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REVIEWS

BETWEEN INTERPRETATION AND APPLICATION OF EU LAW: CASE-TAILORED CJEU JUDGMENTS IN THE PRELIMINARY RULING PROCEDURE

JASPER KROMMENDIJK*

The division of roles between the CJEU and national courts in the preliminary ruling procedure is clearly defined, at least on paper. The CJEU interprets EU law and the referring national court applies this interpretation to the case pending before it. In the literature, there are often complaints that this is different in practice and that the CJEU all too often steps into the domain of the national judge by not limiting itself to only interpreting EU law but also applying the interpretation to the national legal or factual context. Too much case specificity may put the referring court in a difficult position, especially in cassation appeals when the facts have already been established. Little is known as to whether the CJEU adheres to the clear 'separation of functions'. This contribution analyses to what extent and why the CJEU abides by this division. It examines 55 judgments delivered during the period between 1 January 2020 and 22 March 2021 in response to questions from courts in five EU Member States (the Netherlands, Ireland, the Czech Republic, Sweden and Greece). This structured case law analysis aids the identification of factors that contribute to outcome-oriented judgments. The article also critically examines the approach of the CJEU from a normative perspective weighing the pros and cons.

1 INTRODUCTION

The division of the roles of the Court of Justice of the EU (CJEU) and national courts in the context of the preliminary ruling procedure is clearly delineated, at least on paper. The CJEU emphasizes that there is 'a clear separation of functions' and that it can only interpret EU law and not take cognizance of, or assess the facts of a case.[1] The latter remains the 'exclusive jurisdiction' of national courts.[2] In addition, the CJEU cannot rule on the validity of national laws in the light of EU law.[3] This separation is not contested as a matter of fundamental

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[1] National law is traditionally considered part of the facts of the case, rather than the law. Morten Broberg and Niels Fenger, *Preliminary References to the European Court of Justice* (3rd edn, Oxford University Press 2021) 122; Juliane Kokott, 'Fact and Law-Finding Issues in the Preliminary Ruling and Infringement Procedures before the ECJ in Tax Matters' (2019) 2(5) IBFD International Tax Studies 9*;* Case C-409/06 *Winner Wetten GmbH v Bürgemeisterin Bergheim* EU:C:2010:503 para 49; Case 6/64 *Costa v ENEL* EU:C:1964:66.

[2] Case 13/68 *SpA Salgoil v It. Ministry of Foreign Affairs* EU:C:1968:54; Joined Cases C-175/98 and C-177/98 *Lirussi* EU:C:1999:486 para 38.

[3] Broberg and Fenger, *Preliminary References* (n 1) 121-122.

constitutional principle.[4] The CJEU has also *de jure* stuck to this division and does not directly or explicitly determine the outcome of disputes before national courts.[5] Judicial practice of the CJEU does, however, not always match these constitutional parameters. While the CJEU does not make findings of fact as such, itoften renders quite case-tailored responses in which its guidance goes beyond mere interpretation of EU law, tending towards application of EU law to the case at hand. It thus frequently arrives at a conclusion on the basis of an application or weighing of the facts in the case at hand.[6] The CJEU sometimes supplements, or even corrects, the (referring court's understanding of the) facts.[7] In other cases, the CJEU is so directive that it leaves little room for a national court to make its own assessment and, hence, usurps the court's jurisdiction.[8] In *Josemans*, for example, the CJEU concluded that the so-called Maastricht weed pass, which prohibited admission of non-residents to coffee-shops, was justified and proportionate. The CJEU considered the measure appropriate, partly on the basis of factual information provided by the mayor of Maastricht at the hearing to illustrate the nuisance caused by drug tourism. On that basis, the CJEU concluded that 'it is indisputable' that the measure significantly curtails drug tourism.[9] One judge involved in the case criticised the factual CJEU's 'know-it-all' attitude that simply required the referring court to 'tick the box'.[10] Thus, this case reflects what Davies describes as a disruptive and controversial intervention by the CJEU in national legal orders with the application by the national court as a mere 'formality'.[11] The surprisingly honest observation from former CJEU judge Mancini indicates that these cases are not isolated exceptions. He noted that the use of the preliminary reference procedure has shifted from ensuring uniformity in the application of EU law to monitoring national laws for incompatibility with EU law.[12] In relation to such 'monitoring' judgments, he aptly stated: 'the national judge is thus led in hand as far as the door; crossing the threshold is his job, but now a job no harder than a child's play'.[13]

Too much involvement from Luxembourg by way of case-tailored judgments can put the referring court in a difficult position, especially at the cassation stage when the facts have

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[4] Gareth Davies, 'Activism Relocated. The Self-Restraint of the European Court of Justice in its National Context' (2012) 19(1) Journal of European Public Policy 76, 78; Gareth Davies, 'Abstractness and Concreteness in the Preliminary Reference Procedure: Implications for the Division of Powers and Effective Market Regulation' in Niamh Nic Shuibne (ed), *Regulating the Internal Market* (Edward Elgar Publishing 2006).
[5] The only exception is *Rimševičs* in which the Grand Chamber annulled the decision suspending the Governor of the Central Bank of Latvia from office. Case C-202/18 *Rimševičs v Latvia* EU:C:2019:299 paras 70-71.
[6] An insufficient description of the facts and (national) legal context in the order for reference can also be a reason for the CJEU to declare the request inadmissible. E.g., Joined Cases C-320/90, 321/90 and 322/90 *Telemarsicabruzzo v Circostel* EU:C:1993:26; Takis Tridimas, 'Constitutional Review of Member State Action: The Virtues and Vices of an Incomplete Jurisdiction' (2011) 9(3-4) International Journal of Constitutional Law 737, 741 and 755. See also e.g. Case C-258/15 *Sorondo v Academia Vasca de Policía y Emergencias* EU:C:2016:873 para 48.
[7] Broberg and Fenger, *Preliminary References* (n 1) 137.
[8] Davies, 'Abstractness and Concreteness' (n 4) 232.
[9] Case C-137/09 *Josemans v Burgemeester van Maastricht* EU:C:2010:774, para 75.
[10] Ibid; Jasper Krommendijk, National Courts and Preliminary References to the Court of Justice (Edward Elgar 2021), 128-129.
[11] Davies, 'Activism Relocated' (n 4) 79.
[12] Federico Mancini, *Democracy and constitutionalism in the European Union: Collected Essays* (Bloomsbury Academic 2000) 8.
[13] Federico Mancini, 'The Making of a Constitution for Europe' (1989) 26(4) Common Market Law Review 595.

already been established. This happened to the Dutch Supreme Court in *Ladbrokes* regarding the provision of games of chance via the internet. In its order for reference, the Supreme Court ruled that it has been established in cassation that betting activities are restricted in a coherent and systematic manner.[14] However, the CJEU ruled that this cannot simply be assumed and gave the Supreme Court a difficult task of establishing 'whether the development of the market for games of chance in the Netherlands is such as to demonstrate that the expansion of games of chance is being supervised effectively by the Netherlands authorities […]'.[15] The Supreme Court subtly overruled this by ruling that the CJEU judgment is strongly interwoven with factual assessments not open to review in cassation.[16] In *Scotch Whisky Association*, the CJEU suggested that the Scottish minimum pricing of alcohol is disproportionate. The referring court, however, disagreed and subsequently decided that the policy is proportionate.[17]

Despite these relatively high-profile cases, little is known about the way in which the CJEU actually approaches the 'separation of functions' it propagates.[18] The (older) literature contains several unsubstantiated claims that the CJEU often oversteps this separation.[19] Tridimas mentions the 'substantial' number of outcome cases on free movement and argues that deference cases 'are numerically fewer'.[20] Former Advocate General (AG) Jacobs held that the CJEU essentially resolves 'an extremely high proportion of cases'.[21] Rasmussen held in 2000 that the CJEU interweaves law and facts in such a way that there is little room for manoeuvre for the referring court in more than two thirds of cases, without, however, providing any evidence.[22] Nonetheless, beyond these uncorroborated assertions, there is a 'surprising absence of relevant scholarship', as Davies noted as well.[23] The only exception of a systematic study on the actual practice of the CJEU is Zglinski's analysis of preliminary references and infringement actions dealing with national restrictions in free movement cases in the period 1974-2013 with a specific focus on proportionality assessments.[24]

The gap in (empirical) research warrants the following research question as to how and when the CJEU renders case-tailored judgments in preliminary rulings in which it not only offers an abstract interpretation but applies this interpretation in the specific case (see Section 2 for a further explanation). This article is of academic relevance for three reasons. First, it fills an empirical gap by examining the actual practice of the CJEU on the basis of a structured case law analysis of preliminary references in all areas of EU law (how?). Second, this empirical analysis enables us to identify the factors that explain when the CJEU does

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[14] HR 13 June 2008 NL:HR:2008:BC8970 (*Ladbrokes v Sporttotalisator*) para 4.16.
[15] Case C-258/08 *Ladbrokes v Sporttotalisator* EU:C:2010:308 para 37.
[16] *Ladbrokes v Sporttotalisator* (n 14) para 2.9.4.
[17] Case C-333/14 *The Scotch Whisky Association v Lord Advocate for Scotland* EU:C:2015:845; *Scotch Whisky Association & Ors v The Lord Advocate & Anor* [2017] UKSC 76 para 63; Jurian Langer and Wolf Sauter, 'The Consistency Requirement in EU Law' (2018) 24 Columbia Journal of European Law 39, 70.
[18] Davies, 'Abstractness and Concreteness' (n 4) 215.
[19] Cf. Jan Zglinski, 'The Rise of Deference: The Margin of Appreciation and Decentralized Judicial Review in EU Free Movement Law' (2018) 55(5) Common Market Law Review 1341, 1370.
[20] Tridimas (n 6) 740 and 745.
[21] Francis Jacobs, 'The Effect of Preliminary Rulings in the National Legal Order' in Mads Andenas (ed), *Article 177 References to the European Court: Policy and Practice* (Butterworths 1994) 29.
[22] Hjalte Rasmussen, 'Remedying the Crumbling EC Judicial System' (2000) 37(5) Common Market Law Review 1071, 1101.
[23] Davies, 'Abstractness and Concreteness' (n 4) 211.
[24] Zglinski (n 19).

render case-tailored judgments and when it does not (when?). Third, this structured case law examination also provides a basis for an informed and balanced discussion of the (dis)advantages of case-tailored judgments that have only partly been identified in the literature to date.

The structure of this article is as follows. Section 2 presents the article's conceptual and methodological framework. Section 3 discusses several abstract CJEU judgments in which the CJEU only provides an (abstract) interpretation of EU law, while Section 4 provides a thematic discussion of a selection of noteworthy case-tailored judgments (how?). Both sections aim to identify reasons for the case-tailored approach of the CJEU (when?). Section 5 puts the structured case law analysis in a broader academic context and examines the desirability of case-tailored responses from a more normative perspective.

2 CONCEPTUAL AND METHODOLOGICAL FRAMEWORK

This article uses three conceptual categories (see Figure 1). The first category includes case-tailored judgments in which the CJEU's guidance goes beyond mere interpretation of EU law, tending towards application of EU law to the case at hand (category 1). Such case-tailored judgments contain a 'ready-made solution to the dispute', leaving a limited margin for manoeuvre for the national court, if at all.[25] The third category at the other end of the spectrum consists of cases in which the CJEU limits itself to an abstract interpretation of EU law.[26] Note that this binary division is at times rather unsatisfactory. It is often difficult for courts to clearly differentiate between application and interpretation, just as it is difficult for a researcher to make this classification.[27] AG Ruiz-Jarabo Colomer stated: 'there is a very fine distinction between interpretation and application, because it is difficult to interpret a rule without applying it or to apply it without interpreting it'.[28] What is more, CJEU judgments addressing multiple questions can contain elements of both abstract interpretation and case-tailored application.[29] For this reason an intermediate category (2) is introduced for cases that contain both elements or that are difficult to categorize.[30]

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[25] This definition reflects to a certain extent what Tridimas calls 'outcome cases'. The notion of 'case-tailored' was chosen, because an abstract interpretation can also amount to an outcome case. Tridimas (n 6) 739.

[26] One might also wonder whether 'pure' abstract cases are even possible. Note that abstract cases can also leave no or a limited margin to the referring court. Tridimas (n 6) 739; Jeffrey Cohen, 'The European Preliminary Reference and U.S. Supreme Court Review of State Court Judgments: A Study in Comparative Judicial Federalism' (1996) 44(3) The American Journal of Comparative Law 421.

[27] One could argue that it is nearly impossible for a court to deliver a judgment without considering the facts. In the US, the expression 'mixed questions of law and fact' is used. Kokott (n 1); Lord Reed, 'EU Law of the Supreme Court (The Sir Thomas More Lecture for 2014)' (12 Nov 2014) <www.supremecourt.uk/docs/speech-141114.pdf> accessed 1 October 2023; Factual and contextual 'stories' are simply essential to courts; cf. Fernanda Nicola and Bill Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017).

[28] Opinion of AG Ruiz-Jarabo Colomer in Case C-30/02 *Recheio – Cash & Carry* EU:C:2004:373 point 35.

[29] Tridimas (n 6) 740.

[30] This category does not entirely reflect what Tridimas terms 'guidance cases'. Guidance can be abstract or concrete, thereby it was decided not to use this term. This category is especially for cases in which one can argue whether the CJEU's assessment of the facts in the light of the law ('qualification' of the facts) belongs to interpretation or can already be seen as application, especially when the subsequent application by the national court is merely mechanical. Davies, 'Abstractness and Concreteness' (n 4) 216; cf. Broberg and Fenger, *Preliminary References* (n 1) 138.

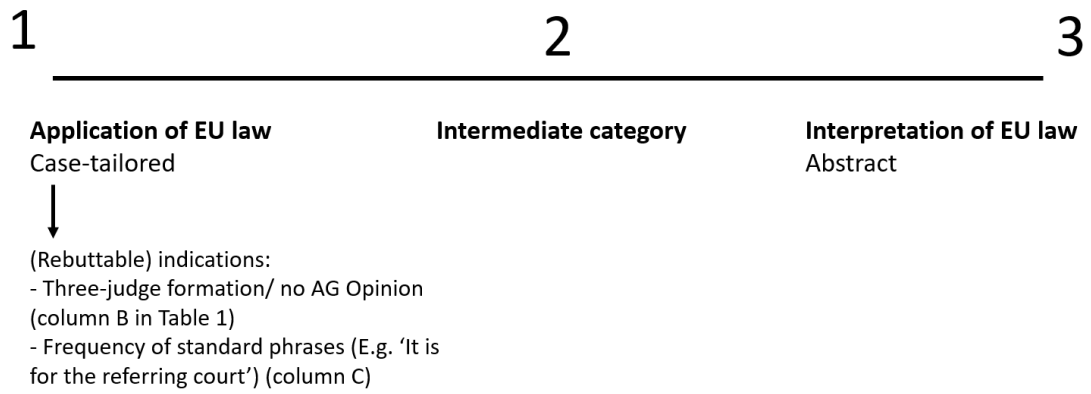

Figure 1: The interpretation/ application continuum

To answer the research question, 'mundane rulings in diverse policy areas' (not only high-profile judgments or free movement cases) were included in the analysis.[31] All CJEU judgments rendered in the period between 1 January 2020 and 22 March 2021 were examined. Different Member States were selected to obtain a relatively representative picture, where judgments from a common law jurisdiction country (Ireland) and four different civil law countries, namely a Central European state that acceded relatively recently in 2004 (the Czech Republic), a Nordic country (Sweden), a Southern European country (Greece) and a North-western European country (the Netherlands) were subject to scrutiny.[32] The search resulted in a total of 55 CJEU judgments (see Appendix 1 for Table 1 with the overview of cases).[33]

In order to classify the CJEU judgments two methodological approaches were taken. First, judgments have been 'categorised' in relation to two aspects: the handling of the case (see column B in Table 1) and the frequency of standard phrases (see column C in Table 1). Several standard phrases used by the CJEU were taken as an indication of a more case-tailored judgment.[34] These include such expressions as 'It is for the referring court to ascertain…' and 'Subject to the verification(s)…'. As will be discussed in Section 4, such phrases seem to imply - at least in theory - a certain margin of manoeuvre for the referring court, but in fact they give little leeway as to the application of the findings to the particular case at hand. Other phrases such as 'In the present case/instance…' and 'According to the referring court…' are treated as mere indications for a case-tailored answer, requiring a more comprehensive careful analysis of the entire judgment. In addition, the way in which the

[31] Davies, 'Abstractness and Concreteness' (n 4) 211-212.
[32] For feasibility reasons, Member States with a high absolute number of references were deliberately not included. E.g., Germany (125 references), Italy (59) and Spain (57).
[33] This time period does not preclude an analysis of other relevant judgments falling outside the defined parameters of the case study sample. Two cases were found in which the referring court had withdrawn the questions, namely Case C-133/20 *European Pallet Association v PHZ* EU:C:2020:557; Case C-512/20 *Alpes Provence v ECB* EU:C:2021:101.
[34] Cf. the approach of Daniel Sarmiento relying on the 'complex use of both language and silence'. Daniel Sarmiento, 'The Silent Lamb and the Deaf Wolves' in Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Bloomsbury Publishing 2012); Davies also discussed particular 'techniques' used by the CJEU. Davies, 'Abstractness and Concreteness' (n 4) 222.

