASURES IN THE EU

In the EU, the R2R movement has also already has left its marks: the European Commission has adopted in 2020 the Circular Economy Action Plan, aiming to achieve a carbon-neutral, sustainable, toxic-free and fully circular economy by 2050.[10] However, while the action plan mentions in several occasions that the new circular economy will lead to a more competitive economy, competition law matters are not mentioned.

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[4] Kyle Wiens, 'Copyright Office Ruling Issues Sweeping Right to Repair Reforms' (*iFixit*, 25 October 2018) <www.ifixit.com/News/11951/1201-copyright-final-rule> accessed 28 February 2022.
[5] Library of Congress U.S./Copyright Office, Final Decision dated 19 October 2018, 37 CFR Part 201 < federalregister.gov/d/2018-23241 > accessed 28 February 2022.
[6] Kevin Purdy, 'We Told the Copyright Office that Repair Should be Legal, Period.' (iFixit, 22 April 2021) <www.ifixit.com/News/49993/we-told-the-copyright-office-that-repair-should-be-legal-period> accessed 28 February 2022.
[7] Kerry Sheehan, 'Repair Isn't Piracy—And the Copyright Office (Kind of) Gets it Now' <www.ifixit.com/News/54317/section-1201-exemptions-for-2021-repair-consoles-medical-devices>
[8] The White House, Executive Order on Promoting Competition in the American Economy (9 July 2021) <www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/> accessed 28 February 2022, Section 5 (h)(ii).
[9] Federal Trade Commission, Nixing the Fix: An FTC Report to Congress on Repair Restrictions (May 2021) < www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-report-congress-repair-restrictions/nixing_the_fix_report_final_5521_630pm-508_002.pdf> accessed 28 February 2022.
[10] Commission, 'Communication from the Commission to the European Parliament the Council, the European Economic and Social Committee and the Committee of the Regions – A new Circular Economy Action Plan For a cleaner and more competitive Europe' COM(2020)98 final.

In EU law, solutions for sustainability concerns are being primarily sought in the regulatory area. For example, last year, various EU Ecodesign regulations have been amended which facilitate the repair of devices such as washing machines, displays, dishwashers and fridges.[11] This goal is primarily achieved by regulating the design of the products aiming for a more sustainable construction of goods.

Although the idea of sustainability is not foreign to EU competition law, the discussions mainly revolve around the legality of co-operations pursuing sustainability objectives. Also, the latest Competition Policy Briefs by the Commission – published in the light of the consultations regarding the European Green Deal – mainly focused on this topic.[12] Ideas for strengthening the R2R have not yet been taken up.[13]

However, also EU competition law has (indirectly) manifested concerns for the R2R as shown in the next section.

2 THE RIGHT TO REPAIR AND THE AUTOMOTIVE AFTERMARKET IN EU COMPETITION LAW

As elaborated above, the two issues frequently addressed by the R2R movement are repairs of motor vehicles, especially those for agricultural use, and repairs of electronic goods. Especially the automotive market and its aftermarket are subject to intense competition regulation in the EU.

In EU competition law there is the Block Exemption Regulation exempting vertical agreements in the motor vehicle sector relating to spare parts ('aftermarket BER').[14] The aftermarket BER is the successor of a range of BER in the motor vehicle sector since 1985, the last being Regulation 1400/2002[15], which was in force until 31 May 2010. While the aftermarket BER is only applicable to the automotive aftermarket, the scope of Regulation 1400/2002 also included the production and sale of motor vehicles. This limitation of the scope stems from evaluations of the Commission regarding the competitive conditions in the motor vehicle sector showing an ongoing concentration among vehicle manufacturers,

[11] Commission Regulation (EU) 2021/341 amending Regulations (EU) 2019/424, (EU) 2019/1781, (EU) 2019/2019, (EU) 2019/2020, (EU) 2019/2021, (EU) 2019/2022, (EU) 2019/2023 and (EU) 2019/2024 with regard to ecodesign requirements for servers and data storage products, electric motors and variable speed drives, refrigerating appliances, light sources and separate control gears, electronic displays, household dishwashers, household washing machines and household washer-dryers and refrigerating appliances with a direct sales function [2021] OJ L 68/108.

[12] Commission, 'Competition policy briefs'<https://ec.europa.eu/competition-policy/publications/competition-policy-briefs_de#ecl-inpage-378 > accessed 28 February 2022.

[13] See for example Commission, 'Competition policy brief' (10 September 2021) <https://ec.europa.eu/competition-policy/index/news/competition-policy-brief-12021-policy-support-europes-green-ambition-2021-09-10_en accessed 28 February 2022.

[14] Commission Regulation (EU) No 461/2010 of 27 May 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector [2010] OJ L 129; of course, agreements regarding the automotive aftermarket are also subject to the Vertical Block Exemption Regulation (Regulation [EU] No 330/2010) which is currently under revision and especially its Articles 4 (b)(iv) and 4 (e).

[15] Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector [2002] OJ L 203.

an increase of market power of the remaining players and, therefore, risks of reduced competition.[16]

In Article 5, the aftermarket BER stipulates the hard-core restrictions, i.e. anti-competitive agreements which cannot be exempted under the Regulation. In particular, the restriction of sales of spare parts by a member of a selective distribution system to an independent repairer counts among them. This would mean that an authorized repairer or reseller is able to supply any repairer with spare parts. Additionally, a supplier of spare parts might not be prevented by the car manufacturer from selling spare parts to an independent repairer. Therefore, in essence, independent repairers must have access to technical repair and maintenance information, tools and training to the same extent and under the same conditions as the authorized repairers do.

However, so far, only the aftermarket regarding usual street vehicles is protected by the restrictions of the aftermarket BER. Currently, the aftermarket BER is being reviewed in sight of its expiration in 2023. In the course of the public consultation, it has been suggested that also off-road vehicles like agricultural machinery (and especially tractors) should fall under the scope of the automotive BER.[17] If the EU regulators will follow this claim, one of the main subjects of the R2R movement - farmers and their agricultural vehicles - would be included in the scope of protection of the aftermarket BER.

If tractors were included in the scope of the regulation, farmers would be able to choose from a range of authorised as well as independent repairers to have their vehicle fixed, without suffering from any potential tensions with the manufacturer of their tractor as all the garages are – at least in theory – able to provide the same services to the farmers. In this way, they might not be forced to travel to an authorised repairer, but can get their tractors to, or spare parts from independent repairers within their area.

With the aftermarket BER, EU competition law already supports independent repairers on the automotive aftermarket by prohibiting certain clauses which significantly restrict their business possibilities on the aftermarket. However, there is room for an extension of the scope of the BER to the aftermarket for agricultural vehicles, levelling the playing field for its specialised independent repairers so that also farmers currently facing issues in finding repairers for their vehicles would have a larger number of options and could therefore benefit from EU competition law.

3 THE RIGHT TO REPAIR AND THE ELECTRONIC AFTERMARKET IN EU COMPETITION LAW

While the automotive aftermarket is already subject to sector specific EU competition law regulation, there are no specific rules for what seems to be the second flagship topic of the R2R movement – electronic goods. The electronic sector aftermarket is only subject to the general rules of competition law and independent repairers are not supported in the way motor vehicle repairers are.

[16] Commission, 'Evaluation Report on the operation of Commission Regulation (EC) No 1400/2002' SEC (2008) 1946, 2.
[17] Commission 'Staff Working Document of the Motor Vehicle Block Exemption Regulation', COM(2021) 264 final, 122.