CJEU handled a case also constitutes a useful indication. A judgment rendered by a three-judge formation without an AG Opinion suggests that the questions did not raise novel or difficult points related to the interpretation of EU law.[35] Instead, such cases tend to involve questions concerning the application of previous case law to a slightly different factual or legal constellation. Note, however, that this aspect is - just as the presence of standard phrases - merely treated as an indication. Not all CJEU judgments rendered in a three-judge formation without AG Opinion are necessarily case-tailored.

The categorisation is obviously not sufficient in itself, as mentioned before.[36] An in-depth and close analysis of judgments, in conjunction with Opinions of AGs, is thus essential. Case comments and articles in academic and legal professional journals were consulted, if available, to facilitate this analysis and the categorization of the CJEU judgments. When possible and available, the implementing or follow-up judgment of the referring court was analysed as well with the view of identifying the referring court's appreciation of the response of the CJEU. A short or oral follow-up judgment was also considered to be an indication that the CJEU rendered a case-tailored judgment, settling the dispute easily.

3 ABSTRACT INTERPRETATION

25 of 55 judgments belong to the category of abstract cases, as Table 1 also shows. Interestingly, there are notable differences between the five studied EU Member States. In the cases of both the Netherlands and Ireland, the majority of referred cases resulted in abstract guidance (5 out of 9 and 14 out of 26, respectively), whereas fewer abstract cases were rendered in Czech and Swedish cases (2 out of 8 and 4 out of 11, respectively). It seems that there is a correlation between case-tailored judgments and 'easy' legal questions that are decided in a three-judge formation without an AG Opinion. In the case of Ireland, only 1 out of 9 cases was dealt with in the latter way, and, in the case of the Netherlands, it was 9 out of 26, whereas this occurred in 4 out of 8 Czech cases and 6 out of 11 Swedish cases. This section discusses the legal areas (Section 3.1) and the type of questions (Section 3.2) with which the CJEU is more likely to adhere to abstract interpretation.

3.1 SUBJECT MATTER AND LEGAL AREA

It is perhaps not surprising that the CJEU remains at an abstract level and does not engage with the substance of the criminal proceedings before the referring courts since this very much involves matters of weighing of (factual) evidence.[37] In two cases concerning European

[35] E.g. Article 20 of the Statute of the CJEU.
[36] Table 1 suggests that the frequency of standard phrases *alone* is not indicative at all. The same is true of the handling of the case. Nonetheless, a combination of the two types of indicators gives a slightly different picture: in 20 of the 25 category 3 judgments no or only a very limited number of indicators was present. The five exceptions are: Case C-446/18 *Agrobet CZ* EU:C:2020:369; Case C-363/19 *Konsumentombudsmannen* EU:C:2020:693; Case C-330/19 *Exter BV v Staatssecretaris van Financiën* EU:C:2020:809; Joined Cases C-229/19 and 289/19 *Dexia Nederland BV* EU:C:2021:68; and Case C-814/18 *Ursa Major Services* EU:C:2020:27.
[37] Such criminal cases are also different from tax and VAT cases discussed in Section 4.1, especially considering the fundamental rights of suspects right to fair hearing, including *audi alteram partem.*

arrest warrants (EAWs), the CJEU remained at an abstract level.[38] In *L and P*, the Amsterdam District Court determined that the deterioration of the rule of law in Poland is so serious that no suspect is guaranteed a right to a fair trial and an independent judge.[39] The Court asked the CJEU whether Article 47 of the Charter and Article 19 TEU preclude a surrender of *all* suspects. However, the CJEU ruled that, even if there are structural or fundamental deficiencies, a concrete and precise verification, that takes into consideration the personal situation of that person, the nature of the offense and the actual context, is still required. The CJEU did not discuss the facts and the situation of L and P at all. The CJEU provided a similar abstract interpretation of EU law in a case concerning the return of a convicted person to the executing Member State after a final criminal sentence.[40] The CJEU also adhered to its legal task in an Irish EAW case related to the grounds for the refusal to execute an EAW for offences committed in third states.[41] In the migration law area, the CJEU for example answered *in abstracto* a highly specific and peculiar legal question regarding the rules on admissibility in the previously applicable Procedures Directive 2005/85,[42] as well as questions about access to the labour market of so-called Dublin claimants in the light of the Reception Conditions Directive 2013/33/EU.[43]

3.2 THE NATURE OF THE QUESTIONS

The possibility of an abstract judgment is higher when questions concern regulations, the validity of EU law or constitutional principles of EU law. When the CJEU is asked to interpret a specific provision for the first time an abstract response is more likely as well. For instance, a request for a preliminary ruling from a Swedish court regarding Article 16(6) of Regulation 714/2009 on conditions for access to the network for cross-border exchanges of electricity and the concept of cross-border interconnection constitutes an example where such an approach is used.[44] Another example is a Swedish case regarding a provision in the Code about the extinction of a customs debt.[45]

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[38] Cf. the conclusion of Martufi that the CJEU has tried to mitigate the impact of Article 47 of the Charter on national procedural autonomy. Adriano Martufi, 'Effective Judicial Protection and the European Arrest Warrant: Navigating between Procedural Autonomy and Mutual Trust' (2022) 59(5) Common Market Law Review 1371.
[39] Joined Cases C-354/20 PPU and 412/20 PPU *L & P* EU:C:2020:1033.
[40] Case C -314/18 *SF* EU:C:2020:191.
[41] The CJEU, nonetheless, made a factual determination on a minor point that was not addressed by the referring court. In its request, the Irish High Court mentioned an optional ground for non-execution of an EAW in Article 4(1) that relates to double criminality/correspondence of offences. The CJEU, following AG Kokott's Opinion, ruled that this ground 'cannot apply in the circumstances of the main proceedings' and referred to 'the description of the facts'. It also determined that 'it appears that the acts committed by JR are punishable in Lithuania and Norway by a custodial sentence for a maximum period of at least three years'. This factual engagement played no role before the referring High Court in its follow-up judgment. *Minister for Justice and Equality v Gustas* [2019] IEHC 558; Case C-488/19 *JR* EU:C:2021:206; *Minister for Justice & Equality v Gustas (Approved)* [2021] IEHC 572.
[42] Those legal-technical questions stemmed from the Irish opt-out of the new Procedures Directive 2013/32/EU; Case C-616/19 *M.S. v Minister for Justice and Equality* EU:C:2020:1010.
[43] The CJEU was asked to choose between two competing interpretations of EU law existing in Irish legal practice. Joined Cases C-322/19 and 385/19 *KS v The International Protection Appeals Tribunal* EU:C:2021:11; Liam Thornton, 'Clashing Interpretations of EU Rights in Domestic Courts' (2020) 26(2) European Public Law 243.
[44] Case C-454/18 *Baltic Cable AB v Energimarknadsinspektionen* EU:C:2020:189.
[45] Yassine El Bojaddaini, 'Combinova. Custom debt. Use of Good Concerns only Use beyond Processing Operations. Court of Justice' (2021) H&I 193 (case note). The judgment, however, contains a reference to the

3.2[a] Interpretation of regulations

The majority of cases in which questions were raised regarding the interpretation of regulations resulted in abstract answers (13 of 21). In contrast, only 10 of 26 cases dealing with directives resulted in abstract answers. It is not surprising that the CJEU is better equipped to refrain from a case-tailored response geared towards the national dispute when interpretating regulations.[46] Nonetheless, questions regarding the interpretation of regulations are not by definition abstract.[47] Regulations are directly applicable in every Member State and do not have to be transposed into national law.[48] Transposition is not even allowed. This differs for directives. Directives have to be transposed into national law. This also means that, when preliminary questions are asked regarding the interpretation of directives, a significant amount of national law inevitably comes into play, especially when questions essentially relate to whether the implementation of specific legislation conflicts with EU law (Section 4.2[a]).[49]

The national legal and factual context is particularly irrelevant in relation to regulations in areas where the EU has exclusive competence, such as the customs union with its external customs tariffs, at least, when these are no classification-related questions (see Section 4.1[a] for such case-tailored classification cases). For example, *X BV* concerned the regulation on import duties in the poultry and eggs sectors and the Community Customs Code.[50] A question was also asked in *Exter BV* about this Code and the application of a preferential tariff measure.[51] *De Ruiter* focused on (implementing) regulations on the common agricultural policy and reductions in direct payments due to non-compliance with the specific requirements.[52]

3.2[b] Validity of EU law

The CJEU also by and large adheres to the division in handling questions about the validity of EU law. Certainly, in relation to validity questions, it is obvious that the CJEU restricts itself to an interpretation of EU law. In *Donex Shipping,* the CJEU limited itself to answering abstract questions about the validity of the regulation that imposes a definitive anti-dumping

factual situation in its operational part; Case C-476/19 *Allmänna ombudet hos Tullverket v Combinova* EU:C:2020:802 para 25.

[46] The CJEU, for example, provided a mere legal interpretation in response to a question about the rules of jurisdiction applicable to consumer contracts in the context of claims for compensation from airlines for delays on the basis of the Flight Compensation Regulation 261/2004. Case C-215/18 *Libuše Králová v Primera Air Scandinavia* EU:C:2020:235, para 46.

[47] The CJEU, for example, held in relation to Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters that 'an action of that type' in the case at hand is not a 'civil and commercial matter (*acta iure gestionis*). It determined that the action does not fall within the scope of the Regulation because it did not involve an exercise of public powers (*acta iure imperii)*. Case C-186/19 *Supreme Site Services v Supreme Headquarters Allied Powers Europe* EU:C:2020:638 para. 68.

[48] See also Article 288 TFEU.

[49] E.g. Case C-806/18 *JZ* EU:C:2020:724.

[50] Case C-160/18 *X BV v Staatssecretaris van Financiën* EU:C:2020:190.

[51] Case C-330/19 *Exter BV* (n 36).

[52] Case C-361/19 *De Ruiter vof v Minister van Landbouw, Natuur en Voedselkwaliteit* EU:C:2021:71.

duty on certain iron or steel fasteners that originate from China.[53] In *Facebook Ireland and Schrems,* the validity of the EU-US Privacy Shield took centre stage.[54]

3.2[c] Constitutional classics of EU law

Another type of questions that tends to result in abstract judgments relates to important constitutional doctrines or principles of EU law, such as direct effect and primacy of EU law. One Irish example deals with the (legal) possibilities for national courts to refuse to declare that a directive relating to veterinary medicinal products has not been correctly transposed, because the package leaflet was only in the English and not in the Irish language. AG Bobek noted that this case contained the 'genuine EU law constitutional polyphony: direct effect, primacy, procedural autonomy, effective judicial protection, the overall effectiveness of national enforcement of EU law'.[55] The CJEU refrained from the (factual) argument of the Irish government to justify non-transposition of the directive in a remarkably short judgment consisting of merely 10 substantive paragraphs.[56] In his elaborate and more detailed Opinion, AG Bobek went considerably further than the CJEU, engaging substantively with the 'case at hand' and 'exceptional circumstances' that justify non-transposition.[57]

4 BEYOND ABSTRACT INTERPRETATION: CASE-TAILORED JUDGMENTS

During the period under investigation, 30 cases emerged in which the CJEU went beyond merely providing an explanation of EU law. 15 judgments are in category 1 and include answers that essentially settle the disputes. 15 judgments belong to the intermediate category 2. This section discusses particular subject matters and legal areas (case-tailored tariff classification, VAT deductions and copyright and trademark cases) that are prone to a case-tailored response (Section 4.1). It subsequently focuses on the nature of questions (case-tailored) that frequently leads to case-tailored judgments, such as questions about the conformity of national law with EU law and proportionality (Section 4.2). The last subsection analyses how national courts can prompt the CJEU to give case-tailored answers (Section 4.3).

4.1 SUBJECT MATTER AND LEGAL AREA

4.1[a] Customs tariff and VAT classifications

Questions relating to the level of VAT or level of customs tariffs are almost by definition factual in nature.[58] According to Davies, these cases are the 'most spectacular example of

[53] Case C-104/19 *Donex Shipping and Forwarding BV v Staatssecretaris van Financiën* EU:C:2020:539 para 71.
[54] Case C-311/18 *Data Protection Commission v Facebook Ireland Ltd and Maximillian Schrems* EU:C:2020:559.
[55] Opinion of AG Bobek in Case C-64/20 *UH v An tAire Talmhaíochta Bia agus Mara* EU:C:2021:14 point 1.
[56] Case C-64/20 *UH v An tAire Talmhaíochta Bia agus Mara* EU:C:2021:207.
[57] Opinion of AG Bobek in Case C-64/20 *UH* (n 56) points 91-98.
[58] Cf. in relation to VAT, Opinion of AG Kokott in Case C-115/16 *N Luxembourg 1 v Skatteministeriet* EU:C:2019:134 point 106.

Court's specificity'.[59] One of them is, for example, a request for a preliminary ruling from the Netherlands, *Rensen Shipbuilding,* which involved a question of whether imported ship hulls are destined for inland shipping or sea shipping and, hence, which import duties had to be paid.[60] Interestingly, the CJEU gave the referring court a slap on the wrist by pointing out that there is a lack of factual information in the order for reference. However, this did not prevent the CJEU from delving into the case. The CJEU concluded that the imported hulls are not suitable for seafaring ships when they are fully loaded and in adverse weather conditions. The CJEU also based its conclusions on submitted expert statements, which held that ships with dimensions such as those in question would only be able to sail within approximately 21 nautical miles from the coast in adverse weather conditions.[61] On this basis, the CJEU concluded that these ships cannot be regarded as ships designed and built for navigation on the high seas.[62] This practically settled the dispute in the national proceedings.

The CJEU also went quite far in a case referred by the Dutch Supreme Court regarding the application of a reduced VAT rate for aphrodisiac capsules and drops that are taken orally and sold in erotica shops. The CJEU ruled that a product that contains no or a negligible amount of nutrients cannot be classified as food, and, thus, concluded that 'although it would appear from the information before the Court that that is the case in so far as concerns the aphrodisiacs at issue in the main proceedings, that is a matter for the referring court to ascertain'.[63] It is for a good reason that this CJEU judgment was described in the literature as a 'no-brainer' for the Supreme Court, as it had no choice but to merely repeat the CJEU judgment.[64] Likewise, a Czech court asked a highly specific question about the classification of 'the product known as 'Bob Martin Clear 50 mg spot-on solution for cats'. The Czech court mentioned two possibilities, namely heading 3004 or heading 3808. In a three-judge formation, the CJEU opted for the latter, 'subject to the assessment by the referring court of all the facts at its disposal'.[65]

It is noteworthy that the CJEU attempts to obfuscate the factual nature of classification cases by consistently repeating the mantra that 'its task is to provide the national court with guidance on the criteria which will enable the latter to classify the relevant products correctly in the Combined Nomenclatura, rather than to effect that classification itself'.[66] This creates the impression that there is still room for manoeuvre by including the usual caveats. It is, nonetheless, evident that the CJEU *de facto* carries out the classification. Cohen aptly stated that 'To say that the Court merely interpreted but did not apply the relevant provisions of Community law is to indulge what can only be described as disingenuous formalism or a formalist fiction'.[67]

[59] Davies, 'Abstractness and Concreteness' (n 4) 225.
[60] Case C-192/19 *Rensen Shipbuilding v Inspecteur van de Belastingdienst Rotterdam* EU:C:2020:194.
[61] ibid para 26.
[62] ibid para 37.
[63] Case C-331/19 *Staatssecretaris van Financiën v X* EU:C:2020:786 para 37.
[64] Bart van Osch, 'Alles wat Eetbaar is, is Niet Altijd Eten voor de Btw' (2021) 19 BtwBrief 12.
[65] Case C-941/19 *Samohýl group v Generální ředitelství cel* EU:C:2021:192.
[66] ibid para 28.
[67] Cohen (n 26) 430-431.