There might be two main reasons why the automotive aftermarket seems to get more attention by the regulators.

First of all, the automotive aftermarket is considered to have certain specialities and cannot per se be compared with other aftermarkets, as the General Court confirmed in the *Watch repair* case.[18]

The *Watch Repair* case revolved around the practise of Swiss watch manufacturers which limited independent repairers' access to spare parts under a selective distribution system. In essence this practice did not only mean that many independent repairers were excluded, but also that consumers' options to have a product repaired were also limited. The claimant submitted that these prohibitions are hard core restrictions analogue to the automotive BER. However, the Commission and subsequently the General Court confirmed that the automotive BER is limited in its sectoral scope. The General Court was reluctant to draw parallels between the automotive sector and the luxury watch business. The arguments used were, inter alia, that the aftermarket for luxury watches is not as profitable compared to the aftermarket of the automobile market, and does not '*represent a high proportion of total consumer expenditure.*'.[19] The General Court also indicated that it is less important to have repair centres close to customers as watches can easily be shipped to be repaired.[20] In this case, the General Court approved the Swiss watch manufacturers' practice to limit the aftermarket's possibilities to obtain spare parts to repair the watches. Therefore, the prohibition for members of a selective distribution system to sell to independent repairers is a hardcore restriction only in the automotive aftermarket.

The General Court ruled that it is up to the Swiss watch manufacturers to maintain a selective distribution system, excluding companies not fulfilling the selective distribution criteria from its network of authorized repairers and correspondingly refusing to supply those with spare parts necessary for repair.

The *Watch Repair* case mainly sparked interest in the General Court's considerations regarding the question of community interest (since the case concerned Swiss manufacturers) and in general as a further clarification in the application of case law on the conditions of the legality of a selective distribution system.[21] Additionally, with its decision, the General Court also determined that EU competition law considers an aftermarket to be worthy of protection and accordingly intends to protect it by applying a specific BER only if the market requires this due to its particular characteristics. In the case of the automotive sector, the profitability and the proportion of total consumer expenditure warrants the special protection of its aftermarket. The aftermarket for the repair of watches, however, does not live up to these standards and therefore the specific rules of the automotive aftermarket BER cannot provide a benchmark.

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[18] Case T-712/14 *Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v Commission* EU:T:2017:748.

[19] ibid para 69.

[20] ibid.

[21] Dimitris Vallindas, 'Selective Distribution Systems Relating to Luxury and Prestige Products: Advocate General Wahl's Opinion in the Coty Case' [2017] 1 Eur. Competition & Reg. L. Rev. 361, 362; Andrezej Kmiecik, 'European Union: EU General Court Endorses Selective Distribution Of Spare Parts for Luxury Watches', (*Mondaq*, 27 November 2017) <www.mondaq.com/x/650200/Antitrust+Competition/EU+General+Court+endorses+selective+distribution+of+spare+parts+for+luxury+watches> accessed 28 February 2022.

While the aftermarket for electronic goods might also not be comparable to the automotive aftermarket, there are certain indicators that the EU plans to take a closer look at this sector, considering it to be worth of further protection in the light of its pursuit for a more sustainable economy.

First, the Commission's Circular Economy Action Plan mentions the fight against electronic waste as one of the main agendas of the new economy.[22] It criticizes the waste of resources due to the frequent impossibility to repair an electronic device. A R2R is explicitly mentioned as a possible solution. Regulatory measures should therefore relate to the reparability of mobile phones, tablets and laptops, among other things. Remarkably, the Commission also seems to make an effort to establish a R2R by considering new horizontal material rights for consumers, for instance as regards the availability of spare parts or access to repair.[23]

As already mentioned above, it seems that the creators of this plan did not primarily think of competition law as a solution for a stronger regulation of these secondary markets. However, this stronger emphasis on R2R is a reason to take a closer look at these markets and to evaluate whether they also need support from a competition law perspective - be it through the establishment of (soft) law or through an analogous application of existing law, like the aftermarket BER.

The second reason why the automotive aftermarket seems to get more attention by the regulators than the aftermarket for electronic goods might simply be the louder voices of the interest group of the automotive industry.

When amending the aftermarket BER in 2010 the Commission examined the automotive aftermarket sector and saw a need to further support independent repairers, by facilitating their access to technical information and spare parts.[24] This was especially pushed by interest groups like AIRC, CECRA, EGEA, FIA and FIGIEFA[25], as well as other R2R associates emphasizing the importance of specific rules for the automotive market for both consumers as well as market players like garages.[26] These were the interest groups which identified and fought for the need for changes in EU competition law in connection with the automotive industry.

In contrast, the part of the R2R movement dealing with electronic goods mainly focused on copyright law and has already achieved remarkable success in the US (as shown above). So far, no similar efforts by R2R interest groups have materialized regarding competition law.

As a result there seems to be a lack of advancement regarding the R2R in the area of EU competition law. However, if one looks at the EU's advances and plans in the area of

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[22] COM(2020)98 (n 10) 7.
[23] COM(2020)98 (n 10) 5.
[24] Commission, 'Commission Evaluation Report on the operation of Commission Regulation (EC) No 1400/2002 concerning motor vehicle distribution and servicing' < https://ec.europa.eu/competition/sectors/motor_vehicles/documents/evaluation_report_en.pdf > accessed 28 February 2022, 9.
[25] AIRC – Association Internationale des Réparateurs en Carrosserie; EGEA – European Garage Equipment Association; CECRA – European Council for Motor Trade and Repairs; FIA – Fédération Internationale de l'Automobile; FIGIEFA – International Federation of Automotive Aftermarket Distributors.
[26] *Anthony Seely*, 'Independent garages and the Motor Vehicle Block Exemption Regulation' (House of Commons Library, 6 July 2010), 4.

sustainability and, in particular, the R2R, it now appears that the demand for regulating the electronic aftermarket will also find its way into EU competition law.

4 CONCLUSION

As the discussion above shows, the *R2R* movement has many strong and important claims. Some of them, have already been heard by EU competition law legislation like those relating to the support of the aftermarket in the automotive sector – at least relating to common street vehicles. Others, like the facilitation of the repair of electronic goods and therefore, the reduction of electronic waste have left their traces in general EU law but are not as well established in terms of competition law.

Nevertheless, this raises the question of whether sustainability aspects, such as the demands of the R2R movement, are in general better regulated by legislative measures, or whether they should belong in the jurisprudence of the competition authorities. The latter, however, would require a difficult compromise or balance between competitive concerns, sustainability claims and measures that are restrictive of competition but perceived as necessary by the enterprises practicing them. Hence, it is essential to carefully monitor these developments in competition law (as well as in other fields of law), especially since it is to be expected that the voices for the R2R movement will become stronger and louder.

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PUBLIC INTEREST IN MERGER CONTROL AS A POTENTIAL INSTRUMENT OF REALIZATION OF SOCIO-ENVIRONMENTAL GOALS

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The aim of this paper is to review the ongoing debate[1] on the goals of merger control in Europe. The article focuses on the existing national provisions allowing for recognition of public interest in the ambient of merger control in EU member states, with a particular focus on the aspects of socio-environmental goals together with the functioning models of public interest considerations and their application. The paper points out the weaknesses of the existing national regulations and suggests general solutions, which could eliminate the most prevalent problems.

1 INTRODUCTION

2.1 BACKGROUND – DISCUSSION ON EU MERGER REGULATION REFORM

The recent decisional practice of the European Commission sparked a lively debate on the goals of merger control in Europe. The turning point has been the Commission's decision to prohibit the Siemens and Alstom merger.[2] The decision provoked vivid criticism, putting significant pressure on the Commission's approach to merger control assessment and goals. In particular, the decision opened the way for the Franco-German proposal to overhaul the EU merger control rules in order to facilitate the creation of "European champions", capable of thriving in global markets.[3] The specific solutions proposed in the Manifesto included *inter alia* the right of the Council to override Commission's decisions.

The Franco-German proposal faced strong opposition, including from the European Commission, national governments[4] and antitrust practitioners, focusing on threats associated with the politicization of competition law. The critics of the call to overhaul the EU merger control rules emphasized that consideration of industrial policy goals would undermine the credibility and legal certainty of EU merger control. This opposition may have influenced the position of France and Germany, as the joint statement of France, Germany

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1 The article was written in September 2019 and does not cover further discussion and developments regarding the debate on the goals of merger control in Europe.

2 Siemens/Alstom (Case M.8677) Commission Decision C(2019) 921 final [2019].

3 Bundesministerium für Wirtschaft und Energie, Le ministère de l'Économie et des Finances, A Franco-German Manifesto for a European industrial policy fit for the 21st Century, 19.02.2019 <www.bmwi.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-a-european-industrial-policy.pdf> accessed August 31, 2019.

4 eg., the Dutch government stated that "European champions should build on healthy competition", emphasizing that "bigger is not always better", see Government of Netherlands, Position Paper. Strengthening European competitiveness, 15.05.2019, <www.permanentrepresentations.nl/documents/publications/2019/05/15/position-paper-strengthening-european-competitiveness> accessed August 31, 2019.

and Poland[5] published in July 2019 does not include a proposal for a political veto of commission merger decisions.[6]

2.2 ALTERNATIVE GOALS

However, the ongoing debate is not deemed to remain within the field of industrial policy.[7] The discussion on the revision of the merger control rules provokes also to take into consideration a broader look on competition law policy and goals. In fact, at the same time when the *Siemens/Alstom* decision was issued, the European Parliament adopted a resolution,[8] in which it expressed its concerns about the Commission disregarding the goals such as food safety, protection of consumers, environment and climate.[9] Furthermore, the European Parliament directly called the Commission to review the EU merger control rules to adopt measures to protect the rights and principles of the TFEU and EU Charter of Fundamental rights, including environmental protection.[10]

3 NATIONAL REGULATIONS

3.1 NATIONAL REGULATIONS: PROTECTED VALUES AND GOALS

Although the debate on the proposals of changing merger control goals at the EU level seems to be perceived as revolutionary, the general idea of considering the public interest in merger control is far from being a novelty at the national level. More than 10 EU Member States have already adopted rules allowing the recognition of public interest grounds in merger control, including national security, general interests of national economy, media plurality, employment protection and positive impact on the environment. Many of these criteria are common throughout different jurisdictions, however there are many differences in terms of the application of the relevant rules. The wide scope of national regulations and their application makes it clear that they should become an inspiration for further discussion on the EU merger control framework.

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[5] Bundesministerium für Wirtschaft und Energie, Le ministère de l'Économie et des Finances, Ministerstwo Przedsiębiorczości i Technologii, *Modernising EU Competition Policy*, 04.07.2019 <www.bmwi.de/Redaktion/DE/Downloads/M-O/modernising-eu-competition-policy.pdf> accessed August 31, 2019.

[6] However, as noted by A Stefanowicz-Barańska: "This in itself does not yet mean that Germany and France have entirely abandoned their own further-going agendas, which they could pursue independently". See M Richards, *France and Germany tone down calls for political intervention*, (Global Competition Review, 05.07.2019) <https://globalcompetitionreview.com/article/1194873/france-and-germany-tone-down-calls-for-political-intervention> accessed August 31, 2019.

[7] For example, one of the most discussed topics regarding the EU merger control framework is merger control in high-tech and pharma sectors, in particular the rising issue of so-called *killer acquisitions*.

[8] European Parliament, *Resolution of 31 January 2019 on the Annual Report on Competition Policy*, P8_TA-PROV(2019)0062 <www.europarl.europa.eu/doceo/document/TA-8-2019-0062_EN.html> accessed August 31, 2019.

[9] ibid, para 45.

[10] ibid, para 47.

3.2 FUNCTIONING MODELS

In general, it is possible to distinguish two institutional models of application of the public interest in merger control. The first dual responsibility model separates the process between the competition authority, which is responsible for the main merger control assessment, and the authority in power to intervene on the public interest basis, e.g. to grant an authorization to the merger despite the competition's authority opposition. This model is prevalent in the EU. In most cases the extra powers within the merger control process are in hands of specific ministries.[11]

In the second single authority model, all powers regarding the merger control process, including the application of the public interest exemptions, lie with the competition authority, which autonomously processes the proposed merger not only within the standard merger control framework, but also on the public interest grounds. An example of a country which adopted this model is Poland.[12]

It is also possible to distinguish a mixed model, where it is the competition authority that considers and applies the public interest grounds, but it does not proceed independently. This is the case in Italy,[13] where the Council of Ministers, at the proposal of the Minister for Trade and Industry, lays down the general criteria to be used by the competition authority.[14]

In most jurisdictions the consideration of the public interest is connected only with the extraordinary power to approve the transaction, which was prohibited due to merger control assessment by the competition authority. In a few jurisdictions, public interest considerations can also lead to the prohibition of transactions that would have been cleared by the competition authorities.[15]

3.3 SOCIO-ENVIRONMENTAL GOALS

As mentioned before, the grounds for public interest considerations within the national merger control frameworks cover a vast scope of goals and values. At the same time the concepts of public interest adopted by particular countries differ – starting from the broad, open and general references to the public interest, to the precisely determined values and goals. Although the most common circumstances allowing the questionable concentration to be ultimately cleared is contribution to the protection of the national security or national economy, many jurisdictions recognize other aspects of the public interest. In the context of

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[11] eg, in Germany it is the Minister of Economic Affairs and Energy, in the Netherlands – the Minister of Economic Affairs, in France – the Minister for the Economy.

[12] On the other hand, the Swedish competition authority takes into account public interest, meant as national security and supply interests, when deciding on issuing a prohibition decision. Namely, a prohibition decision may only be issued if no significant national security or supply interest is set aside. As a variation of a single authority model one could consider Austria, where public interest may be taken into account in judicial review of a prohibition decision.

[13] Italian Competition Act (*Legge 10 ottobre 1990, n. 287 – Norme per la tutela della concorrenza e del mercato*), Art 25(1).

[14] Also, the Polish Competition Authority in its decisional practice has taken the governmental policies into account, however, it was not obliged to do so. See eg DOK-163/06 [2006].

[15] For example, in the UK the Secretary of the State may prohibit the realization of a transaction on public interest grounds such as national security and financial system's stability, whereas in Romania, the Romanian Supreme Council for National Defense may intervene and prohibit the transaction, if it raises national security risks.

the realization of the socio-environmental policy, notable examples are France (protection of employment) and Spain (protection of environment), whose regulations directly express specific socio-environmental values. Nevertheless, the general public interest clauses may also allow to take such values into consideration.[16]

Table: Public interest grounds for intervention in non-sector specific merger control context in EU Member States.[17]

#	EU Member State	Public interest grounds for intervention
1	Austria	International competitiveness[18], advantages for national economy[19]
2	Cyprus	public security, pluralism of the mass media, the principles of sound administration[20]
3	France	general interest other than maintenance of competition, in particular: industrial development, competitiveness of the companies concerned as regards international competition, creation or safeguarding of jobs[21]
4	Germany	benefits to the economy as a whole, public interest[22]
5	Hungary	general public interest, in particular: preservation of jobs, security of supply[23]
6	Italy	major general interests of the national economy involved in the process of European integration[24], essential reasons of national economy[25] or stability requirements in banking sector[26]

16 For example, in Poland the competition authority cleared two transactions, indicating that they will be beneficial for environmental protection, see RPZ-4/2004 [2004] and RPZ-9/2005 [2005].