4.1[b] VAT deduction

The CJEU also adopted a case-tailored approach in two cases dealing with VAT deduction (the right to recover VAT on costs incurred). This is evidenced by a Swedish case that was decided by a three-judge formation without an AG Opinion. The case-tailored nature is not inconceivable because the referring court essentially asked whether the CJEU's approach in a previous case (*Pactor Vastgoed*) is applicable to a specific Swedish situation.[68] The CJEU ruled quite specifically ('subject to verification by the national court') that the purchaser of immovable property is not entitled to deduct VAT when the seller has already done so.[69]

The CJEU adopted a similar approach in the VAT case *Stichting Schoonzicht.*[70] This case concerned a dispute between a foundation and tax authorities about the revision of VAT deduction because the foundation had changed its plans for the use of the apartment complex. In its judgment, the CJEU delved into the facts and concluded ('in the present case...') on the basis of the order for reference that the foundation had built an apartment complex consisting of seven apartments and that it had deducted the VAT on the costs of the construction of this complex. After completion, the foundation rented out four of these apartments, exempt from VAT. This means that the deduction of VAT incurred was higher than otherwise allowed. Based on this conclusion, the tax authorities were within their rights to demand a revision of the deduction, according to the CJEU.[71] The CJEU compared the Dutch rules with those in a Polish case where the 'legal and factual context [was] different'.[72] The CJEU ruled that the VAT Directive does not preclude the Dutch capital goods adjustment scheme. This case-tailored response caused some problems for the referring Dutch Supreme Court, because the CJEU construed the implications of the legislative amendment incorrectly when presenting the facts by equating appropriation for taxable purposes with exempt rental. The CJEU created the impression that the foundation's intention towards the use of the property had changed rather than that there had been an amendment of the law.[73] This incorrect case-tailored response can be partly attributed to the order for reference that did not state the facts fully.[74] The Supreme Court is thus also to blame for having failed to clearly outline the implications of the amendment of the Dutch law. The CJEU's misunderstanding eventually had no effect on the settlement of the dispute. The Supreme Court dismissed the appeal in cassation and ruled that the CJEU judgment is correct, irrespective of the reasoning used by the CJEU.[75]

4.1[c] Comparability analysis and different treatment in tax cases

The CJEU has also opted for a case-tailored approach in tax law cases involving a so-called comparability analysis. The CJEU examines the comparability of a cross-border situation

[68] Case C-622/11 *Pactor Vastgoed* ECLIEU:C:2013:649; Case C-787/18 *Skatteverket v Sögård Fastigheter AB* EU:C:2020:964 para 32.
[69] Case C-787/18 *Sögård Fastigheter AB* (n 68) paras 61 and 69.
[70] Case C-791/18 *Stichting Schoonzicht v Staatssecretaris van Financiën* EU:C:2020:731.
[71] ibid paras 34-36.
[72] Case C-500/13 *Gmina Międzyzdroje v Minister Finansów* EU:C:2014:1750 paras 54-55.
[73] The (taxed) integration levy had expired months before the commissioning as a result of this amendment to the law. Case C-791/18 *Stichting Schoonzicht* (n 70) paras 15-16.
[74] J. Sanders and T.D.J. Korevaar, 'Schone Schijn in de Zaak Schoonzicht?' (2021) 33 BtwBrief 8.
[75] HR 27 November 2020 NL:HR:2020:1884 para 2.2.

with an internal situation in relation to the purpose of the national provisions. The rationale is to prevent a difference in the tax treatment of a company in a Member State (that benefits from certain tax advantages) and another company incorporated in another Member State (that is excluded from the same advantages), which dissuades companies from using their freedom of establishment.

In a Czech tax law case, *Aures,* the Supreme Administrative Court asked whether freedom of establishment permits a taxpayer, when relocating a company's head office, to claim a tax loss incurred in the host state in previous years in another Member State. After examining the Czech legislation and 'the chronology of the relevant facts of the case', the CJEU concluded that companies were *not* in a comparable situation.[76] Mittendorfer and Riedl questioned the CJEU's engagement with Czech law from the perspective of role division and Article 19 TEU. They noted that the CJEU needs detailed knowledge of the objective of national norms, which is sometimes absent, causing the CJEU to render inaccurate judgments.[77] The CJEU also employed a comparability analysis in a different tax context, namely the deduction of interest. In *Lexel AB,* the Swedish Supreme Administrative Court approached the CJEU regarding Swedish legislation that does not permit a company in a group of associated companies to deduct interest expenses in relation to a debt owed to another associated company. As also noted by the CJEU, the referring court essentially asked whether Swedish legislation restricts the freedom of establishment, contrary to Article 49 TFEU. The judgment constitutes eleven paragraphs, with details of the Swedish legislative framework on interest deductibility rules. The CJEU concluded, without an AG Opinion, that there is a difference in treatment that cannot be justified on the basis of the fight against tax evasion and tax avoidance or balanced allocation of the power to impose taxes.[78] This relatively strong conclusion can be attributed to the submissions of the Swedish tax agency during the hearing. These submissions differed from the agency's position, outlined in the order for reference.[79] As the CJEU noted, it was discovered at the hearing that the objective was not merely to counter purely artificial and fictitious arrangements, but also debts resulting from transactions.[80]

It is for this reason that the CJEU has — with reference to the institutional framework of Article 267 TFEU — deliberately left the determination of objectives of the national legislation to the referring court in other cases.[81] One example found in our selection is *Köln-Aktienfonds Deka,* referred by the Dutch Supreme Court.[82] The Dutch court asked about the

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[76] Case C-405/18 *Aures v Odvolací finanční ředitelství* EU:C:2020:127 paras 38 and 49.
[77] Markus Mittendorfer and Mario Riedl, 'The Comparability Analysis of the Court of Justice of the European Union in the Light of the *Aures* Case' (2021) 30(4) EC Tax Review 166, 171.
[78] Case C-484/19 *Lexel AB v Skatteverket* EU:C:2021:34 paras 41, 57, 70 and 77.
[79] Alexander Tale, 'Targeted Interest Deduction Limitation Rules post-Lexel' (HARN60 Master Thesis 2020) <https://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=9087799&fileOId=9087804> accessed 1 October 2023, referring to Coen Deij, 'Är Undantaget Från Tioprocentsregeln Förenligt med EU-rätten?' (2021) 2 Svensk Skattetidning 75. Note that the general conclusion of the CJEU in para 56 led to criticism in the literature for its considerable consequences: João Nogueira, 'Opinion Statement CJEU-TF 1/2021 on the CJEU Decision of 20 January 2021 in Lexel AB (Case C-484/19) concerning the Application of the Swedish Interest Deductibility Rules' (2021) 61 European Taxation Journal; the Dutch Supreme Court asked follow-up questions. HR 2 September 2022 NL:HR:2022:1121.
[80] See also Case C-484/19 *Lexel AB* (n 78) para 53.
[81] Case C-419/16 *Federspiel v Bolzano* EU:C:2017:456; Case C-347/09 *Dickinger v Ömer* EU:C:2011:582 para 51.
[82] Case C-156/17 *Köln-Aktienfonds Deka v Staatssecretaris van Financiën* EU:C:2020:51; Rita Szudoczky and Balázs Károlyi, 'The CJEU's Approach to the Objectives of Progressive Turnover-Based Taxes: Respect for

compatibility of Dutch legislation precluding the refund of withheld dividend tax for non-resident investment funds when they do not meet certain shareholder requirements. The CJEU ruled that these requirements are in principle not prohibited by EU law because evidentiary requirements 'also appear to be imposed' on resident investment funds, which the referring court still had to verify.[83] However, the CJEU did indeed find the obligation to redistribute the accruing profits problematic, although subject to the usual disclaimer:

> In the present case, it is for the referring court, which has sole jurisdiction to interpret national law, taking account of all the elements of the tax legislation at issue in the main proceedings and the national tax system as a whole, to determine the main objective underlying the condition for redistribution of profits.[84]

The CJEU subsequently provided the referring Supreme Court with some guidelines that mention two possible legitimate objectives to justify the restriction. It therefore provided some reflection on the present case,[85] but left the assessment and application to the Supreme Court.[86]

The difference between *Aures/Lexel* and *Köln-Aktienfonds Deka* illustrates the inconsistent approach of the CJEU in the application of the comparability test.[87] It is not surprising that AG Kokott even recommended abandoning the test altogether because of its vagueness and because 'all situations are comparable in some respect, even if they are not identical'.[88]

4.1[d] Copyright and trademark cases

Copyright cases are also prone to a case-tailored approach. On the basis of the Copyright Directive 2001/29/EC, authors have the exclusive right to authorize or prohibit any communication of their works to the public. There has been burgeoning case law on what exactly constitutes a 'communication to the public' in the sense of Article 3 of the Directive. AG Szpunar rightly observed that 'few questions in EU law have given rise to as many rulings of the Court in so little time […] Such extensive, albeit necessarily disparate, case-law has even been dubbed a "labyrinth" and the Court itself as "Theseus"'.[89] The case law analysis

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the Member States' Fiscal Sovereignty or Authorization for Circumventing EU Law?' (2022) 50(1) Intertax 82, 85.

[83] Case C-156/17 *Köln-Aktienfonds Deka* (n 82) para 66.

[84] ibid para 79.

[85] According to De Wilde the CJEU even exceeded its jurisdiction with its tentative conclusion that there was a restriction in the case at hand and the identification of two possible justifications. Maaren de Wilde, 'Als Dispariteiten "Voorwaardelijk Belemmerende Zonderonderscheidmaatregelen" worden…' [2020] Nederlands Tijdschrift voor Fiscaal Recht 1.

[86] The CJEU judgment is a good example of a guidance case belonging to category 2. An indication for this is that PG Wattel adopted his fifth (!) conclusion in this high-profile case. Conclusion in HR 16 April 2021 NL:PHR:2020:531. In addition, the literature criticized the CJEU for not serving 'clear wine'. Vakstudie Nieuws (V-N) 2020/9.10.

[87] Hein Vermeulen and Vassilis Dafnomilis, 'CJEU Decision in Bevola (Case C-650/16): A Missing Piece in the Marks & Spencer (Case C-446/03) Puzzle' (2019) 59 European Taxation 89; Peter Wattel, 'Non-Discrimination à la Cour: The CJEU's (Lack of) Comparability Analysis in Direct Tax Cases' (2015) 55 European Taxation 542.

[88] Opinion of AG Kokott in Case C-405/18 *Aures v Odvolací finanční ředitelství* EU:C:2019:879 point 30.

[89] Opinion of AG Szpunar in Case C-753/18 *Stim and SAMI* EU:C:2020:4; more than 20 judgments and orders have been rendered since Case C-89/04 *Mediakabel* EU:C:2005:348; Birgit Clark and Julia Dickenson,

in the chosen sample includes two Swedish cases. Szkalej referred to 'banal and perhaps annoying factual circumstances' in these cases.[90] In *BY,* the CJEU needed only fifteen paragraphs to determine that transmission of a protected work - a photograph - to a court by electronic means as evidence does not constitute a 'communication to the public'.[91] In *Stim and SAMI,* the CJEU needed only fourteen paragraphs to reach the same conclusion for the hiring of motor vehicles equipped with a radio. Only four paragraphs engage directly with the specific context, while the remainder are essentially a repetition of earlier case law.[92] The brevity of the CJEU's analysis and the absence of an AG Opinion suggests that the case did not involve novel questions of EU law, but rather questions concerning the application of a previous interpretation to a different case.

A similar case-tailored tendency occurs in trademark cases. In a Swedish trademark case, the CJEU went beyond merely providing an abstract interpretation. It could have simply determined that 'it will be for the referring court to determine, in the context of its overall analysis by reference to the actual situation in the case, whether the systematically arranged colour combinations, as shown in the applications for registration, are capable of conferring an inherent distinctive character on the signs in question'.[93] Nonetheless, in the subsequent paragraphs, the CJEU hinted that the marks are 'not indissociable'.[94]

4.2 THE NATURE OF THE QUESTIONS

Except for specific subjects and areas of law, certain types of questions are susceptible to a case-tailored answer from the CJEU. Questions about the compatibility of national law often lead to an interpretation of EU law that practically settles the matter (Section 4.2[a]). While questions about proportionality traditionally belong to the domain of national judges, some cases discussed in this section show that this has not always been the case (Section 4.2[b]).

4.2[a] Conformity of national law with EU law

It is perhaps not surprising that the CJEU goes beyond an abstract interpretation of EU law in cases related to the conformity of national law with EU law.[95] Zglinski concluded that the

'Theseus and the Labyrinth? An Overview of "Communication to the Public" under EU Copyright Law: after Reha Training and GS Media Where are We Now and Where do We Go from There?' (2017) 5 European Intellectual Property Review 265.

[90] Kacper Szkalej, 'Looking for the Edge of Article 3 InfoSoc Directive and Finding it Twice – in a Car and in the Court' (*Kluwer Copyright Blog*, 25 November 2020) <http://copyrightblog.kluweriplaw.com/2020/11/25/looking-for-the-edge-of-article-3-infosoc-directive-and-finding-it-twice-in-a-car-and-in-the-court/> accessed 1 October 2023.

[91] This case also dealt with a more principled legal question that involved the balance of copyrights with the right to an effective remedy. Case C-637/19 *BY v CX* EU:C:2020:863.

[92] Case C-753/18 *Stim v Fleetmanager Sweden* EU:C:2020:268, paras 32-35.

[93] Case C-456/19 *Aktiebolaget Östgötatrafiken* ECLI :EU:C:2020:813 para 37; cf. Davies, 'Abstractness and Concreteness' (n 4) 222.

[94] Case C-456/19 *Aktiebolaget Östgötatrafiken* (n 93) para 43; Lavinia Brancusi, 'The Procrustean Fitting of Trade Marks under the Requirements of Clear and Precise Subject-Matter in the EU Trade Mark Law — A Case of Position Marks' (2022) 25(1) The Journal of World Intellectual Property 45, 62-63.

[95] It is for this reason that the preliminary reference procedure has been called 'citizens' infringement procedure'. Bruno de Witte, 'The Impact of *Van Gend en Loos* on Judicial Protection at European and National Level: Three Types of Preliminary Questions' in Antonio Tizzano et al (eds), *50th Anniversary of the Judgment Van Gend en Loos: 1963-2013* (Office des publications de l'Union européenne 2013) 93, 95; Pierre Pescatore, 'Van Gend en Loos, 3 February 1963 – A View from Within' in Miguel Poiares Maduro and Loïc

CJEU went beyond just interpreting EU law in no fewer than 117 of the 160 referred cases dealing with national restrictions of free movement.[96] The CJEU famously determined in *Placanica* that,

> although the Court cannot answer that question in the terms in which it is framed, there is nothing to prevent it from giving an answer of use to the national court by providing the latter with the guidance as to the interpretation of Community law necessary to enable that court to rule on the compatibility of those national rules with Community law.[97]

In *Varkens in Nood*, the CJEU ruled that access to justice in environmental matters covered by the Aarhus Convention should not be made conditional on prior participation in the authorization procedure for the extension and modification of a pigpen. However, the CJEU went beyond just providing an explanation. In fairly explicit terms, it commented on the compatibility of Article 6:13 of the Dutch General Administrative Law Act with Article 9(2) and (3) of the Aarhus Convention.[98] The CJEU stated that

> it follows, subject to findings of fact to be made by the referring court, that a person such as LB, who is not part of the 'public concerned' within the meaning of the Aarhus Convention, cannot rely on an infringement of Article 9(2) of that convention on the ground that she does not have access to justice in the main proceedings.[99]

The CJEU offered more leeway to the national court with respect to Article 9(3), although it did not give *carte blanche* as to the application of its interpretation. It considered that the limitation of the right to an effective remedy within the meaning of Article 47 of the Charter was justified because, 'in the present case', the conditions were met, inter alia with regard to the requirement of proportionality.[100]

Another interesting conformity case is *JZ* on the criminalization of illegally staying third-country nationals and the Return Directive 2008/115/EC. The Dutch Supreme Court explicitly asked about the compatibility of a provision in the Dutch Criminal Code (Article 197 Sr.) with EU law. In its answer (and not in the section 'the main proceedings and the question referred for a preliminary ruling'), the CJEU presented the conflicting interpretations of the Dutch provision advanced by the parties.[101] The CJEU did not take sides but merely outlined the implications of both options in the light of the principle of legality and the ECHR. At first glance, it seems that the CJEU judgments allowed the Supreme Court a great deal of freedom in settling the dispute. However, this is not the case. The judgment shows that the CJEU found little or no problem in Article 197 Sr. This is also apparent from the final judgment of the Supreme Court and the conclusion of PG Silvis.

Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 3, 7.

96 Zglinski (n 19) 1371.

97 Joined Cases C-338/04, 359/04 and 360/04 *Placanica* EU:C:2007:133 para 37.

98 Case C-826/18 *Varkens in Nood* EU:C:2021:7 para 59.

99 ibid para 46.

100 ibid paras 65-67.