17 The table does not include sector-specific regulations (eg mergers in media industry), which may take into consideration certain aspects of the public interest (eg media pluralism). For example, such solutions are implemented in Austria and Ireland.

18 Federal Act against Cartels and other Restrictions of Competition (*Bundesgesetz gegen Kartelle und andere Wettbewerbsbeschränkungen*), §12 (2). English version available at: <https://www.bwb.gv.at/fileadmin/user_upload/PDFs/Cartel_Act_2005_Sep_2021_english.pdf>

19 In force since 01.01.2022. Federal Act against Cartels and other Restrictions of Competition (*Bundesgesetz gegen Kartelle und andere Wettbewerbsbeschränkungen*), §12 (3). English version available at: <https://www.bwb.gv.at/fileadmin/user_upload/PDFs/Cartel_Act_2005_Sep_2021_english.pdf>

20 The Control of Concentrations Between Undertakings LawCypriot Competition Act (*N.83(I)/2014*), Art 35ff. English version available at: <http://www.competition.gov.cy/competition/competition.nsf/All/5937AB49B8B38080C2257FB2003A442B/$file/Law%2083(I)2014.pdf>

21 French Commercial Code (*Code de commerce*), Art L430-7-1.

22 German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*), §42. English version available at: <http://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html>

23 Hungarian Competition Act (*1996 évi LVII Törvény a tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról*), Art 24/A. English version available at: <https://www.gvh.hu/pfile/file?path=/en/legal_background/rules_for_the_hungarian_market/competition_act/competition-act-documents/jogihatter_tpvt_hataly_20190101_a&inline=true>

24 Italian Competition Act (*Legge 10 ottobre 1990, n. 287 – Norme per la tutela della concorrenza e del mercato*), Art 25(1).

25 In cases of acquisition of Italian undertakings by undertakings from the states, where the Italian undertakings are discriminated, Italian Competition Act (*Legge 10 ottobre 1990, n. 287 – Norme per la tutela della concorrenza e del mercato*), Art 25(2).

26 Italian Competition Act (*Legge 10 ottobre 1990, n. 287 – Norme per la tutela della concorrenza e del mercato*), Art

#	EU Member State	Public interest grounds for intervention
7	the Netherlands	important reasons in the public interest[27]
8	Portugal	fundamental strategic interests of the national economy[28]
9	Poland	Justified cases, in particular: contribution to economic development or aiding technical progress, positive impact on the national economy[29]
10	Romania	national security[30]
11	Spain	general interest other than protecting competition, in particular: national defense and security, the protection of public security and public health, free movement of goods and services within the national territory, protection of the environment, the promotion of technical research and development, adequate maintenance of the sector regulation objectives[31]
12	Sweden	significant national security or supply interests[32]

3.4 CASE LAW

As mentioned above, several EU Member States explicitly protect goals such as environment and employment. In practice there is a small number of cases[33] where these goals have been protected by taking into account the public interest in the merger control context. Interesting examples can be found in France, Germany and Poland.

The aim of protecting employment has been taken into consideration in France in 2018, where due to a ministerial intervention the parties to the merger were granted an unconditional clearance, as opposed to the French Competition Authority decision, which imposed an obligation to divest a brand and a production site.[34] In order to guarantee the protection of employment, the decision of the French Minister for the Economy included an obligation not to cut any job positions for two years.[35]

20(5-bis)(b).

27 Dutch Competition Act (*Mededingingswet*), Art 47(1).

28 Portuguese Competition Authority statutes (*Decreto-Lei n.º 125/2014 de 18 de agosto - Estatutos da Autoridade da Concorrência*), Art 41.

29 Polish Competition Act (*Ustawa z dnia 16 lutego 2007 r. o ochronie konkurencji i konsumentów*), Art 20 (2). English version available at: <https://www.uokik.gov.pl/download.php?plik=7618>

30 Romanian Competition Act (*Lege nr. 21 din 10 aprilie 1996 a concurenței*), Art 47(9).

31 Spanish Competition Act (Ley 15/2007, de 3 de julio, de Defensa de la Competencia), Art 10(4). English version available at: <https://www.cnmc.es/file/64176/download>

32 Swedish Competition Act (*Konkurrenslag (2008:579)*), Chapter 4, Art 1. English version available at: < https://www.konkurrensverket.se/globalassets/english/publications-and-decisions/the-swedish-competition-act.pdf>

33 See EU Merger Working Group, Public Interest Regimes in European Union – differences and similarities in approach, March 10, 2016, para 14.

34 n°18-DCC-95 [2018].

35 Decision du ministre de l'économie et des finances du 19 juillet 2018 statuant sur la prise de contrôle exclusif d'une partie du pôle plats cuisinés ambiants du groupe Agripole par Financière Cofigeo, Bulletin Officiel de la Concurrence, de la Consommation, de la Répression des Fraudes n°7 du 7 août 2018 [2018].

The same reason was invoked by the German Minister of Economic Affairs and Energy, whose intervention[36] overruled the German Competition Authority decision[37], prohibiting the acquisition of control of Tengelmann by Edeka. The German Competition Authority prohibited the transaction as it could lead to lessening of competition on highly concentrated local markets and, consequently, diminish consumer choice. The German Minister of Economic Affairs and Energy stated that the failure to implement the deal would result in the loss of 16,000 jobs, while job security is the workers' right. The ministerial authorization was conditional on the obligation not to cut any job for five years.

The German ministerial intervention has been applied also with regard to the aim of the protection of the environment and the development of the SME sector. In January 2019 the German NCA prohibited[38] the creation of a joint venture by Zollern and Miba, main competitors in an already concentrated market for plain bearings. The Minister justified its authorization[39] by indicating that Zollern and Miba need to work jointly on development of bearings, in particular used in wind power plants. Thus, cooperation serving the development of green technologies would be in line with the country's general policy based on developing the renewable energy sources. The ministerial authorization was conditional, as the companies were obliged to invest EUR 50 million in research and development during an eight-year period and avoid any change in the joint venture structure for five years.

Environmental protection has been considered also in Poland, where the Polish Competition Authority cleared two transactions, despite its concerns on competition-related issues. In 2004 the Polish Competition Authority cleared a transaction which led to the creation of a strong dominant position in local markets for production and distribution of heat.[40] The Polish Competition Authority justified its decision by indicating that the acquiring party committed to invest in new energy sources, emission reduction and use of waste to produce energy. Similarly, in 2005 the Polish Competition Authority cleared a transaction which led to creation of a strong dominant position in local markets for sanitation and waste disposal.[41] The authority noted the positive impact of the transaction on environmental protection, emphasizing that it was aligned with pro-ecological policy. The Polish Competition Authority indicated that the buyer had a plan of active participation in environmental protection projects, planned investments in recycling solutions, as well as distinctive know-how, allowing for the successful realization of these projects.

3.5 PUBLIC INTEREST AS AN INSTRUMENT FOR THE REALIZATION OF SOCIO-ENVIRONMENTAL GOALS

As it follows from the above considerations, the merger control procedure provides for the possibility to take into account non-competition goals and to protect socio-environmental values. Furthermore, it is not only a virtual possibility as it has already been applied in practice.

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36 Gesch-Z: I B 2 – 22 08 50/01 [2016].
37 B2-96/14 [2015].
38 B5-29/18 [2019].
39 Gesch-Z: I B 2 – 20302/14–02 [2019].
40 RPZ-4/2004 [2004].
41 RPZ-9/2005 [2005].

However, the realization of socio-environmental goals via merger control does not currently seem to be a viable instrument as it is applied rather scarcely and in exceptional circumstances only. Although the main reason for this could be the aversion to step beyond the more economic approach and competition-based assessment,[42] there are many other factors that could impact the viability of consideration of non-competition goals within the merger control context.

Firstly, it should be noted that the existing regulations are predominantly vague and do not provide for clear and specific instructions with regard to the consideration of alternative values in the merger control context. The lack of clear regulations and procedures could in particular lead to an ambiguous and uncertain interpretation of the law, discouraging any interested parties to pursue problematic transactions, even if they could be hypothetically cleared based on the protection of socio-environmental goals. Looking from the perspective of the intervening authority, one must also take into account the difficulties related to the necessary balancing of the protected values. Furthermore, the application of such an instrument, in particular in the form of a ministerial intervention, is likely to be treated as a political decision. At the same time every use of this instrument could attract a fierce public opposition. Therefore, relevant authorities would rather take a conservative stance while considering public interest in the merger control context, as they would need to take into account the political aspects of making any decision. Finally, it is not certain that the application of the discussed instrument would effectively serve the socio-environmental goals, as clearing a controversial decision based solely on general justifications might not result in the desired effects in practice.

3.6 PROPOSED SOLUTIONS

Taking into account the above, it is possible to upgrade the existent regulations into a more effective model. Firstly, it would be beneficial to provide more precise law, e.g. by clarifying the general clauses with specific examples. Secondly, publishing guidelines or official statements would definitely bring more clarity on the application of the discussed rules in practice. In addition to this, the relevant regulations should allow the intervening authorities to impose behavioral commitments on the merging parties, guaranteeing the effective realization of the socio-environmental goals.

Finally, one should also consider the harmonization of the relevant rules at the EU level or even their introduction into EU merger control framework. Taking into account that less than half of the EU Member States adopted regulations allowing to consider the public interest in the merger control context, the sensitive nature of the protected goals and the importance of the more economic approach in EU competition law, such a solution would be considered as obviously controversial. However, it should be noted that the clarification of the rules at the supranational level could encourage the relevant national authorities to intervene on the basis of public interest grounds, making public interest considerations in the merger control context a potential, viable instrument for the realization of socio-environmental goals.

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[42] EU Merger Working Group, Public Interest Regimes in European Union – differences and similarities in approach, March 10, 2016, paras 20-21 <https://ec.europa.eu/competition/ecn/mwg_public_interest_regimes_en.pdf> accessed August 31, 2019.

3.7 SUMMARY

The recent discussion on the EU merger control regulations brings an opportunity to consider a broader look at competition policy and goals, such as employment and environmental protection. Furthermore, this should not be treated as a novelty, as many EU Members States' regulations already provide for considering the public interest within merger control context. The national solutions differ with regard to the adopted institutional models and protected goals. In particular, some EU Member States provide for the protection of goals such as the environment and employment. There are interesting examples from France, Germany and Poland, in which the authorities considered the protection of environment and the employment as crucial for the merger control assessment.

The analysis of the relevant national regulations shows many weaknesses and issues related to the consideration of public interest within merger control context. The application of this kind of instruments is rather scarce and there is little case law that could facilitate the intervention of the relevant authorities. However, many of those problems could be fixed by adopting clear and precise procedures and issuing relevant guidelines, making public interest considerations in the merger control context a potential, viable instrument for the realization of socio-environmental goals, with a perspective to be implemented at the EU level.

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MEGA MERGERS IN THE SEEDS & AGRO-CHEM INDUSTRY: NIPPING THE SEEDS OF INNOVATION (& SUSTAINABILITY) IN THE BUD?

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The Seeds and Agro-Chem Industry today is a tightly knit oligopoly with only a handful of global players. Following a detailed assessment, the European Commission recently conditionally cleared three major transactions in the already highly concentrated sector - Chem China and Syngenta, Dow and Du Pont, Bayer and Monsanto – reducing the number of effective global players from six-to-four. Even though the Commission's decisions are laudatory in terms of their economic assessment of the impact of the transactions on product, price and innovation competition, these merger approvals suggest the following gap in EU Merger Control. Taking pride in its more economic approach, the EU Merger Control in its current form neglects the need to integrate the most fundamental principles of EU law. These principles can neither be easily quantified nor put in a straitjacket of 'cost/benefit' or 'efficiency' analysis. This article accordingly calls for the need to go back to the Treaty articles and examine how EU Merger Control can effectively meet the larger policy objectives as enshrined in the Treaty articles, such as Article 11 TFEU's 'environmental integration rule', while simultaneously retaining the impression of being based in sound principles of competition law and economics. Incorporation of the principle of sustainable development alongside the well-defined economic principles well aligns with an integrated and holistic approach to policy-making. The approach suggested may lead to a multiciplty of objectives – meaning that if such an approach is indeed adopted, the EU Merger Control may well need to look beyond the narrow construct of 'efficiency' and 'consumer welfare'. A failure to take account of these larger objectives, however, may ironically thwart the EU Merger Control from achieving the very fundamental objective it seemingly aspires to achieve that is 'consumer welfare'! Consumers being numerous and geographically dispersed experience the collective action problem. In the Bayer/Monsanto merger, despite this typical collective active problem, the Commission received over 55,000 emails, letters and postcards and an uncountable number of tweets on the social networking site Twitter. The citizens, who are also consumers, in their complaints requested the Commission to prohibit the transaction, as they saw the proposed merger being detrimental to 'human health, food safety, consumer protection, the environment and the climate'. The Commission's response to these complaints was that even though the said concerns were significant - they nonetheless could not form the basis of merger assessment, which

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In compliance with the requirements for transparency, I confirm no conflict of interest. This paper represents my opinion based on my academic research and should not be attributed to my academic institution. In addition, it may be useful to add that I am currently conducting academic research on the interface between sustainability and competition and trade law within the framework of Horizon 2020: Making Agricultural Trade Sustainable (MATS) RUR-21-2020.

needs to be limited to competition issues. As for the issues raised, in the opinion of the Commission, other areas of law such as those dealing with the regulatory system for pesticides and the consumer protection law could well address these other concerns. The dilemma confronting the Commission was whether to assess these transactions within the current framework grounded in well-defined scientific principles of economics (and increasingly econometrics) or in the alternative take account of some qualitative non-price considerations. The Commission evidently resorted to the former option. A decision otherwise would have been subject to intense economic criticism just like the GE/Honeywell decision, wherein the Commission proposed a very novel theory of 'Archimedean Leveraging', and prohibited the proposed merger. This means that for a truly effective competition policy and EU Merger Control in particular, the authorities need to 're-think, re-design and re-frame' the notion of competition policy as a 'system of inter-locking processes' in the Raworth's 'doughnut'.[1] For such a sustainability-driven thinking on innovation, that re-directs the 'consumption choices available to consumers' within the sustainable 'safe and just space for humanity', there is a visible need to think and reflect upon the 'double limit of planetary boundaries' and incorporate it in the everyday philosophy of competition policy.[2]