101 Cf. Marq Wijngaarden, 14 JV 1317 (2020).

Silvis, like the Supreme Court, wrote only one short paragraph on the assessment of the requirements, concluding that Article 197 Sr is not in conflict with the Return Directive.[102]

4.2[b] Proportionality assessment

Proportionality is a 'highly contested' and context-specific matter, often requiring a proper factual assessment.[103] For this reason, the CJEU generally refrains from a proportionality assessment because this is very much a factual exercise for national courts to conduct.[104] Nonetheless, itenters this factual area and decides on proportionality, as illustrated by *Josemans* and *Scotch Whisky Association* discussed in the introduction.[105] According to Davies, 'a half-understanding' of the factual situation did not prevent the CJEU from 'drawing sweeping conclusions'.[106] Several commentators likewise observed an inclination in the case law of the CJEU to increasingly give detailed guidance.[107]

The case law analysis yielded two case-tailored judgments that involve proportionality of criminal sanctions. Interestingly, no cases related to free movement were found, and this is an area of law that often requires factual proportionality assessments by the CJEU. *K.M.* is a prime example of where the CJEU delved into the proportionality. This case also exemplifies that cases handled by the CJEU in a three-judge formation without an AG Opinion tend to be case-tailored rather than answer (new) questions of law. The Irish Court of Appeal's question dealt with the proportionality of a criminal sanction, namely a conviction on indictment in addition to a fine, for the mandatory forfeiture of all fish and fishing gear found on board the boat, also in the light of Article 49(3) of the Charter. The CJEU admitted that the referring court should decide on such an assessment, but noted that it 'may provide it with all the criteria for the interpretation of EU law which may enable it to determine whether that is the case'.[108] It subsequently noted the Irish observation ('subject to the verifications, which is for the referring court to carry out') that the Irish legislative framework stipulates that sanctions should vary in relation to the seriousness of the infringement.[109] With the same 'subject to the verifications' caveat, the CJEU hinted quite explicitly that, due to the seriousness of the infringement, sanctions are 'necessary to deprive

[102] HR 1 December 2020 NL:HR:2020:1893 para 3.4.3; Conclusion of P.G. Silvis, HR 1 December 2020 NL:PHR:2020:935 para 16.
[103] Davies, 'Activism Relocated' (n 4) 80-81; Davies, 'Abstractness and Concreteness' (n 4) 218.
[104] E.g. Case C-145/88 *Torfaen Borough Council v B & Q plc.* EU:C:1989:593; Case C-438/05 *International Transport Workers' Federation v Viking Line ABP* EU:C:2007:772; Case C-73/08 *Bressol e.a.* EU:C:2010:181; Case C-135/08 *Rottmann v Bayern* EU:C:2010:104; Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Bloomsbury Publishing 2012) 225-227; Hanna Eklund, 'The Margin of Discretion and the Boundary Question in EU Fundamental Rights Law' (2022) 59(5) Common Market Law Review 1407, 1425-1426.
[105] Zglinski distinguishes five types of (de)centralization on a spectrum between complete deferral to the national court and a proportionality assessment by the CJEU itself. Zglinski (n 19) 1349; see also Case C-372/04 *Watts v Bedford Primary Care Trust* EU:C:2006:325; Case C-341/05 *Laval v Byggnadsarbetareförbundet* EU:C:2007:809. UK courts have been critical about the inconsistency in the CJEU's case law on the principle of proportionality. R (Lumsdon & Ors) v Legal Services Board [2015] UKSC 41, para 23; see also Dorte Sindbjerg Martinsen, 'Judicial Policy-Making and Europeanization: The Proportionality of National Control and Administrative Discretion' (2011) 18 Journal of European Public Policy 944.
[106] Davies, 'Abstractness and Concreteness' (n 4) 218.
[107] E.g. Langer and Sauter (n 17).
[108] Case C-77/20 *K.M.* EU:C:2021:112 para 39.
[109] ibid para 51.

those responsible of the economic benefit derived from their infringement. It also appears to have a dissuasive effect'.[110]

In a Czech case, a three-judge formation of the CJEU examined the proportionality of sanctions in a consumer context. Specifically, a penalty for a creditor's failure to comply with a pre-contractual obligation to assess consumer's creditworthiness is nullity of a credit agreement, which means that a creditor is no longer entitled to the agreed interest and costs. A consumer may raise an objection of nullity within a specified period of three years after the conclusion of the agreement. Even though the CJEU noted that it is for national courts, 'which have sole jurisdiction to interpret and apply national law', to determine the effectiveness, proportionality and dissuasiveness of sanctions, providing quite concrete guidance,[111] it concluded that the penalty was proportionate and 'genuinely dissuasive'.[112] In this conclusion, the CJEU went further than AG Kokott, who also touched on the matter but included a note of warning that the assessment depends on the enforcement of rules in practice. She also held that the matter 'remains largely unclarified, despite being raised at the hearing'.[113] However, the CJEU referred to the submission of the European Commission and concluded, without being explicit, that the limitation period does not align with the principle of effectiveness.[114]

4.3 THE REFERRING COURT STEERS TOWARD A CASE-TAILORED RESPONSE

As several of cases discussed above illustrate, a referring court partly controls the answers it receives from Luxembourg. As Tridimas noted, 'specificity may be demand-led'.[115] The more technical and concrete the question is, the more specific is the answer. In contrast, limited (factual) information tends to result in abstract answers.[116] The more detailed the questions are, the more detailed are the answers.[117] Therefore, referring courts should consider the level of abstraction at which they submit their questions.

A helpful illustration of how particular questions affect the way in which the CJEU approaches the references is the Czech case of *BONVER WIN*.[118] The referring Supreme Administrative Court steered the CJEU in the direction of a case-tailored answer by asking about the application of Article 56 TFEU on free movement of services to a municipal decree, prohibiting a betting service in Děčín, a town situated approximately 25 km from the German border. The betting service, BONVER WIN, claimed, on the basis of a witness statement, to have customers from other Member States. The CJEU concluded quite simply

[110] The CJEU left some room for the referring court to assess the 'overall level of the sanctions'. Case C-77/20 *K.M.* (n 108) para 52.
[111] Case C-679/18 *OPR-Finance v GK* EU:C:2020:167 paras 26-27.
[112] ibid paras 29-31.
[113] Opinion of AG Kokott in Case C-616/18 *Cofidis v YU* EU:C:2019:975 point 81.
[114] Case C-679/18 *OPR-Finance* (n 111) paras 34-40.
[115] Tridimas (n 6) 751.
[116] The CJEU often uses the argument that the referring court is better placed when it lacks knowledge and information itself. Zglinski (n 19) 1375-1377; Broberg and Fenger, *Preliminary References* (n 1) 389-391.
[117] Krommendijk (n 10) 128-129.
[118] Case C-311/19 *BONVER WIN v Ministerstvo financí ČR* EU:C:2020:981.

on the basis of settled case-law that existence of foreign consumers is not 'purely hypothetical'.[119]

The *formulation* of the questions can also impact a response from the CJEU. For example, this is what occurred in the Dutch social security case *AFMB.*[120] The question of how to assess in which Member State an international truck driver is covered by social insurance (in a Member State of an employer with whom an employment contract had been concluded (in this case, AFMB was established in Cyprus) or in a Member State of an employer who actually has authority over the driver (in this case, the transport company in the Netherlands with which fleet management agreements have been concluded) was central to this case. The CJEU opted for the latter. The referring court more or less forced the CJEU to take a position because of the conditional formulation of the preliminary questions. The Tribunal asked a second and a third question, in the event that the CJEU were to rule that AFMB is the employer. Therefore, it seems that the Tribunal wanted a decision from the CJEU, based on the facts. This also emerged from the third question, 'do the facts and circumstances (of the dispute in the main proceedings) constitute a situation that should be interpreted as an abuse of EU law and/or an abuse of EFTA law? If so, what is the consequence thereof?' The CJEU's conclusion that the Dutch transport company was the employer was based on the Tribunal's order for reference. The CJEU referred to the referring court several times, which would still have to examine certain aspects under the guise of 'subject to verification by the referring court'.[121] Despite these caveats, the CJEU discussed the case in detail and mentioned the facts that the drivers were selected by the transport company, that the wage costs were de facto borne by the transport company and that the transport company was de facto authorised to dismiss drivers.[122] This case-tailored factual determination did not cause any problems in this case because the CJEU relied on the information provided by the referring court.

Maintaining questions, despite the CJEU hinting at an *acte clair* or *éclairé,* can also push the CJEU in a more case-tailored direction. Case *Solak* on social security for Turkish migrant workers under the EEC-Turkey Association Agreement serves as an example for this approach. The CJEU's Registry informed the referring court of another judgment, *Çoban*, that involved identical questions and asked whether the referring tribunal wished to maintain the reference. The Tribunal maintained the request. The CJEU subsequently answered the questions by means of an order mimicking its earlier judgment in *Çoban.*[123] However, the CJEU did not limit itself to repeating the earlier answer but went even further by engaging with the specific facts in *Solak,* namely the situation of a Turkish national who was not completely and permanently incapacitated for work and who, at the time of his departure to Turkey, was still in the regular labour market in the Netherlands. The CJEU also discussed the fact that Solak had renounced his Dutch nationality.[124] This is similar to the Czech VAT case *Herst.*[125] The Prague Regional Court referred questions about multiple transactions in a

[119] Since the Czech court did not ask about the compatibility of the decree with EU law. Case C-311/19 *BONVER WIN* (n 118) para 32.
[120] Case C-610/18 *AFMB v Raad van bestuur van de Sociale Verzekeringsbank* EU:C:2020:565.
[121] ibid paras 76-79.
[122] ibid para 79.
[123] Case C-677/17 *M. Çoban v Raad van bestuur Unv* EU:C:2019:408.
[124] Case C-258/18 *Solak v Raad van bewtuur Unv* EU:C:2020:98 paras 54 and 58.
[125] Case C-401/18 *Herst s.r.o. v Odvolací finanční ředitelství* EU:C:2020:295.

cross-border supply chain. The Court acknowledged 'the significant factual similarities' to an earlier Czech case brought before the Court, *Arex CZ.*[126] Even though the referring court was aware of this judgment, the CJEU nonetheless sent the judgment to it and asked whether it wanted to maintain its request and/or all questions. The referring court subsequently decided to withdraw five of the initial eight questions. The CJEU did not answer one of the three remaining questions, while another one was answered against the advice of AG Kokott who noted that it concerned a question of national law.[127] It is evident that *Herst* primarily entails a judgment in which the CJEU merely applied the interpretation that it had already provided previously.[128]

4.4 INTERIM CONCLUSION

In the majority of cases studied, the CJEU adopted case-tailored answers in which its interpretation of EU law comes closer to its application in practice. This often settles the dispute and leads to no or only short written follow-up judgments by the referring court.[129] This section shows that several factors contribute to a case-tailored CJEU judgment. Case-tailored answers are more likely to be received in specific legal areas, such as customs, VAT and copyright, as well as certain types of questions, such as those about the conformity of national law with EU law.[130] The referring court has also considerable influence on the CJEU through the formulation of the questions or by deciding to maintain specific questions despite earlier CJEU judgments.[131] The CJEU has a tendency not to dismiss questions that it had already answered, but to still give a referring court something in return. A referring court can also opt for a more detailed answer by including a provisional answer in the order for reference.[132]

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126 Case C-414/17 *AREX CZ v Odvolací finanční ředitelství* EU:C:2018:1027.

127 The CJEU essentially repeated its settled case law about the relationship between a directive and national law. Opinion of AG Kokott in Case C-401/18 *Herst s.r.o. v Odvolací finanční ředitelství* EU:C:2020:295 points 75-78.

128 See also AG Kokott who mentioned that the CJEU receives 'once again' a question on this issue and 'has already dealt with situations of this kind a number of times' - Opinion of AG Kokott in Case C-401/18 *Herst* (n 127) points 1-2. The CJEU was also aware of this when it held that 'The aim of the national court in referring questions to the Court is to determine whether the first of those conditions is met in the present case' - Case C-401/18 *Herst* (n 125) para 35. For criticism on the factual nature of the questions: *Vakstudie Nieuws (V-N)* 2020/24.13.

129 In an Irish environmental case, the CJEU also issued a rather factual-oriented judgment. There was, hence, no need for the referring High Court to issue a written judgment. Case C-254/19 *Friends of the Irish Environment Ltd v An Bord Pleanála* EU:C:2020:680 paras 33, 36 and 47. Another example is an Irish copyrights dispute about the right of the performers to equitable remuneration. This case involved two clashing interpretations: one based on Irish law and one based on EU law. The CJEU sided with the latter interpretation. That essentially settled the dispute, as the referring High Court also noted itself: 'the interpretation advocated for by RAAP prevailed'. Recorded Artists Actors Performers Limited v Phonographic performance (Ireland) Limited & ors (Approved) 2021 IEHC 22, para 13; Case C-265/19 *Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland)* EU:C:2020:677.

130 Cf. Broberg and Fenger, *Preliminary References* (n 1) 139.

131 The CJEU can also be 'forced' to apply EU law to the facts of the case through follow-up questions after the initial abstract answers, as happened in the UK Sunday trading saga. Case C-169/91 *Council of the City of Stroke-on-Trent v B & Q plc.* EU:C:1992:519; Cohen (n 26) 438.

132 For an example of the latter, Case C-922/19 *Stichting Waternet v MG* EU:C:2021:91 paras 58-62.

5 AN APPRAISAL OF CASE-TAILORED JUDGMENTS

The previous two sections provided a typology of how the CJEU has complied with the 'separation of functions' between it and national courts in practice. It was shown that the CJEU does not adhere to this division and has gone beyond the mere interpretation of EU law in the majority of cases. This last substantive section discusses from a more normative perspective whether or not a case-tailored approach of the CJEU is desirable. This question suggests that the CJEU can to a large extent decide in a conscious way which approach to use. As discussed in Section 2, there is a fine line between interpretation and application. A case-tailored judgment is often inevitable if the interpretation of the CJEU can lead to only one specific result. In addition, the type of cases and questions asked may leave the CJEU no alternative, as discussed in Section 4. Having provided this caveat, this section starts with an assessment of the advantages of such an approach (Section 5.1), followed by an assessment of the risks (Section 5.2).

5.1 ADVANTAGES OF CASE-TAILORED JUDGMENTS

There are certainly solid arguments in favour of a case-tailored approach. Four arguments, based on user-friendliness, legal certainty, uniformity an effectiveness of EU law respectively, can be discerned in this regard. A first advantage is user-friendliness. Case-tailored answers are often helpful to a specific referring court and litigating parties.[133] Previous research has shown that national court judges usually appreciate a reflection of the CJEU on application of an abstract interpretation to a specific dispute.[134] Provided that the CJEU bases its judgment on correct facts and has a correct appreciation of national law, judges do not find it objectionable that the CJEU does not neatly adhere to the division.[135] Certainly among Dutch administrative judges, there seems to be a growing awareness that it is necessary to prevent the CJEU from issuing overly abstract judgments.[136] Apart from the judge involved in *Josemans,* national court judges have not at all felt 'emasculated and infantilised' by overly concrete answers.[137] This is also the impression that CJEU judges have of their national counterparts. Bay Larsen noted that judges generally do not want a wide margin of appreciation.[138] Former CJEU référendaire Sarmiento likewise noted that national courts want a practical and useful response and do not just refer 'for the sake of abstract clarity or academic concern'.[139] The rendering of useful case-tailored answers thus contributes to the cooperative dynamic between Luxembourg and national courts, as the CJEU itself has

[133] E.g. Case C-25/11 *Varzim Sol – Turismo v Fazenda Pública* EU:C:2012:94. para 30.
[134] Krommendijk (n 10) 134-138.
[135] R (on the application of Newby Foods Ltd) v Food Standards Agency [2019] UKSC 18, para 69; Newby Foods Ltd, R (on the application of) v Food Standards Agency [2017] EWCA Civ 400, para 49; cf. Davies, 'Abstractness and Concreteness' (n 4) 227.
[136] Krommendijk (n 10) 127; Joined Cases C -148/13 to 150/13 *A v Staatssecretaris van Veiligheid en Justitie* EU:C:2014:2406; Case C-579/13 *P & S v Commissie Sociale Zekerheid Breda* EU:C:2015:369 para 49.
[137] This runs counter to the expectation of Davies, 'Abstractness and Concreteness' (n 4) 232.
[138] Bay Larsen as discussed by Anna Wallerman, 'Book review: Renvoi Préjudiciel et Marge d'Appreciation du Juge National, Elefteria Neframi' (2016) 53(6) Common Market Law Review 1805, 1807.
[139] Sarmiento (n 34) 298; Broberg and Fenger, *Preliminary References* (n 1) 387.

consistently determined as well.[140] A case-tailored answer is also beneficial from a litigant's perspective in terms of avoiding costs and delays.[141] An additional interpretation limits the discussion between the parties and can, thus, facilitate the settlement of the dispute.[142]

In addition to enhanced clarity for the referring court, a judgment from the CJEU that moves beyond mere interpretation could also broadly contribute to more legal certainty.[143] Abstract judgments are often criticised in the literature for a failure to provide clarity and guidance.[144] One example is *FNV v Van den Bosch Transporten,* which dealt with the secondment of (Eastern European) drivers in international road transport and the question whether they are entitled to renumeration in line with the Dutch collective labour agreement.[145] The CJEU ruled that a worker is a posted worker in the territory of a Member State when the work has a sufficiently close connection with that territory. This requires an overall assessment of factors such as the nature of the work, the extent to which the worker's activities are territorially linked and the proportion of those activities in the territory of each Member State in the transport service as a whole. Because of the abstract judgment, the implications were not immediately obvious.[146] The literature therefore criticised the vagueness and the limited number of factors mentioned by the CJEU.[147] Similar dissatisfaction was also expressed in response to the CJEU judgment in *Dexia* regarding unfair contractual terms.[148]

A third advantage of case-tailored judgments is that they are helpful from the perspective of the uniform application of EU law, especially in areas of law in which Member States are reluctant to comply with EU law. This consideration explains not only the reasons why national courts refer their questions to the CJEU, but also the temptation of the CJEU to continue answering 'easy' and rather case-tailored questions.[149] The former can be illustrated with reference to the classification cases discussed in Section 4.1[a]. National courts do not make references because they are in doubt but because they want the CJEU to

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[140] E.g. 'in order to give the national court a useful answer, the Court may, in a spirit of cooperation with national courts, provide it with all the guidance that it deems necessary' - Case C-142/05 *Mickelsson* EU:C:2009:336 para 41; Zglinski (n 19) 1369; John Cotter, *Legal Certainty in the Preliminary Reference Procedure. The Role of Extra-Legal Steadying Factors* (Edward Elgar 2022) 195.

[141] Tridimas (n 6) 754; Broberg and Fenger, *Preliminary References* (n 1) 393.

[142] See e.g. CBb 12 September 2016 NL:CBB:2016:270. This is especially the case if the CJEU determines or hints that a particular provision of national law does not comply with EU law. See e.g. Case C-153/14 *K. & A. v Minister van Buitenlandse Zaken* EU:C:2015:453.

[143] Cf. Opinion of AG Kokott in Case C-401/18 *Herst* (n 127) point 3; Joxerramon Bengoetxea et al, 'Integration and integrity in the legal reasoning of the European Court of Justice' in Gráinne de Búrca and Joseph Weiler (eds), *The European Court of Justice* (Oxford University Press 2001) 43.

[144] E.g. in relation to the fair balance between property rights and other fundamental rights. Peter Oliver and Christopher Stothers, 'Intellectual property under the Charter: Are the Court's scales properly calibrated' (2017) 54(2) Common Market Law Review 517.

[145] Case C-815/18 *FNV v Van den Bosch Transporten* EU:C:2020:976.

[146] Incidentally, the CJEU offers more clarity with regard to the third question of whether the binding nature of collective agreements should be determined on the basis of national law. Case C-815/18 *FNV* (n 145) para 71.

[147] Anne van der Mei, in TRA 2021/39; Edith Franssen, in JAR 2021/16.

[148] The CJEU reminded the referring court of the division of tasks and held that 'it is for that court to determine, in the light of those criteria, whether a particular contractual term is actually unfair in the circumstances of the case'. Joined Cases C-229/19 and 289/19 *Dexia* (n 36) para 45; Charlotte Pavillon, 'De prejudiciële procedure als abstracte onredelijk bezwarend-toets' (2017) 148 Weekblad voor Privaatrecht, Notariaat en Registratie 700.

[149] Cf. Philipp Schroeder, 'Seizing opportunities: the determinants of the CJEU's deference to national courts' [2023] Journal of European Public Policy 1.

provide a binding *erga omnes* ruling in a field of law that is considerably harmonized.[150] In this way, in the words of a Dutch referring judge, 'the whole of Europe knows where we stand' instead of classifying a product in a different and more disadvantageous way than in other EU Member States.[151] Dissimilar tariffs could disrupt trade flows and, hence, distort competition. Case-tailored judgments thus contribute to a level playing field for businesses and consumers and avoid 'forum-shopping'.[152] Case-tailored judgments are thus especially warranted in areas in which national judges tend towards non-compliance by doing their utmost to justify national measures.[153] As Rasmussen noted, the CJEU prevents courts from drawing unintended consequences from an abstract dictum.[154] The issue of uniformity could partly explain a steady rise in the number of case-tailored VAT group cases. This area of law is noted for considerable non-compliance with CJEU judgments in some Member States.[155] In a Swedish VAT case, *Danske Bank,* the question was whether a Swedish branch of a bank established in another Member State (Denmark) constitutes an independent taxable person. The CJEU disposed of the case in a three-judge formation without an AG Opinion**.** It determined explicitly that the Danish VAT group and the Swedish branch in that company do not form a single taxable person. The CJEU also differentiated the facts of this case from the factual basis of an earlier *Skandia* case.[156]

A related fourth advantage of case-tailored answers has materialized more recently in the context of rule of law backsliding in several EU Member States. If the CJEU were to remain on an abstract level, this could reduce the effectiveness of its judgments considerably and EU law more generally. This is especially problematic in relation to violations of fundamental common EU values as laid down in Article 2 TEU. The Hungarian *IS* case provides a good example.[157] A Hungarian judge asked about the conformity with EU law of disciplinary proceedings instituted against him following a reference, as well as the power of the Kúria (Supreme Court) to declare the request for a preliminary ruling unlawful. Legally, the answer to the questions was quite evident in light of the established case law. However, this did not prevent the Grand Chamber from issuing this principled judgment, most probably to send a strong signal to the Hungarian (judicial) authorities. The Grand Chamber simply elucidated the application of well-known principles to the Hungarian context and reflection on the Kúria decision.[158] Earlier, the CJEU ruled in a quite straightforward way that the Polish Disciplinary Chamber is not independent, even though it left the official (and rather formalistic) decision to the referring court.[159] These explicit pronouncements can

[150] Opinion of AG Kokott in Case C-115/16 *N Luxembourg 1 v Skatteministeriet* EU:C:2019:134 point 106.
[151] Krommendijk (n 10) 106.
[152] European Federation for Cosmetic Ingredients, R (on the application of) v The Secretary of State for Business, Innovation and Skills & Ors [2014] EWHC 4222 (Admin), para 25; The Gibraltar Betting and Gaming Association Ltd, R (on the application of) v HMRC [2015] EWHC 1863 (Admin), paras 13-14; Broberg and Fenger, *Preliminary References* (n 1) 390.
[153] Davies, 'Activism Relocated' (n 4) 81.
[154] Rasmussen (n 22) 1102.
[155] Siqalane Taho, 'Companies Call for EU VAT Grouping Overhaul and Harmonisation' (*International Tax Review*, 18 May 2022) <www.internationaltaxreview.com/article/2a7cstq7ub837k1olodmo/companies-call-for-eu-vat-grouping-overhaul-and-harmonisation> accessed 1 October 2023.
[156] Case C-812/19 *Danske Bank A/S v Skatteverket* EU:C:2021:196 para 32.
[157] Case C-564/19 *IS* EU:C:2021:949.
[158] ibid paras 74-75 and 77.
[159] Joined Cases C-585/18, 624/18 and 625/18 *A.K. (Independence of the Disciplinary Chamber of the Supreme Court) v Sąd Najwyższy* EU:C:2019:98 paras 132-154.

partly be attributed to the limited and reluctant role of the European Commission as guardian of the treaties, as evidenced by the decreasing number of infringement procedures.[160] The CJEU seems to compensate for the silence from Berlaymont by extending a helping hand to the referring courts.[161] Especially these rule of law cases could reflect a deliberate strategy by the CJEU to establish itself as a hierarchically superior court by rendering case-tailored judgments.[162]

5.2 DISADVANTAGES AND RISKS OF CASE-TAILORED JUDGMENTS

An overly case-tailored approach has four risks: erroneous interpretations of national law and facts, inconsistencies in the case law and legal uncertainty, exponential growth in case-tailored references as well as pressure on the CJEU's workload.

First, the CJEU's engagement with a national factual or legal context can create difficulties in specific cases, especially in cassation appeals when the facts have already been established, as mentioned in the introduction.[163] There are several older cases that illustrate this risk, among which is *Ten Kate Holding Musselkanaal* on state liability for damages due to the violation of the ban on producing and selling protein from pork fat.[164] The CJEU held that 'contrary to what the Hoge Raad assumed', the Standing Veterinary Committee did discuss requests for authorisation but did not take a position.[165] The Supreme Court disregarded this particular fact established by the CJEU and explicitly ruled that the CJEU judgment was partly based on facts that were not considered by the Supreme Court.[166] The *Ladbrokes* case discussed in the introduction is another illustration of the difficulties of overly specific CJEU judgments, even though the Dutch Supreme Court eventually managed to find a way to settle the case.[167] A Dutch case concerning the tariff classification of Sonos zone players, a wireless music system, also led to some resentment among judges from the Dutch Supreme Court.[168] The CJEU established of its own motion some facts regarding how the zone players were presented to consumers on the Sonos website.[169]

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[160] Roger Daniel Kelemen and Tommaso Pavone, 'Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union' (2023) 75(4) World Politics 779.
[161] E.g. Speech of President Lenaerts during FIDE (2021) <https://fide2020.eu/fide-2020/recordings/>. National courts frequently refer to the CJEU for politico-strategic reasons to obtain support vis-à-vis the executive or legislature. Krommendijk (n 10) 89-109.
[162] Rasmussen (n 22) 1101-1102.
[163] Too much reliance on the referring court in relation to the facts can also be tricky when the CJEU decides to handle purely internal situations. Jasper Krommendijk, 'Wide Open and Unguarded Stand our Gates: The CJEU and References for a Preliminary Ruling in Purely Internal Situations' (2017) 18 German Law Journal 1359.
[164] Case C-511/03 *Ten Kate Holding Musselkanaal* EU:C:2005:625.
[165] ibid para. 39.
[166] HR 22 December 2006 NL:HR:2006:AZ3083 (*Staat v Ten Kate Holding Musselkanaal*) paras 2.2.1-2. This solution has been applied in the past, for example, by the UK Supreme Court. E.g. North Wales Training and Enterprise Council Ltd v Astley & Ors. [2006] UKHL 29; HMRC v Aimia Coalition Loyalty UK Ltd [2013] UKSC 15.
[167] See supra n 16.
[168] Case C-84/15 *Sonos Europe BV v Staatssecretaris van Financiën* EU:C:2016:184.
[169] This did not prevent the Supreme Court from reaching a final decision. It subtly referred to this finding of the CJEU by pointing out both the fact that the CJEU had based its reasoning on the description of the Supreme Court as well as the fact that the Zoneplayer is offered to the consumer as a wireless system for the reproduction of hi-fi stereo sound; HR 8 July 2016 NL:HR:2016 para 2.3; In another case the CJEU held that

These few older cases are clear exceptions. That is confirmed by the fact that the case samples do not include CJEU judgments that caused insurmountable problems.[170] The only exception is the Dutch consumer case *A, B and C*, where the CJEU went beyond the separation of functions.[171] Although the CJEU normally leaves considerable room for national courts to assess whether terms are unfair, in this case, the CJEU provided some specific guidelines.[172] However, some of this concrete application to the national situation was incorrect, according to the referring court.[173] This case illustrates that too much specificity is not risk-free, although the District Court ultimately managed to avoid a real confrontation with the CJEU. However, problematic 'interference' by the CJEU could, especially in the long run, be detrimental to the legitimacy of the CJEU from the perspective of national courts and could affect the willingness of national courts to make references.[174]

A second problem concerns wider effects of the CJEU's overly case-tailored case law beyond the case at hand. As Tridimas aptly observed, 'excessive recourse to the outcome approach might in fact reduce rather than help legal certainty'.[175] This is because it is more difficult to derive statements of legal principle and precedents from case-tailored judgments.[176] Former Dutch Supreme Court Judge Van Vliet criticised the CJEU for often acting as a judge of the facts. In his view, the factual tax case law results in an absence of a clear red line.[177] The more case-tailored CJEU's guidance is, the higher is the probability of creating inexplicable inconsistencies, as was also noted in relation to the CJEU's comparability test (Section 4.1[c]). Previous research revealed, for instance, that national court judges have been critical about the CJEU's factual and 'not entirely consistent' case law on the 'communication to the public', as discussed in Section 4.1[d].[178]

A third problem with extremely case-tailored judgments is that they implicitly encourage national judges to ask further questions related to cases in which the factual constellation differs slightly.[179] This problem of 'factual' jurisprudence has been recognized

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the statement of facts was inadequate. It based itself on the written and oral observations. Case C-18/93 *Corsica Ferries Italia Srl v Corpo dei Piloti del Porto di Genova* EU:C:1994:195 para 13; Cotter (n 140) 206.

[170] This observation holds true for the Netherlands and Ireland whose follow-up judgments of national courts, if available, were examined.

[171] Case C-738/19 *A v B* EU:C:2020:687 paras 23-26 and 31-32; cf. Candida Leone, 'CJEU in C -738/19: Limits to Global Assessment of Term's Fairness' (*Recent European Consumer Law*, 10 September 2020) <https://recent-ecl.blogspot.com/search?q=+C-738%2F19> accessed 1 October 2023.

[172] The CJEU held: 'In the present case, it is apparent from the request for a preliminary ruling […]'. Case C-738/19 *A v B* (n 171) para 35.

[173] The CJEU assumed that the claim for payment of the profits acquired as a result of the prohibited subletting is based on Article 6:104 of the Dutch Civil Code. In its final judgment, however, the Court pointed out that this claim is also (independently) supported by Article 7.18 of the general terms and conditions of the Code. In the final judgment, the Amsterdam District Court concluded that both clauses are not unfair, even when the cumulative effect is taken into account. Rb. Amsterdam 28 January 2021 NL:RBAMS:2021:388 paras 4.5-6.

[174] Krommendijk (n 10) 165-167.

[175] Tridimas (n 6) 754.

[176] Broberg and Fenger, *Preliminary References* (n 1) 393; Davies, 'Abstractness and Concreteness' (n 4) 232, 243.

[177] Henk Bergman and Bart van Zadelhoff, 'Met die BTW kan het zo weer Afgelopen Zijn' (2017) 90 Weekblad Fiscaal Recht.

[178] Specsavers International Healthcare Ltd v Asda Stores Ltd [2012] EWCA Civ 24, para 179; Krommendijk (n 10) 132-134.

[179] Cf. Michal Bobek, *National Courts and the Enforcement of EU Law. Institutional Report. The XXIX FIDE Congress in The Hague* (Eleven International Publishing 2020) 61, 87-88; Broberg and Fenger, *Preliminary References* (n 1) 393; see for a discussion Karoline Spies, 'CJEU VAT Case Law in 2020: Evergreens, Revivals and New Trends' (2021) 49 Intertax 606, 607.

by several AGs, most notably AG Jacobs in *Wiener*.[180] Therefore, he called for 'self-restraint' and cautioned against national courts making even more references for 'further clarification' when the facts of the cases differ (slightly) from the factual background of the cases where the CJEU has already provided answers to similar questions.[181] AG Jacobs stated that

> this Court would […] be going beyond its functions under Article [234 EC] if it were to rule on all aspects of repackaging and relabelling that might be undertaken by parallel importers in relation to different types of product. Once the Court has spelt out the essential principle or principles, it must be left to the national courts to apply those principles in the cases before them.[182]

Such extrapolation is especially warranted in 'technical fields', such as customs and VAT or copyright and trademark cases discussed in Section 4.1.[183] Several AGs have subsequently expressed similar concerns. AG Sharpston held, for example, that

> I would then hope that national courts will play their part robustly in applying the principles to the facts before them without further requests to fine-tune the principles. Every judge knows that ingenious lawyers can always find a reason why a given proposition does or does not apply to their client's situation. It should not however, in my view, be for the Court of Justice to adjudicate on such detail for evermore.[184]

In a similar fashion, AG Ruiz-Jarabo Colomer called on the CJEU to avoid replacing the national court.[185] AG Bobek argued for more room for national courts to reach a decision based on the case law of the CJEU.[186] Some national courts, especially UK courts, have strictly observed this distinction between the interpretation and application of established principles of EU law and have, thus, been reluctant to refer questions primarily concerned with application.[187] This approach can be a source of inspiration for other national courts, especially in light of the recent *Consorzio* (*CILFIT 2.0*) judgment, where the CJEU limited the obligation to refer to doubts about the correct *interpretation* of EU law and the concrete correct application of EU law.[188]

A fourth related problem is the workload of the CJEU. It is no secret that the CJEU has to cope with significant pressure and an ever-growing number of requests.[189] The CJEU

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[180] Opinion of AG Jacobs in Case C-338/95 *Wiener S.I. GmbH v Hauptzollamt Emmerich* EU:C:1997:552 point 15. See also Opinion of AG Fennelly in Case C-220/98 *Estée Lauder Cosmetics* EU:C:2000:8 point 31; Opinion of AG Gullman in Case C-315/92 *Verband Sozialer Wettbewerb v Clinique Laboratories* EU:C:1994:34 point 9.
[181] Opinion of AG Jacobs in Case C-338/95 *Wiener* (n 180) point 15.
[182] Opinion of AG Jacobs in Case C-349/95 *Loendersloot v Ballantine* EU:C:1997:530 point 33.
[183] ibid point 61.
[184] Opinion of AG Sharpston in Case C-348/04 *Boehringer Ingelheim v Swingward* EU:C:2007:249 point 3.
[185] Opinion of AG Ruiz-Jarabo Colomer in Case C-30/02 *Recheio* (n 28) point 35.
[186] Bobek called on the CJEU to revise *CILFIT* for this reason. Opinion of AG Bobek in Case C-561/19 *Consorzio Italian Management v Rete Ferroviaria SpA* EU:C:2021:799; cf. Bobek (n 179) 61 and 88.
[187] Reed (n 27) 14; HMRC v Frank A Smart and Son Ltd (Scotland) [2019] UKSC 39, paras 59 and 64.
[188] Contrast 'correct interpretation of EU law is so obvious' with 'the correct *application* of Community law'. Case C-561/19 *Consorzio Italian Management v Rete Ferroviaria SpA* EU:C:2021:799 para. 39; Case 283/81 *Cilfit and Others* EU:C:1982:335 para. 16.
[189] Broberg and Fenger, *Preliminary References* (n 1) 394-396.

tends to answer all questions and to simply attempt to manage the volume rather than impose measures to limit the inflow of references.[190] One wonders whether this is tenable in the long run, and it raises a question of whether the CJEU should be more selective and critical of incoming requests and focus on interpretation rather than application. Over-specificity undermines the CJEU's fundamental function of *interpreting* EU law.[191] This is reflected in the criticism of the CJEU's handling of tariff cases as 'a very wasteful and inefficient way to employ the time'.[192]

6 CONCLUSION

This article analysed how and when the CJEU adheres to the 'separation of functions' between itself and national courts. The empirical evidence culled from a structured doctrinal case law analysis of 55 judgments in relation to five Member States confirms that the interpretation-application division is a fiction or, in the words of Broberg and Fenger, 'more a question of form than a substantive delimitation'.[193] Rasmussen even talked about a 'smokescreen'.[194] This article showed that case-tailored answers are more likely to be seen in specific legal areas, such as customs, VAT and copyright or in response to specific types of questions regarding conformity of national law with EU law. Even proportionality assessments are frequently dealt with by the CJEU. This article also showed that referring courts can steer the CJEU towards a case-tailored answer by formulating the questions or by deciding to proceed with specific questions, despite existence of earlier judgments of the CJEU.