1 INTRODUCTION

In the 1980's when genetically engineered crops were first introduced, the market was highly competitive with a number of key players. By the early 90's, following a series of wave of consolidations, over 80% of the market for agriculture biotechnology was controlled by the 'Big Six' firms. Following the recent mega mergers that may be more appropriately referred to as a wave of big-data driven M&As (mergers and acquisitions), the market today is a tight oligopoly comprising of a handful of global players. Notable consolidations in this phase include the global mergers between Chem China and Syngenta, Dow and Du Pont and Bayer and Monsanto. This is not the first wave of consolidation in the industry. There have been earlier notable waves of consolidation. Following three factors, however, make this recent wave particularly worrisome. First, post-consolidation, the seed & agro-chem industry today is a tightly knit oligopoly with little meaningful 'localized competition' across different 'nodes'[3]Second, these firms are vertically integrated (VI) entities that control the entire value chain from R&D in the upstream market to production and distribution in the downstream market. Third, these VI firms also increasingly own the data across the entire value chain – from the data about the genetic information of the seeds to the data about the buyers of the seeds and other agro/chemical products such as fertilizers and pesticides.

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[1] Kate Raworth, 'A Safe and Just Space for Humanity: Can We Live Within the Doughnut?' February 2012 *Oxfam Discussion Paper* <https://www-cdn.oxfam.org/s3fs-public/file_attachments/dp-a-safe-and-just-space-for-humanity-130212-en_5.pdf> accessed 08 June 2022.

[2] Tomaso Ferrando and Claudio Lombardi 'EU Competition Law and Sustainability in Food Systems: Addressing the Broken Links' (February 2019) *Fair Trade Advocacy Office*, *Brussels* < http://www.responsibleglobalvaluechains.org/images/PDF/FTAO_-_EU_Competition_Law_and_Sustainability_in_Food_Systems_Addressing_the_Broken_Links_2019.pdf> accessed 08 June 2022.

[3] Kalpana Tyagi, Promoting Competition in Innovation through Merger Control in the ICT Sector: A Comparative and Interdisciplinary Study, *Springer* (2019) <https://www.springer.com/gp/book/9783662587836> on unilateral effects at pp. 55-59. *See* also references therein.

This emerging dynamics at play challenges the very fundamental principles of how competition authorities assess the impact of the proposed concentration, particularly in the Seed and Agro-chemicals sector. In other words, considering the complexity of the debate and challenges peculiar to the sector, should competition authorities be only concerned with the impact of the proposed merger on competition and innovation? Is it not time to introspect and perhaps re-set the boundaries of competition policy in general and merger control in particular, particularly when sectors as critical as food and agri are under consideration? Considering the critical significance of the sector to ensure that all have access to food and a healthy lifestyle, should the authorities 'not' take into account some non-price parameters of competition – such as the sustainable development goal 2, "Zero Hunger" ? Pre-Covid, the world was already suffering from severe food shortages in certain parts of the world. As per estimates by World Food Programme, over 135 million people suffer from "acute hunger largely due to man-made conflicts, climate change and economic downturns".[4] This number, following the COVID-19 pandemic, has now more than doubled, at close to 300 million. It is feared that by 2030, over 840 million will be affected by this food shortage.[5] The ongoing war between Russia and Ukraine threatens to further break down an already fragile food supply chain.[6]

Within the framework of the Treaty articles, should we not look at the larger EU Treaty objectives, such as Article 11, TFEU, the 'environmental integration rule'? To offer the background and need for this debate, section 2 presents a brief over view of the European Commission's decisions in Chem China and Syngenta, Dow and Du Pont, Bayer and Monsanto. Section 3 identifies how 'sustainability initiatives' can be and in fact need to be taken account of in EU merger control. Section 4 concludes.

2 EUROPEAN COMMISSION IN DOW AND DU PONT, CHEM CHINA AND SYNGENTA AND BAYER AND MONSANTO: FROM 'GIANT' SIX –TO– 'GOLIATH' FOUR

Three recent notable mergers in the food and agro-chemical industry have reduced the number of effective competitors from six-to-four. Each one of these transactions, following a detailed Phase II review, received the Commission's conditional clearance. This section briefly summarizes the European Commission's findings and remedies in each one of these mergers.[7]

[4] United Nations' Sustainable Development Goals, available at https://www.un.org/sustainabledevelopment/hunger/. Accessed 8th June 2022.
[5] United Nations' Sustainable Development Goals, available at https://www.un.org/sustainabledevelopment/hunger/. Accessed 8th June 2022.
[6] Editorial, The war in Ukraine is exposing gaps in the world's food systems research (12 April 2022) Nature available here https://www.nature.com/articles/d41586-022-00994-8. Accessed 8th June 2022.
[7] This section offers a very broad overview of these three transactions. For a detailed legal analysis of these transactions, see Kalpana Tyagi, '6-to-4 Mergers in the Seed & Agro-Chem Industry: Unsustainable Challenges with the Current EU Merger Control Framework' (forthcoming). Copy available with the author on request.

2.1 DOW/DU PONT[8]

Dow/DuPont was a 5-to-4 merger in the market for 'crop protection innovation'. According to EU Merger Control Regulation 139/2004, the relevant test to assess the impact of a proposed transaction is the 'significant impediment to effective competition' (SIEC) test. According to the test, if the proposed concentration may create significant impediment through the creation or strengthening of a dominant position, it may be declared incompatible with the internal market. The transaction was expected to adversely affect the market for Agriculture (seed & crop protection), in other words "agrochem" and material sciences. The Commission assessed numerous sub-markets – for various seed and crop protection varieties. Considering the expected adverse effect on innovation competition, the Commission also assessed the impact of the transaction on the 'innovation spaces'. The Commission came up with a novel test - 'significant impediment to industry innovation' (SIII) - to assess the impact of the concentration on the transaction.[9] The Commission' assessment indicated that the parties were close competitors and competed 'head-to-head' in large number of 'innovation spaces' in the market for herbicides, insecticides and fungicides.[10]

To alleviate the Commission's concerns, the parties divested DuPont's global pesticide business and the global R&D organization to FMC, a leading generic player in the industry.

2.2 CHEMCHINA/SYNGENTA[11]

ChemChina/Syngenta was a merger between Chem China, a Chinese state owned enterprise active in the generics sector for agrochemical and Syngenta, Swiss-based innovator active along the entire value chain in the seed and crop protection segment. ChemChina also owned the Israel-based ADAMA, a leading generics player active in manufacturing and distribution of off-patent formulated agri products. Considering that it was a merger between an innovator and a generic, the Commission's principle concerns related to off-patent crop protection products, and markets where there existed close competition between off-patent and patented products. The principle difference between the Commission's approach in Dow/DuPont and ChemChina/Syngenta was the following. Whereas in Dow/Du Pont, the Commission was equally concerned about both loss of product and innovation competition, in ChemChina/Syngenta, the Commission's concerns were confined to the loss of competition in those sub-markets where the generics could exert 'significant price

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8 8 *Dow/DuPont* (CASE M.7932) [2017] OJ C 353/05.

9 Nicolas Petit refers to this new theory as the 'Significant Impediment to Industry Innovation' (SIII Theory). For a detailed discussion and criticism of the same and how the Commission has departed from its earlier practice of concentrating on the identified relevant product markets, see Nicolas Petit, 'Significant Impediment to Industry Innovation: A Novel Theory of Harm in EU Merger Control?'(2017) *ICLE Antitrust & Consumer Protection Research Program White Paper 2017-I* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2911597>. Accessed 8th June 2022.