The high proportion of application cases makes one wonder why the CJEU still sticks to its 'separation of functions' discourse. It is not only in relation to this aspect of its interaction with national courts that the CJEU uses rhetoric that does not match the actual judicial practice. The construction of this interaction in the preliminary ruling procedure as a form of 'cooperation' or 'dialogue' is largely a myth as well.[195] The findings pose a question of whether the CJEU should continue to ignore its own ideal.

The last section of this article discussed several advantages of case-tailored judgments, including user-friendliness, legal certainty, uniformity and the effectiveness of EU law. There are also considerable risks, such as erroneous interpretations of national law and facts, a reduction in legal certainty, inconsistencies and an exponential growth in factual references that lead to an unmanageable workload. This article identified a paradox: too much specificity can lead to more as well as less certainty. It is, thus, difficult to conclude *in abstracto* that the

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[190] Tom de la Mare and Catherine Donnely, 'Preliminary Rulings and EU Legal Integration: Evolution and Continuity' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2021) 228.
[191] Tridimas (n 6) 754.
[192] Joseph H H Weiler and Jean-Paul Jacqué, 'On the Road to European Union – A New Judicial Architecture: An Agenda for the Intergovernmental Conference' (1990) 27(2) Common Market Law Review 185; cf. Opinion of AG Ruiz-Jarabo Colomer in Case C-30/02 *Recheio* (n 28) point 35.
[193] Broberg and Fenger, *Preliminary References* (n 1) 139; Cohen (n 26).
[194] Rasmussen (n 22) 1101.
[195] Jos Hoevenaars and Jasper Krommendijk, 'Black box in Luxembourg. The bewildering experience of national judges and lawyers in the context of the preliminary reference procedure' (2021) 46 European Law Review 61.

risks overweigh the advantages. In some situations, such as rule of law backsliding, a more case-tailored approach is warranted.[196]

Be that as it may, the aforementioned risks are apparent and should be a reason for the CJEU to adhere more closely to the separation of functions that it propagates so forcefully. The former also better reflects the institutional balance, contained in Article 267 TFEU.[197] As Tridimas held, 'guidance rather than outcome appears the desired default position'.[198] Reducing a case-tailored inclination enables national courts to take a more prominent position in the construction of the EU legal order.[199] How can the CJEU better live up to the propagated division? It is clear that it should thread carefully in order not to upset national courts and not to contradict the spirit of cooperation. If the CJEU suddenly starts declaring too factual or national-oriented questions inadmissible, this could be regarded as a rebuke for referring national courts.[200] One possible solution is to provide clearer instructions for national courts, for example in the CJEU's Recommendations, as to the type of questions that are appropriate to refer. Despite calls in the literature, there is still a persisting lack of clarity in this respect.[201] The recent *Consorzio* (*CILFIT 2.0*) is a step in the right direction. It is to be anticipated that the CJEU's recent change towards *application* in relation to *CILFIT* will also produce trickle-down effects in relation to the way in which the Court responds to references and positions itself on the interpretation-application spectrum.[202] This also demands a more mature and restrained attitude from national courts, whereby 'easy' questions regarding the application of earlier interpretations of EU law are not simply thrown over the CJEU's fence. Another option is to acknowledge that there are several areas that are inherently factual-technical and, hence, do not all fit the interpretation-application division. This holds true for classification of the cases in relation to which uniformity and level-playing-field concerns also play a prominent role. One specific solution is creating a separate single EU customs court.[203] In any way, if the CJEU chooses not to abandon or decides to justify its judicial practice, it should reflect upon whether adherence to the 'separation of functions' mantra should still be upheld.

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196 E.g. Case C-564/19 *IS* (n 157).
197 Sarmiento (n 34) 309.
198 Tridimas (n 6) 756.
199 Tridimas (n 6) 755; Rasmussen (n 22) 1109.
200 Broberg and Fenger, *Preliminary References* (n 1) 393.
201 Tridimas (n 6) 754; Krommendijk (n 163).
202 Morten Broberg and Niels Fenger, 'If You Love Somebody Set Them Free: On the Court of Justice's Revision of the Acte Clair Doctrine' (2022) 59(3) Common Market Law Review 711; Case 283/81 *Cilfit* (n 188); Case C-561/19 *Consorzio Italian Management* (n 188).
203 Davies, 'Abstractness and Concreteness' (n 4) 225. The CJEU proposed that the General Court could handle requests for a preliminary ruling on the basis of Article 256(3) TFEU in relation to six areas, including tariff classification. 'Request submitted by the Court of Justice pursuant to the second paragraph of Article 281 of the Treaty on the Functioning of the European Union, with a view to amending Protocol No. 3 on the Statute of the Court of Justice of the European Union 4-5 (December 2022)' <https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-12/demande_transfert_ddp_tribunal_en.pdf> accessed 1 October 2023.

APPENDIX 1 – TABLE 1

A. Information about the case					B. The handling of the reference suggesting case-specific answers			C. The frequency of standard phrases suggesting case-specific answers[I]
Case	**Case name**	**Category[II]**	**Subject matter**	**Main EU law source[III]**	**No AG Opinion**	**Three judge formation**	**Order**	
Ireland (9)								
C-77/20	K. M.	1	Proportionality sanction	R	x	x		9
C-739/19	VK v An Bord Pleanála	1	Legal representation	D				4
C-265/19	Recorded Artists Actors Performers	2	Copyright renumeration	D				
C-254/19	Friends of the Irish Environment Ltd	2	Habitat impact assessment	D				4
C-616/19	Minister for Justice and Equality	3	Admissibility Procedures Directive	D				
C-64/20	An tAire Talmhaíochta Bia agus Mara	3	Primacy EU law	D				1
C-488/19	Minister for Justice and Equality	3	Non-execution Arrest Warrant	D				1
C-322/19 & C-385/19	The International Protection Appeals Tribunal	3	Dublin claimant's labour market access	R				1
C-311/18	Facebook Ireland and Schrems	3	Validity EU-US Privacy Shield	d				6
Czech Republic (8)								
C-941/19	Samohýl group	1	Tariff classification	R	x	x		5
C-311/19	BONVER WIN	1	Cross-border element betting services	T				3
C-679/18	OPR-Finance	1	Proportionality sanctions	D		x		6
C-405/18	AURES Holdings	1	Loss utilisation	T				3
C-98/20	mBank	2	Consumer's domicile	R	x	x	x	3
C-401/18	Herst	2	VAT	D				7
C-446/18	A.G.ROBET CZ	3	VAT refund	T		x		5
C-215/18	Primera Air Scandinavia	3	Compensation delays	R				3
Sweden (11)								
C-812/19	Danske Bank	1	VAT taxable person	D	x	x		1
C-637/19	BY v CX	1	Communication to public	D				1
C-484/19	Lexel AB	1	Interest deductibility	T	x			8
C-787/18	Skatteverket	1	VAT deduction	D	x	x		7
C-753/18	Stim & SAMI	1	Communication to public	D				
C-473/19	Föreningen Skydda Skogen	2	Conservation of birds	D				3

[II] The following phrases were counted: 'It is for the referring / national court'; 'Subject to (the) verification(s)'; 'In the present case/ instance' and 'According to the information/ documents/ explanation/ referring court'. Note that only the use of standard phrases in the operative part ('The dispute in the main proceedings and the question referred') were counted.

[II] 1 = case-tailored judgment; 2 = intermediate; 3 = abstract judgment (see Figure 1 and Section 2 for an explanation).

[III] R = Regulation; D = Directive/ Framework Decision; T = Treaty; d = decision.

C-456/19	Aktiebolaget Östgötatrafiken	2	Registration trade mark	D	x	x		3
C-476/19	Combinova	3	Community Customs Code	R	x			3
C-363/19	Mezina	3	Health claims	R	x	x		2
C-193/19	A v Migrationsverket	3	Schengen family reunification	R				
C-454/18	Baltic Cable	3	Cross-border electricity exchange	R				1
Netherlands (26)								
C-331/19	X	1	VAT classification	D		x		1
C-192/19	Rensen Shipbuilding	1	Custom classification	R	x	x		3
C-186/19	Supreme Site Services	1	Immunity NATO	R				3
C-791/18	Stichting Schoonzicht	1	VAT deduction	D				2
C-610/18	AFMB	1	Social security	R				5
C-922/19	Stichting Waternet	2	Conclusion consumer contract	D	x	x		11
C-738/19	A	2	*Subletting social housing dwelling*	D	x	x		6
C-225/19 & C-226/19	RNNS and KA	2	appeal visa refusal	R				1
C–826/18	Varkens in Nood	2	Access to environmental justice	d				2
C-806/18	JZ	2	criminalisation illegal stay	D				3
C-258/18	Solak	2	Social security	R	x	x	x	1
C-354/20 P PU & C-412/20 P PU	L & P	3	Non-execution Arrest Warrant	D				
C-673/19	M & A	3	administrative detention illegal refugee	D				2
C-441/19	TQ	3	Return unaccompanied minor	D				3
C-361/19	De Ruiter	3	common agricultural policy	R				
C-360/19	Crown Van Gelder	3	Complaint customer installation	D				
C-330/19	Exter BV	3	Community Customs Code	R	x	x		
C-229/19 & C-289/19	Dexia Nederland	3	Unfair consumer contracts	D	x			6
C-104/19	Donex Shipping	3	Validity anti-dumping duty	R				1
C-21/19 - C-23/19	P.F. Kamstra Recycling	3	Shipment of waste	R				
C-815/18	FNV	3	Posted workers	D				1
C-814/18	Ursa Major Services	3	European Fisheries Fund	R	x	x		4
C-341/18	Staatssecretaris van Justitie en Veiligheid	3	Schengen Borders Code	R				2
C–314/18	SF	3	Non-execution Arrest Warrant	D				
C-160/18	X BV	3	Community Customs Code	R				
C-156/17	Köln-Aktienfonds Deka	2	Taxation dividends	T		x		10
Greece								
C-760/18	M.V. and Others	2	Fixed-term employment	D	x	x		1

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THE ROAD LESS TRAVELLED IN EU ASYLUM LAW: THE CJEU'S RESTRICTIVE WAY OF REASONING AND HOW A DIFFERENT APPROACH COULD STRENGTHEN HUMAN RIGHTS

MARTIN WESTLUND*

Many asylum cases present an opportunity for the European Court of Justice to promote and protect EU values such as human rights and the rule of law. Yet, in central issues on the EU asylum system, the Court has opted for careful and formal readings of law rather than exploring such perspectives. The Court's legal reasoning in asylum is examined by case analyses in NF v Council on the EU-Turkey Statement, X and X on humanitarian visas, and A.S. and Jafari on the EU asylum system. In free movement, the Court is considered a key driver of integration, whereas, in asylum law, it is seen as more restrictive. Rather than promoting EU integration and ensuring human rights protections, the Court grants discretion to the legislator or the executive. There are legitimate reasons why a different path has been taken in asylum. However, as a more extensive and dynamic method of interpretation could increase human rights protections, it is relevant to reassess the position of the Court in asylum law.

1 INTRODUCTION

This article reflects on the line of reasoning of the European Court of Justice (CJEU or the Court) in EU asylum law. Enshrined in international treaties and primary law, human rights in principle constitute powerful tools for judicial scrutiny. The open-endedness of many rules further means that the Court could help the harmonisation of asylum law. Nevertheless, in several cases involving possible human rights violations or putting the EU asylum system to the test, the Court has treated asylum law as a technical matter.[1] A different approach that interprets asylum law in light of human rights and constitutional principles is needed.

The Court's restrictive approach means that human rights protection is at risk when it avoids ruling on the substance, or when it does so but approaches the issues in a too formal way. Due to the EU's increasing powers, it is no longer just an economic organisation. It is an important political organisation that adopts policies in a wide range of areas that have implications for human rights. It is therefore important to reflect on how the Court shapes responses to migration and observes fundamental constitutional principles and guarantees.

Previous scholarship has argued that the expansive approach of the Court in free movement law may not be suitable in other areas, such as asylum. Scholars point to the legal and institutional differences and the political salience of asylum issues.[2] In the history of

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1 Iris Goldner Lang, 'Towards "Judicial Passivism" in EU Migration and Asylum Law' in Tamara Capeta, Iris Goldner Lang, and Tamara Perišin, *The Changing European Union: A Critical View on the Role of Law and Courts* (Hart Publishing 2022).

2 See e.g. Daniel Thym, 'Between "Administrative Mindset" and "Constitutional Imagination": The Role of the Court of Justice in Immigration, Asylum and Border Control Policy' (2019) 44(2) European Law Review

European integration, migration of third-country nationals is a policy area permeated by distinct considerations. The third-country national has been conceptualized as a 'threat' to free movement and amplified the external borders.[3] On this basis, a more restrictive approach may be appropriate, as the legal foundations do not empower the Court to correct legislative choices similarly to fundamental freedoms.

While various scholars have provided valuable insights for the understanding of the Court's position, a remaining question, which this paper aims to answer, is how a more expansive method of interpretation could be used in asylum cases. This article aims to reveal the stakes and alternatives present in the argumentative paths not taken in asylum cases. I argue that the Court's formal and deferential method of interpretation could be replaced by a more teleological reasoning which would lead to more rights-protective outcomes. While considering the legitimate justifications for judicial restraint, this analysis highlights the need and possibility for a different reasoning in asylum that considers the human rights concerns at stake.

This article consists of five sections. The *second section* presents a set of central cases in EU asylum law that display judicial restraint. These are contrasted with the expansive interpretations met in free movement where the legal system was also put to the test. The *third section* explores the application of a more expansive and teleological reasoning in the asylum cases. The *fourth section* discusses different explanations for judicial restraint and human rights-based arguments. While more legal issues could be interpreted in light of EU values and principles, the EU needs to put human rights on top of its agenda to trigger this mode of reasoning. The *fifth section* is a conclusion of the findings and arguments of the article.

2 JUDICIAL APPROACHES TO FREE MOVEMENT AND ASYLUM

How the Court approaches legal issues and considers values or principles is important for the outcome of the case. In both asylum and free movement, as in EU law more generally, the legislation is written in such vague terms that the CJEU is often required to go beyond a mere textual interpretation of the law to reach a decision. Yet, the Court's rulings in these areas of EU law are generally based on different approaches and considerations. Certainly, there are nuances to both of these legal fields. However, this section shows that the teleological and value-based reasoning that is visible in free movement is sometimes missing in central asylum cases. While there may be legitimate reasons for varying approaches, they lead to different levels of rights protection and ultimately shape the legal systems in different ways.

2.1 EXPANSIVENESS IN FREE MOVEMENT

Expansive reasoning is found in many contexts in the EU, but it is most notable in the free movement case law. The internal market with the free movement rights for EU citizens is,

138; Thomas Spijkerboer, 'Bifurcation of people, bifurcation of law: Externalization of migration policy before the EU Court of Justice' (2018) 31(2) Journal of refugee studies 216.

[3] See e.g. Elspeth Guild, 'Promoting the European way of life: Migration and asylum in the EU' (2020) 26(5-6) European Law Journal 355, 357.

at least partly, a creation by the Court of Justice.[4] Through its expansive interpretation of the free movement of people, the CJEU has contributed significantly to shaping the EU as a zone where people can move freely.[5] The Court is considered to take an expansive approach when it interprets legal terms in a wider sense than the wording suggests or when the Court fills regulatory gaps by deciding the meaning of important words or concepts. This expansive approach appears in a wide range of cases, in all of which the Court was breaking new ground.

A few examples illustrate this. In *Antonissen*, the Court extended the meaning of 'worker' to also include work seekers.[6] Later, in *Grzelczyk*, the Court ruled that EU nationals, including non-economically active people, have a right to social security in other Member States.[7] The *Zambrano* case strengthened EU citizenship as the Court held that Article 20 TFEU precludes a Member State from denying residence to parents of minor EU citizens who have yet to exercise their right of free movement.[8] Furthermore, in *Carpenter*, the Court embarked on a line of jurisdiction that developed a concept of 'social citizenship' that moves away from the distinction between economically active and non-economically active citizens.[9] These cases, among others, have elevated the status of a Union citizen the 'fundamental status of nationals of the Member States'.[10]

The expansive rulings were possible due to interpretations that emphasised the legal aims of making free movement easier. The case of *Laval* serves as a good example of this legal reasoning.[11] In this case, the Court argued that the Posted Workers Directive could not be interpreted as allowing for provisions that go beyond the mandatory rules for minimum protection (paras 79–80). A different 'interpretation would amount to depriving the directive of its effectiveness' (para 80). This is not clear from the wording of the legislation but follows from a purposive interpretation that aims to remove obstacles to free movement. As a consequence, the Court limited the constitutional right to take collective action when it infringes on the right to free movement of services.

Since these cases, the Court has delivered some less expansive rulings. For instance, the Grand Chamber of the CJEU ruled in the case of *Dano* that Member States may reject claims of social assistance by EU citizens who have no intention to work and cannot support themselves.[12] This ruling was confirmed in *Alimanovic* where the applicant for social benefits had worked for 11 months.[13] Without recourse to the principle of proportionality, the Court held that the applicants were not entitled to benefits after six months. These examples of restraint do not mean, however, a retreat from previous rulings. There is a difference between

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[4] Thym, 'Between "Administrative Mindset" and "Constitutional Imagination" (n 2) 139.
[5] Spijkerboer (n 2) 16.
[6] Case C-292/89 *The Queen v Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen* EU:C:1991:80.
[7] Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Lovaine-la-Nueve* EU:C:2001:458.
[8] Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi* EU:C:2011:124.
[9] Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department* EU:C:2002:434.
[10] See (amongst others) the following cases: Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* EU:C:2002:493; Case C-456/02 *Michel Trojani v Centre public d'aide sociale de Bruxelles* EU:C:2004:488; Case C-406/04 *Gérald De Cuper v Office national de l'emploi* EU:C:2006:491; Case C-127/08 *Blaise Beheten Metock and Others v Minister for Justice, Equality and Law Reform* EU:C:2008:449. See also Anja Wiesbrock, 'Granting Citizenship-related Rights to Third-Country Nationals: An Alternative to the Full Extension of European Union Citizenship?' (2012) 14(1) European Journal of Migration and Law 63.
[11] Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* EU:C:2007:809.
[12] Case C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* EU:C:2014:2358.
[13] Case C-67/14 *Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others* EU:C:2015:597.

not extrapolating a principle further and retreating from it. If any of the previous cases were to come before the Court again it would probably not decide them any differently. The circumstances in *Dano* were different from *Grzelczyk* and in the case of *Brey*, the Court emphasised that what it held in *Grzelczyk*, remained valid law.[14]

The case law in free movement may have shifted slightly in recent years towards a less expansive and rights-sensitive interpretation, yet it continues to play an important role in the development of free movement law. A fairly new case demonstrating a somewhat expansive reasoning is *Coman*, in which the Court affirmed residence rights in EU countries (that do not recognise same-sex unions) to the spouse of an EU citizen who is exercising their right to freedom of movement.[15] Independent interpretations like these are used to harmonise EU law, even where they go against the politics of the majority in the Member States. These rulings hold important lessons for other legal fields in which judicial help for harmonisation might be needed. Yet, this path is less often taken in asylum cases.

2.2 JUDICIAL RESTRAINT IN ASYLUM CASES

Asylum law contains a vast number of cases, displaying both expansive and restrictive rulings by the Court of Justice. The CJEU has delivered judgments that enhance individual rights in relation to national authorities. This is notable in cases on the concept of a safe third country,[16] the Return Directive and the concept of detention.[17] Notwithstanding these cases, the overall picture is that the CJEU has not replicated the dynamism of the internal market in asylum cases. Observers argue that there is a noticeable trend towards treading carefully, with the Court referring to the position of the EU legislature or granting discretion to the Member States.[18] In several prominent rulings on legal aspects of the EU asylum system, the impression of judicial restraint on behalf of the Court has been reinforced. Examples of this that will be further explored below are *A.S.* and *Jafari* on the Dublin System,[19] *X and X* on humanitarian visas,[20] and *NF v European Council* on the EU-Turkey Statement.[21]

One difference between judicial approaches in free movement and asylum is how the Court contributes to EU integration. In the cases of *A.S. and Jafari*, the Court refrained from expressing itself on the principle of solidarity that could have improved the situation at the EU's external borders.[22] The Court argued that 'in light of the usual meaning of the concept of an 'irregular crossing' of a border, the crossing of a border without fulfilling the conditions imposed by the legislation applicable in the Member State in question, must be generally considered 'irregular' (para 61). When deciding upon its meaning, the Court remained close

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[14] Case C-140/12 *Pensionsversicherungsanstalt v Peter Brey* EU:C:2013:565.
[15] Case C-673/16 *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrari and Ministerul Afacerilor Interne* EU:C:2018:385.
[16] See Joined Cases C-411/10 and C-493/10 *N.S v United Kingdom and M.E. v Ireland* EU:C:2011:865.
[17] See Joined Cases C-924/19 PPU and C-925/19 PPU *FMS and Others v Országos Idegenrendesszeti Föigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendeszeti Föigazgatóság* EU:C:2020:367; Case C-808/18 *Commission v Hungary* EU:C:2020:1029.
[18] Thym, 'Between "Administrative Mindset" and "Constitutional Imagination" (n 2) 3.
[19] Case C-490/16 *A. S. vs. Republic of Slovenia* EU:C:2017:585 and Case C-646/16 *Khadija Jafari and Zainab Jafari vs Bundesamt für Fremdenwesen und Asyl* EU:C:2017:586.
[20] Case C-638/16 PPU *X and X v État belge* EU:C:2017:173.
[21] Case T-192/16 *NF v European Council* EU:T:2017:128.
[22] Cases C-490/16 *A.S.* and C-646/16 *Jafari* (n 19).

to what it saw as the general objective of the Dublin system and emphasised the aim of establishing a predictable structure of responsibility, with the first state of entry being responsible for examining refugee applications.

The ruling is formal as the Court decided that the third-country nationals must be regarded as having crossed irregularly 'irrespective of whether the crossing was tolerated or authorised in breach of the applicable rules or whether it was authorised on humanitarian grounds by way of derogation from the entry conditions generally imposed on third-country nationals' (para 92). In contrast to the Advocate General's proposal, the Court interpreted irregular crossing in its legal context. The Court referred to the Schengen Borders Code which allows for a derogation of the entry conditions on humanitarian grounds, but only in the territory of the Member State concerned, not the territory 'of Member States' as a whole (para 80). The effect of this ruling is that Member States have to comply with a strict reading of the Dublin Regulation, regardless of the need for exceptions in times of mass influx.[23]

Furthermore, while the Court has in some asylum cases interpreted issues in light of human rights, there are cases where such considerations are absent. In *X & X*, the Court was asked to rule on the exceptional issuance of a visa with limited territorial validity for humanitarian reasons.[24] The case concerned a Syrian family who applied for a short-stay visa at the Belgian Embassy in Beirut. As the applicants intended to stay in Belgium when their short-term visa expired and apply for asylum, the Court viewed their application as an application for a long-term visa (para 43). Specifically, the Court held that such applications fell outside the scope of the Visa Code and were solely within the scope of national law (para 44). As a consequence, the Court was not competent to rule on the substantive issue.

Exceptions can be made for humanitarian visas, which the Court rejected. The Court argued that classifying the applications in question as applications for humanitarian visas, under Article 25(1)(a) of the Visa Code, would be contrary to EU law on several levels. It would be against the objective of the Visa Code, Article 79(2)(a) TFEU and the general structure of EU asylum law, notably Articles 1 and 3 of the Dublin Regulation and Articles 3(1) and (2) of the Asylum Procedures Directive (para 49). The reasoning is compelling but formal as it lacks concerns for the human rights issues at stake. The Court interprets the scope of secondary law and the possibility of humanitarian visas without considering the implications of the principle of non-refoulement.

The lack of human rights considerations was also visible in *NF v Council*, which concerned the EU-Turkey Statement.[25] The Court undertook a textual interpretation of the press releases made after the meetings with Turkey. Based on expressions such as 'leaders of the European Union' and 'Statement of the European Union Heads of State or Government', the Court argued that the Member States had not acted as the European Council in the meetings with Turkey (paras 49–51). The Court also found the terms 'Members of the European Council' and 'EU' in the Statement ambivalent. It implied that the Statement was concluded outside the procedures prescribed in Article 218 TFEU (para 56). These references could however also imply that the Statement did involve the EU.

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[23] See also Case C-670/16 *Mengesteab* EU:C:2017:587, decided on the same day as *A.S. and Jafari*. The three-month time frame established by *Mengesteab* limits the practical effects of *A.S. and Jafari* as the time period had expired for most of the migrants who crossed the Western Balkans route in 2015 and 2016.

[24] Case C-638/16 PPU *X and X* (n 20).

[25] Case T-192/16 *NF* (n 21).

Yet, the Court gave weight to the views of the EU institutions by referring to the Council's argument that the terms 'European Council' and 'EU' in the Statement amounted to simplified wording intended for the general public in the context of a press release and could not be taken literally (paras 57–61). As the Statement was not viewed as an act of the EU, the Court lacked jurisdiction and dismissed the case.

The reasoning is formal for several reasons. In contrast to the many free movement cases, the Court applied a strict method of interpretation focusing on the wording of the Statements rather than its effects on asylum law. The text of the Statement and its content attest to an intention of the parties to create binding commitments, which implicates the EU. The Statement carries legal effect on the EU asylum system as there is an agreement on repatriations of asylum seekers to Turkey. These were not considered by the Court, which almost exclusively relied on internal EU documentation to answer the question of authorship of the Statement.

In essence, whereas the CJEU has adopted an expansive approach to free movement, a different outlook defines the reasoning for asylum. It has taken a path of more formalistic and restrictive interpretations rather than exploring human rights instruments or values in its judgments. This cautious method of interpretation ensures greater executive discretion, even when human rights are at stake. It is explained by the structure of primary law which differs from the internal market and endows the legislature with a principled discretion.[26] Contradicting aims of stronger border controls and compliance with human rights law and the general political sensitivity of asylum law prevent an expansive case law. Yet, there is room for more deliberation on human rights issues in the case law, which I demonstrate in the following section.

3 THE LEGAL OPTIONS IN THE ASYLUM CASES: ALTERNATIVE WAYS OF REASONING

Judicial restraint limits the scope of conceptualisation and scrutiny of EU values such as human rights and the rule of law. There is a possibility for a more rights-sensitive approach in asylum law, which poses the question of how this could be practised in the cases studied. This section explores that possibility. The cases open for reflection on the functioning of the asylum system, the protection of rights and EU constitutional principles. By reflecting on these issues rather than making strict readings of law or by deferring to the Member States, more rights-protective outcomes can be reached. The following analysis shows how the Court could interpret the cases in light of EU principles and values and what difference that would make.

3.1 REFORM OR MAINTENANCE OF THE EU ASYLUM SYSTEM: THE *A.S* AND *JAFARI* CASES

The issue of how the EU should organise its asylum system had been up for debate for years when the CJEU ruled on the Dublin rules in the *A.S.* and *Jafari* cases. Observers argued that

[26] Thym, 'Between "Administrative Mindset" and "Constitutional Imagination" (n 2) 157.

the Dublin system did not work in practice and was unfair towards border states.[27] Even though the Court discussed the substance of the cases and the overall context, the method of interpretation was restrictive as the Court did not consider conflicting legal aims or the effects of the ruling on the functioning of the asylum system. By its inability to develop an adequate responsibility allocation mechanism since 1990, the legislator has proven that it is not capable of solving the issue. The Court could fill this gap to sever the 'Solomonic knot of Dublin'. A closer look at *A.S.* and *Jafari* discloses alternative ways of ruling that could be considered.

First, Advocate General Sharpston argued that the first state-of-entry rule did not apply in times of crisis. Her argument rested on the dual consideration that, firstly, the 'wave-through approach' of countries such as Croatia could not be classified as irregular and that, secondly, the Dublin system was set up for 'normal circumstances' while situations of 'mass inflow' were not covered.[28] The Court argued, by contrast, that the Dublin III Regulation was formed to cover crises as well. The early warning mechanisms cited by the Court as a mechanism to cope with crises was a watered-down outcome of the original Commission proposal to temporarily suspend the Dublin system in an 'urgent situation which places an exceptionally heavy burden' on a Member State.[29] In a sense, another interpretation by the Court would mean that the judicial branch would empower itself by replacing what people view as unfortunate political decisions.[30] Yet, such interpretations have been used in free movement when the interpretations otherwise would lead to unreasonable outcomes.

Second, the Advocate General also suggested that the Dublin III Regulation should be viewed independently from the Schengen Borders Code Regulation, which helped the judges in their interpretation of what 'irregular crossing' means.[31] Although the border crossings were not formally 'regular', AG Sharpston argued that the case was different in a situation of mass influx in which authorities 'actively facilitated both entry into and transit across their territories'.[32] The Court argued, by contrast, for an overarching coherence within the supranational legal order, by emphasising that other legal acts form part of the legislative context that influences interpretation, even though differences between the instruments could lead to different outcomes.

A third argument concerns the lack of constitutional imagination of the Court. The Court emphasised the aim of preventing secondary movements without exploring other perspectives. It was only in subsequent cases the Court recognised the conflicting aim of rapid processing of asylum claims.[33] What was at stake was not only the question of legal

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[27] See Daniel Thym and Evangelia Tsourdi, 'Searching for solidarity in the EU asylum and border policies: Constitutional and operational dimensions' (2017) 24(5) Maastricht journal of European and comparative law 605; Violeta Moreno-Lax, 'Solidarity's reach: Meaning, dimensions and implications for EU (external) asylum policy' (2017) 24(5) Maastricht journal of European and comparative law 740.

[28] Opinion of AG Sharpston in Case C-490/16 *A.S.* and Case C-646/16 *Jafari* EU:C:2017:443, paras 155–190.

[29] Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Recast)' COM (2008)820 final, Art. 31.

[30] Daniel Thym, 'Court of Justice Judicial maintenance of the sputtering Dublin system on asylum jurisdiction: *Jafari*, *A.S.*, *Mengesteab* and *Shiri*' (2018) 55(2) Common Market Law Review 549, 558.

[31] Opinion of AG Sharpston in *A.S.* and *Jafari* (n 28) paras 121–141.

[32] ibid para 176.

[33] See Case C-670/16 *Mengesteab* (n 23) and Case C-201/16 *Majid auch Madzhdi Shiri v Bundesamt für Fredenwesen und Asyl* EU:C:2017:805.

responsibility but also of solidarity. The Court could have examined whether the first entry rule in the Dublin III Regulation was compatible with the principle of solidarity enshrined in Article 80 TFEU. This provision holds that the policies of the EU shall be governed by the principle of solidarity and fair sharing of responsibility. Based on Article 80 TFEU and Recital 25 of the Dublin III Regulation, the Advocate General referred to the principle of solidarity which enabled her to reach a different outcome than the Court.[34] Thus, the Court could have entered into a discussion on solidarity and responsibility sharing, which is the main point of disagreement among the Member States.

The Court underexposed the constitutional dimension of the case at hand. A different interpretation along the lines of the proposal of the Advocate General could have considered what serves integration best, adhering to Dublin III even where Member States no longer do so, or leading Member States out of the doomed Dublin system by identifying an integration interest through a solidarity argument. A functional interpretation could have built on this, and established exceptions based on Member States' willingness to side-step the state-of-first-entry rule and the situation for the Border States. The reluctance to do so is explained by the Court's 'administrative mindset'.[35] Typically, the Court focuses in asylum cases on what secondary law contains and leaves the reform of the system to the legislator. The wording of the provision and the manifold options of how to implement it do not guide the Court in a certain direction.[36] Rather than using this as an opportunity to explore values and principles, the initiative to revive the 'spirit of solidarity' is seen to rest with the political process. This is a reasonable position to take but departs from the Court's usual role in the EU.