10 For a detailed discussion on the law and economics of 'innovation competition' in these 'innovation spaces', see Alexandre Bertuzzi, Soledad Blanco Thomas, Daniel Coublucq, Johan Jonckheere, Julia Tew and Thomas Deisenhofer, 'Dow/DuPont: Protecting Product and Innovation Competition', (2017) *2 Competition Merger Brief 2/2017* – Article 1, 1-8.

11 *ChemChina/Syngenta* (CASE M.7962) [2017] OJ C186/07.

competition on R&D players'.[12] Following a detailed econometric analysis, the Commission identified significant concerns in over 100+ relevant markets for fungicides, herbicides, insecticides, seed treatment and plant growth regulators markets.

To alleviate the Commission's concerns, the parties divested ADAMA and Syngenta's crop protection business in the fungicides, herbicides, insecticides, seed treatment and plant growth regulators, with a possibility to transfer the relevant R&D and regulatory staff along with the divested business.

2.3 BAYER/MONSANTO[13]

Bayer's US $66 billion acquisition of US-based Monsanto was the biggest of the three transactions. The merger created the world's largest integrated player active in seeds and traits, pesticides and digital agriculture. Like the Dow/ DuPont merger, the Commission was concerned not only with the impact of the transaction on price, but also with the impact on the level of innovation. The Commission once again employed the above-referred SIII test to assess the impact of the transaction on the 'innovation spaces'. To win the Commission's approval, the parties proposed to divest $6 billion worth of assets to BASF that comprised of crop seeds, traits, crop protection and agriculture and Bayer's global vegetable seeds business. The value of the divestment package itself was so substantial that it led to a separate merger notification as the BASF/Bayer Divestment Business.[14] This leads one to question whether just like in the banking sector, through these conditional approval decisions, the Commission is actually facilitating the creation of 'too big to fail' seed/agri businesses![15] If the $66 billion Bayer/Monsanto and the divestment package therein is any indicator, this clearly seems to be the case. It may be useful to add that these mergers can be considered 'too big to sustain'. The divestment packages in the Bayer/Monsanto[16] and Dow/DuPont[17] were so substantial that the parties were required to notify these divestitures as a separate transaction to receive the Commission's approval.

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[12] For the Commission's approach in ChemChina/Syngenta, see Jean-Christopher Mauger, Marco Ramandino, Laura Seritti and Jullien Sylvestre, 'ChemChina/Syngenta: When Growth is No Longer Organic' (2017) *2 Competition Merger Brief 2/2017* – Article 2, 9-12.

[13] *Bayer/Monsanto* (CASE M.8084) [2018] OJ C459/10.

[14] *BASF/Bayer Divestment Business* (Case M.8851), available at <https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8851> accessed 30 August 2019.

[15] Angela Wigger and Hubert Buch-Hansen, 'Too Big to Control? The Politics of Mega-Mergers and Why the EU is not Stopping Them' (2017) *Coporate Europe Observatory* < https://corporateeurope.org/en/power-lobbies/2017/06/too-big-control>. Accessed 8th June 2022.

[16] *BASF/Bayer Divestment Business* (Case M.8851), available at <https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8851> accessed 08 June 2022

[17] *FMC/DuPont Divestment Business* (Case M.8435) available at <https://ec.europa.eu/competition/mergers/cases/decisions/m8435_1101_3.pdf> accessed 08 June 2022

3 RE-DEFINING THE SILHOUETTES OF EU MERGER CONTROL

Following are the three notable challenges that confront the global agriculture industry today: first, the need to increase the productivity, second, to ensure sustainable agricultural practices and third to enhance the resilience of the sector.[18] Against this background, one must also consider the impact of these M&As (mergers and acquisitions) on the R&D activities of small and medium-sized firms. Though evidence on innovation by big and small start-ups is mixed, following Arrow's line of argument, it emerges start-ups and SMEs may benefit more from disrupting the market, as it does not eat into their existing profits.[19] M&As also offer firms economies of scale and scope by attaining 'scale' and thereby, 'internalize' profits from 'complementary' R&D activities.[20] However, following this increase in concentration in the Agro-chem sector, the small and medium enterprises' (SMEs) ability to innovate are adversely impacted. Cross-licensing is a key input cost in the seed markets and post-consolidation, 'licensing of transgenic resource base in seeds' is likely to emerge as one of the most significant cost disadvantage for the small players in the sector. This can be explained on account of the following: SMEs have a small resource base, as distinct from the big Agro-chem players. As the follow-on innovation depends on the access to existing resources, many of which may be IP-protected, a smaller player is in an evident position of disadvantage when compared with the big incumbent Agro-chem players. This also puts them a weak bargaining position to enter any licensing agreement. In particular, the recent 6-to-4 mergers discussed in the section 2 above are susceptible to have a negative impact on the incentives of the big four to 'engage in pro-competitive R&D' by entering into agreements for cross-licensing of genetic traits.[21] The said report also goes on the allude to an uptake of such agreements.[22] This apparent inconsistency can be explained by transaction cost economics.[23] In an oligopolistic market, with a limited number of players, it is easier to negotiate and enter licensing agreements with relatively insignificant transaction costs. In none of the three the mergers did the Commission require the parties to enter into commitments that may encourage parties to form a patent pool or offer SMEs the possibility to cross-license these genetic traits. If at all, the remedies proposed only strengthened this closed group of big four (or big six)[24] global players, as the commitments comprised of divestiture to other existing market players.

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[18] OECD, Concentration in Seed Markets: Potential Effects and Policy Responses (2018) 15, OECD Publishing, Paris <https://www.oecd.org/publications/concentration-in-seed-markets-9789264308367-en.htm> accessed 2 September 2019.

[19] Kalpana Tyagi, Promoting Competition in Innovation through Merger Control in the ICT Sector: A Comparative and Interdisciplinary Study, *Springer* (2019) <https://www.springer.com/gp/book/9783662587836> pp. 143-49.

[20] Kalpana Tyagi, Promoting Competition in Innovation through Merger Control in the ICT Sector: A Comparative and Interdisciplinary Study, *Springer* (2019) <https://www.springer.com/gp/book/9783662587836> on unilateral effects at p. 47 ff.

[21] *Ibid.,* p. 18

[22] *Ibid.,* p. 19

[23] Roland H. Coase, The Nature of the Firm, available here https://onlinelibrary.wiley.com/doi/10.1111/j.1468-0335.1937.tb00002.x accessed 08 June 2022.

[24] The number of global players are four to six depending on whether one is looking only at the seeds, or agro-chemicals sector or the industrialized agriculture as a whole. See the graph in Angela Wigger and Hubert Buch-Hansen, 'Too Big to Control? The Politics of Mega-Mergers and Why the EU is not Stopping Them'

Furthermore, consolidation and industrialization of agriculture means that today, the big 4 entities not only have access to key inputs, but also data.[25] Therefore, the market today presents significant entry barriers to small and medium entrants in the sector. Additionally, it also adversely affects user innovation. Farmers have traditionally preserved the seeds, crossbred and re-planted them to get better and more sustainable yields. Monsanto's restrictive practices have been particularly infamous for nipping these innovation efforts of farmers by vigorously bringing patent infringement suits to prevent them from re-planting crops produced from its seeds.[26] According to a Center for Food Safety report, Monsanto has collected over $23 million from 410 farmers and 56 small businesses in these infringement cases.[27] In another incident dating back to 2016, Monsanto illegally collected personal information and made a list of 600+ scientific, political and media personalities in order to influence their public position on *glyphosate,* a 'potentially carcinogen', used in Monsanto's best-selling Roundup.[28] These regrettable practices clearly underscore the danger of having 'too big to control'[29] seed and agri businesses. The Bayer/Monsanto merger alone invited a huge public outcry and the Commission received over 55,000 emails requesting the latter to prohibit the proposed merger, as the concentration posed significant risks to 'human health, food safety, consumer protection, the environment and the climate'.[30] The number of complaints is significant considering that the consumers are large in number and dispersed across 27 EU Member States. Despite the well-known problem of collective action, if the emails, tweets and letters to the Commission are any indication, this was 'the' merger that invited the clearest and most convincing call for prohibition from across the EU. Ironically enough, ignoring the voice of the stakeholders, who are also consumers, the Commission in the name of 'consumer welfare' conditionally cleared all the three mergers!

The very important question that arises against this complex interplay of 'sustainability' and 'EU merger control' is whether the current framework offers the possibility to take account of non-price parameters such as 'sustainability' and 'access to food'. Should the Commission continue to ignore issues of 'sustainability' and 'food security' in the name of the 'more economic approach'? If the Commission's own practice is any indicator, the impact of the proposed transaction or practice on the environment has been, on occasions, crucial

(2017) *Coporate Europe Observatory* < https://corporateeurope.org/en/power-lobbies/2017/06/too-big-control> p. 7 accessed 02 September 2019.

[25] Ioannis Lianos and Claudio Lombardi, 'Superior Bargaining Power and the Global Food value Chain: The Wuthering Heights of Holistic Competition Law?' (2016) *Competition Law and Policy and the Food Value Chain: On-Topic Concurrences N°1-2016: 22-35* < http://awa2017.concurrences.com/articles-awards/academic-articles-awards/article/superior-bargaining-power-and-the-global-food-value-chain-the-wuthering-heights> accessed 2 September 2019.

[26] Paul Harris, 'Monsanto Sued Small Farmers to Protect Seed Patents, Report Says' Guardian (New York, 12 February 2013) < https://www.theguardian.com/environment/2013/feb/12/monsanto-sues-farmers-seed-patents> accessed 2 September 2019.

[27] *Ibid*; Center for Food Safety, 'Seed Giants vs. U.S. Farmers' (2013) https://www.centerforfoodsafety.org/reports/1770/seed-giants-vs-us-farmers accessed 08 June 2022.

[28] Stéphane Foucart, ' Fichier Monsanto » : des dizaines de personnalités classées illégalement selon leur position sur le glyphosate' *Le Monde* (Paris 19 June 2019) <https://www.lemonde.fr/planete/article/2019/05/09/fichier-monsanto-des-dizaines-de-personnalites-classees-illegalement-selon-leur-position-sur-le-glyphosate_5460190_3244.html> accessed 08 June 2022.

[29] Angela Wigger and Hubert Buch-Hansen, 'Too Big to Control? The Politics of Mega-Mergers and Why the EU is not Stopping Them' (2017) *Coporate Europe Observatory* < https://corporateeurope.org/en/power-lobbies/2017/06/too-big-control> p. 7 accessed 08 June 2022.

[30] Bayer/Monsanto (CASE M.8084) [2018] OJ C459/10.

to the outcome of the case.[31] The Commission's clearance of the European manufacturers' agreement to improve the energy efficiency of electric motors is a notable example of this practice.[32] Looking at the Treaty articles and identifying the need to ensure that the founding treaties of the EU collectively must form a 'coherent system', Article 11 TFEU and Article 3(3) Treaty on European Union (TEU) are a guidepost.[33] Article 11 TFEU calls for need to 'integrate' the 'environmental protection requirements' in the Union's 'policies and activities'. Article 3(3) calls the Union to work for the 'sustainable development of Europe' based on a number of factors, including 'the quality of the environment'. 'Integration' of the 'environmental protection requirements' in order to promote 'sustainable development' within the meaning of Article 11 TFEU across different policy areas, including competition law, is also in alignment with the intention of the Member States as regards the interpretation of EU law.[34]

4 CONCLUSION

The consolidation in the sector has significant implications not just for innovation, but also 'access to food', a basic human right and United Nations' Sustainable Development Goal (SDG) no.2 that is 'zero hunger'. Despite intense debate and raging criticism from academia and activists alike from across the disciplines and the industry, these mergers received clearance from all the competition authorities from across the world. Within the available framework, as section 2 highlights, the European Commission did a commendable job by assessing mergers against the tools currently available for the competitive assessment of mergers. In other words, the Commission well balanced the qualitative and quantitative evidence to assess the impact of these mergers on the parties' 'incentives to innovate'. These conditional clearances, in retrospect, effectively depict the Commission's assessment of these mergers. However, they also highlight that the Commission's current practice leaves a lot to be desired. The seeds and agro-chem industry today is operating well beyond Raworth's 'planetary boundaries' of a 'safe operating space for humanity'. There is thus the need to re-think, re-design and re-frame the notion of competition policy as a 'system of inter-locking processes' in the 'doughnut'.[35] For such a sustainability-driven thinking on innovation that re-directs the 'consumption choices available to consumers' within the sustainable 'safe and just space for humanity' there is a visible need to think and reflect upon the 'double limit of planetary boundaries' and incorporate this in the everyday philosophy of competition policy.[36] Sustainability – both in terms of production, consumption and leaving a 'green'

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[31] Suzanne Kingston, 'Integrating Environmental Protection and EU Competition Law: Why Competition Isn't Special' (November 2010) *European Law Journal, Vo.16, No.6,* 781.

[32] European Commission, Press Release: IP/00/508 Commission Clears European Manufacturers' Agreement to Improve Energy Efficiency of Electric Motors, Brussels 23 May 2000, <https://europa.eu/rapid/press-release_IP-00-508_en.htm> accessed 08 June 2022.

[33] For a discussion on the two Treaty articles, and how Article 11 TFEU may seems more promising, and possible tension with other Treaty articles such as Article 119 TFEU, *see*, Kingston (n 20) p. 784 ff.

[34] Julian Nowag, 'The Sky is the Limit: On the Drafting of Article 11 TFEU's Integration Obligation and Its Intended Reach' in Beate Sjåfjell and Anja Wiesbrock (eds), *The Greening of European Business under EU Law. Taking Article 11 TFEU Seriously* (Routledge 2014), available at <https://www.taylorfrancis.com/books/e/9781315767864> accessed 08 June 2022.

[35] Kate Raworth 'Why It's Time for Doughnut Economics' (2017) 24*IPPR Progressive Review* (3) 217-222.

[36] Tomaso Ferrando and Claudio Lombardi 'EU Competition Law and Sustainability in Food Systems: Addressing the Broken Links' (February 2019) *Fair Trade Advocacy Office*, *Brussels*

footprint as the discussion in section 3 underscores can be and needs to be incorporated in the EU merger control framework. Considering the significance of 'sustainability-driven' approach to innovation and development for a sustainable future, this short note attempted to highlight how Raworth's doughnut can be a good benchmark if competition policy is assessed within the framework of the larger Treaty objectives. In other words, the Treaty principles should re-define the silhouettes of a reformed and more sustainable competition policy in general, and merger control framework in particular.

<http://www.responsibleglobalvaluechains.org/images/PDF/FTAO_-_EU_Competition_Law_and_Sustainability_in_Food_Systems_Addressing_the_Broken_Links_2019.pdf> accessed 08 June 2022.

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