3.2 THE SCOPE OF HUMAN RIGHTS-BASED REASONING: *X AND X*

While *A.S.* and *Jafari* raised questions about the Court's engagement with constitutional principles, *X and X* was concerned with the scope of EU law and the rights of asylum seekers.[37] The CJEU had the opportunity to establish a new and safe route for asylum-seekers to the EU. The Syrian family who applied for Belgian visas had been forced to return to Syria by the fact that they were not allowed to register as refugees in Lebanon and were not sufficiently prosperous to be able to maintain themselves in Lebanon without such registration. The CJEU abstained from any broader reflections on these issues but thanks to the Advocate General there is an opposing interpretation of EU law put forward to consider.

The Advocate General presented a ruling with the opposite outcome compared to the CJEU by, first, arguing that short-stay visas can be granted despite doubts of the applicant's intentions in humanitarian cases, and second, that after the visa expires the Syrian family will remain in Belgium based on their status as asylum seekers.[38] Therefore, he argued that the procedure concerns a short-stay visa.[39] AG Mengozzi also contended that 'by adopting a decision under Article 25 of the Visa Code, the authorities of a Member State implement EU

[34] Opinion of AG Sharpston in *A.S.* and *Jafari* (n 28) para 139.
[35] Thym, 'Between "Administrative Mindset" and "Constitutional Imagination" (n 2)
[36] Thym, 'Court of Justice Judicial maintenance of the sputtering Dublin system on asylum jurisdiction' (n 30) 561.
[37] Case C-638/16 PPU *X and X* (n 20).
[38] Opinion of AG Mengozzi in Case C-638/16 PPU *X and X* EU:C:2017:93.
[39] ibid para 88.

law for the purposes of Article 51(1) of the Charter and are, therefore, required to respect the rights guaranteed by the Charter'.[40] By viewing their application as an application for a short-stay visa, the EU Visa Code and the Charter of Fundamental Rights (CFR) would be applicable and thereby would render CJEU competent to rule on the substantive issues. This is important since the prohibition of refoulement would be deprived of any effectiveness if measures were not taken to ensure entry into a State for applicants who could otherwise be subjected to ill treatment.[41]

AG Mengozzi recalled the case *Hirsi Jamaa,* where the European Court of Human Rights (ECtHR) held that asylum seekers intercepted at sea cannot be sent back to Libya.[42] As they had been taken onboard an Italian military vessel and had been under continuous and exclusive Italian control, their applications fell under Italian jurisdiction, making the European Convention on Human Rights (ECHR) applicable.[43] The Member States could be under a similar obligation to issue a visa if there were substantial grounds to believe that the refusal thereof would violate the principle of non-refoulement. Still, on the issue of humanitarian visas, the ECtHR has reached a similar conclusion as the CJEU in *X and X*. In *M.N. v Belgium*, the ECtHR argued that it was not competent to rule on the matter since mere administrative control of Belgium over its embassies was found not to entail the exercise of jurisdiction.[44] The opportunity to take a more expansive approach was thus passed up also by the ECtHR.

A key issue in this case is that the possibility of applying for a humanitarian visa to apply for asylum has not been created in European law. Proposals to do so have been discussed but have only remained at the stage of discussion.[45] The CJEU could construct this possibility by interpreting EU law along the lines proposed by the Advocate General. Human rights-based arguments could shift the legal reasoning and lead to other outcomes. Both the CJEU and the ECtHR seem to have felt that they would have overplayed their hand if they had created the option of a humanitarian visa to apply for asylum. This is different from free movement cases where the CJEU has been keen on removing all obstacles to free movement in the EU. Applying this approach to asylum law would have allowed the CJEU to examine the consequences of *non-refoulement* in individual cases, which is needed when there are few legal channels for asylum seekers to travel and enter countries of protection. It might, however, be too politically explosive which explains the more cautious judicial approach. A different outcome needs legislative amendments to the current EU asylum law.

3.3 LEVEL OF DEFERENCE TO EXECUTIVE ACTORS: *NF V EUROPEAN COUNCIL*

In the case of the EU-Turkey Statement, the Court had the opportunity to rule on the legality of informal arrangements on readmission. The Court only has jurisdiction to review international agreements concluded by the EU according to Article 218 TFEU. This does not include informal readmission agreements. For some, the Statement simply reflects a

[40] Opinion of AG Mengozzi in *X and X* (n 38) para 84.
[41] ibid para 154.
[42] See *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR, 23 February 2012).
[43] ibid para 112-114.
[44] *M.N and Others v Belgium* App no 3599/18 (ECtHR, 5 March 2020) para 119.
[45] See Spijkerboer (n 2) 12.

political arrangement with no binding force.[46] This view is reflected in the judgment. Yet, others have considered it as an international agreement.[47] The Court overlooked important aspects of the Statement. A different reading of the Statement is possible and it would have enhanced the level of judicial scrutiny.

One alternative interpretation of the Statement can be made by focusing on the legal effects of the Statement. An act is reviewable by the Court if it is 'intended to produce legal effects vis-á-vis third parties'.[48] This is the case even though an act might be worded as non-binding.[49] As the Statement provided that all migrants would be returned to Turkey it seems clear that this was the intention. Moreover, the Statement has a legal effect on the EU asylum system as there is an agreement on repatriations of asylum seekers to Turkey. This is important to consider in relation to the *ERTA* doctrine, which is codified in Article 3(2) TFEU. It holds that whether a decision is a decision of the Council, or the Member States is governed by European law.[50] What is decisive is not the label of the Statement, but whether the decision implements a common policy or deals with a matter falling within EU competence. The rule is that once the EU implements a common policy in a certain field, the EU Member States no longer have the right 'to undertake obligations with third countries which affect those rules or alter their scope'.[51] Seen this way, it was not sufficient for the Court to consider merely who the signatories were.

Furthermore, a different interpretation could be made if the Statement was analysed in light of international rules on treaty-making.[52] Article 31 of the Vienna Convention on the Law of Treaties (VCLT) states that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. These rules are also relevant in the EU context. Eva Kassoti and Alina Carrozzini have argued that the text of the Statement, the subsequent practice of the parties in the application of the Statement and the principle of good faith, suggest that the Statement is attributable to the EU itself.[53] By reading the Statement it seems like the EU agreed to a number of agreements. EU institutions were involved in the negotiation with Turkey.[54] The EU also covered a significant part of the costs for implementing the Statement from the EU budget and the Commission was involved in the process of implementation. All these attest to the intention of the parties to create binding commitments. Even though

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[46] See Steve Peers, 'The draft EU/Turkey deal on migration and refugees: is it legal?' (*EU Law Analysis*, 16 March 2016) <http://eulawanalysis.blogspot.com/2016/03/the-draft-euturkey-deal-on-migration.html> accessed 1 October 2023; Gloria Fernández Arribas, 'The EU-Turkey Agreement: A Controversial Attempt at Patching up a Major Problem' (2016) 1(3) European Papers 1097.

[47] See e.g. Maarten Den Heijer and Thomas Spijkerboer, 'Is the EU-Turkey refugee and migration deal a treaty?' (*EU Law Analysis*, 7 April 2016) <http://eulawanalysis.blogspot.com/2016/04/is-eu-turkey-refugee-and-migration-deal.html> accessed 1 October 2023.

[48] Article 263(1) TFEU.

[49] Case C-355/10 *European Parliament v Council of the European Union* EU:C:2012:516 paras 80-82.

[50] Narin Idriz, 'The EU-Turkey Statement or the "Refugee Deal": The Extra-Legal Deal of Extraordinary Times?' in Dina Siegel and Veronika Nagy (eds), *The Migration Crisis?: Criminalization, Security and Survival* (Eleven Publishing, T.M.C. Asser Institute for International & European Law 2017) 9.

[51] Joined cases C-181/91 and C-248/91 *European Parliament v Council and Commission* EU:C:1993:271 para. 17.

[52] Eva Kassoti and Alina Carrozzini, 'One Instrument in Search of an Author: Revisiting the Authorship and Legal Nature of the EU-Turkey Statement' in Eva Kassoti and Narin Idriz (eds), *The Informalisation of the EU's External Action in the Field of Migration and Asylum* (T.M.C. Asser Press / Springer 2022) 245.

[53] ibid 254.

[54] Sandrino Smeets and Derek Beach, 'When success is an orphan: informal institutional governance and the EU-Turkey deal' (2020) 43(1) West European Politics 129.

they did not live up to the internal rules on treaty-making, according to Article 280 TFEU, the authorship is not affected as a matter of international law.[55] The Statement could therefore, contrary to the Court's judgment, constitute an international agreement.

In essence, a different reading of the Statement could be made by considering the legal effects, content, and involvement of EU institutions in the negotiation and implementation of the arrangement with Turkey. This is important since it would have made the annulment actions admissible, which in turn, would have allowed for a substantive review of the nature of the Statement, including its compliance with EU constitutional and procedural law and EU asylum and human rights law. The reason why the Court came to a different conclusion is because of its deferential approach to executive actors in politically sensitive matters. Rather than making its own assessment of the negotiation process and the implications of the Statement, the Court gave weight to the views of the actors who did not want to take authorship of the Statement. The formal approach and lack of consideration of values and rights limited the judicial scrutiny and empowered the Member States involved.

4 REASSESSING THE ROAD TAKEN BY THE CJEU IN ASYLUM CASES

While the previous section established how a different judicial approach would lead to more rights-positive outcomes in the asylum cases, a remaining issue is what argument could justify such an approach. Just because an interpretation is possible does not mean that it is preferable. The different legal aims of free movement and asylum are central to explaining the different judicial approaches. Based on the contradictory aims of asylum law, the Court cannot say that the EU has a mission to encourage immigration or to expand the fundamental freedoms of third-country nationals. It is, however, one of the fundamental purposes of the EU to create a space in which rights and common values are protected.[56] Yet even though the case studies show how broader teleological reasonings could have been used, there are several reasons why the Court may have avoided them. In this section, I will reflect on those reasons and discuss the legitimate justifications for different judicial approaches.

The issue of the proper role of courts connects to debates about the separation of powers and democracy. In the traditional position of the judiciary, courts are tasked with applying laws that have been passed by a democratically elected legislator on individual cases.[57] Due to the principle of legal certainty, a textual approach that remains close to the position of the legislator is preferred.[58] Yet the ambiguity of the legal provisions in asylum law means that the Court cannot avoid being normative and should explain why it pursues one objective over the other. Teleological reasoning is useful, or even necessary, in the EU because the legislation is often ambiguous, vague, and imbued with teleology. In the cases studied, the Court could consider the rights of asylum seekers based on the principle of

[55] Kassoti and Carrozzini (n 52) 254.
[56] See Articles 2 and 6 TEU.
[57] Panu Minkkinen, "'Enemies of the People'? The Judiciary and Claude Lefort's "Savage Democracy"" in Matilda Arvidsson, Leila Brännström, and Panu Minkkinen (eds), *Constituent Power: Law, Popular Rule and Politics* (Edinburgh University Press 2020) 38.
[58] Koen Lenaerts and José A Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice' (2014) 20(2) The Columbia Journal of European Law 59.

non-refoulement in *X and X*,[59] the effect different interpretations have on the principle of solidarity in *A.S* and *Jafari*,[60] and the legal effects of the EU-Turkey Statement on EU asylum policies in *NF*.[61]

Judicial reasoning can be seen as a continuation of the legislative process, as it allows courts to adjust legal principles according to how they play out. While the legislator is tasked with making legally unprecedented laws, the judiciary may develop the law gradually using existing legal sources.[62] The scope of the judiciary's decision-making powers includes deliberation on international human rights law. In this reading, there is a potential for judicial intervention based on rights and values.[63]

This democratic role is not merely theoretical.[64] The expansiveness of the Court in other contexts, most notably in free movement, is well-documented. The free movement cases show that the Court has often taken on a role of not merely applying or interpreting the law, but of expanding it. It has in such cases relied on the Treaty aims of making free movement easier. There is a distinct reason for value-based reasoning in asylum law. The EU institutions and the Member States are required to comply with human rights in all spheres governed by EU law, according to Articles 2 and 6 TEU and Article 51 CFR. The Court can apply a reasoning that examines the compatibility of legal measures with EU fundamental rights and freedoms, as well as key values and principles. Such reasoning is already applied in these cases by the Advocate Generals.

Teleological interpretation may be suitable to develop the law, but its use may also be subject to criticism, particularly when it is seen as expanding the role of the Court in making policy decisions. There are asylum cases where the Court has interpreted secondary law in light of human rights.[65] Nonetheless, there are important reasons why the Court may be reluctant to *generally* make expansive interpretations of asylum law.

The possibility of international law to counter EU legislative choices is limited. There is no inevitable primacy of individual rights over public interests. For instance, the European Court of Human Rights often recognises that 'as a matter of well-established international law and subject to its treaty obligations, a state has the right to control the entry of non-nationals into its territory'.[66] The Charter of Fundamental Rights is only applicable when Member States are implementing EU law and while the EU must respect human rights and contribute to their protection, the policy output may pursue other objectives as well.[67]

In this context, one must consider that the competing aims of EU asylum law have ensured a margin of discretion for Member States.[68] There is a distinct treaty regime for asylum law and policy, which prevents, in general, an approach similar to the one we have

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[59] Case C-638/16 PPU *X and X* (n 20).
[60] Cases C-490/16 *A.S.* and C-646/16 *Jafari* (n 19).
[61] Case T-192/16 *NF* (n 21).
[62] John Gardner*, Law as a Leap of Faith: Essays on Law in General* (Oxford University Press 2012) 41.
[63] Minkkinen (n 57) 38.
[64] Minkkinen (n 57) 38.
[65] See e.g. Case C-36/20 PPU *Ministerio Fiscal* EU:C:2020:495 para 82, and Case C-72/22 PPU *Valstybės sienos apsaugos tarnyba* EU:C:2022:505 paras 58–64.
[66] See e.g. *Abdulaziz and others v United Kingdom* App nos 9214/80, 9473/81 and 9474/81 (ECtHR, 28 May 1985) para 67.
[67] Daniel Thym, *European Migration Law* (Oxford University Press 2023) 134.
[68] Sandra Lavenex, '"Failing Forward" Towards Which Europe? Organized Hypocrisy in the Common European Asylum System' (2018) 56(5) Journal of Common Market Studies 1195, 1196.

seen in free movement case law.[69] The constitutional principles of EU asylum law do not prescribe how open borders should be and thus the legislature benefits from the discretion to decide between different competing interests. The Treaties are not directing policy choices in a pre-determined direction of enhancing the rights of third-country nationals. If there is a distinctive rationale behind EU asylum law, it is protectionist. The aims of mobility and free movement within the Schengen area have led to an amplification of borders against countries outside Schengen. There is a foundational norm of protectionism in EU asylum law which builds on this distinction, and this in turn, limits the possibilities for judicial expansionism.[70] The initiative to make different policy choices may rest with the political process rather than the Court.

This is different from the free movement case law that has evolved in the context of a political project of strengthening EU citizenship rights. Considering the objectives of the law in this field as articulated in the preambles and articles of successive treaties and secondary legislation, the approach of the Court did not deviate from the aims of the legislators. The relevant provisions of secondary legislation have given precedence to the fundamental rights of workers over satisfying the requirements of the economies of Member States.[71] Therefore, when the Court decided to prioritize free movement rights over social rights in *Laval*, it did so in line with the Treaty aims of integration and open borders.

While the legal issues could have been resolved differently by the Court, one must also consider the political sensitivity of the field and the political pressure on the Court. The Court was previously concerned with promoting EU integration, but today there are more calls on the Court to assume a similar responsibility for the EU's democratic deficit.[72] With increasing demands for democratic legitimacy, the Court might alienate the Member States by deciding politically sensitive issues. At a time when some governments openly reject compliance with EU legislation, such as the relocation decisions, it is understandable that the Court will try to remain close to the legislator.[73] Attempts to develop constitutional values are only successful if they are embedded in political processes.[74] This is a further argument why the Court should not undo the discretion of the legislature to decide on the road to be taken.

There was strong resistance among Member States to further integration in all three asylum cases studied. In the case of *X & X* on humanitarian visas, thirteen Member States and the EU Commission intervened and all of them opposed the idea that there could be an obligation to grant humanitarian visas.[75] Thomas Spijkerboer noted this in his analysis of the case and argued that 'it would have needed a lot of courage to take another position than the Court did' in response to such high resistance.[76] Similar concerns were likely made in *NF v Council*. EU institutions were reluctant to take ownership of the Statement. Daniel Thym has

[69] Thym, 'Between "Administrative Mindset" and "Constitutional Imagination" (n 2) 142.
[70] Gregor Noll, 'Viciously Circular' in Vladislava Stoyanova and Stijn Smet (eds), *Migrants' Rights, Populism and Legal Resilience in Europe* (Cambridge University Press 2022) 3.
[71] Wiesbrock (n 10) 65.
[72] Joseph Corkin, 'Refining Relative Authority: The Judicial Branch in the New Separation of Powers' in Joana Mendes and Ingo Venzke (eds), *Allocating Authority: Who Should Do What in European and International Law?* (Hart Publishing 2020) 176.
[73] Thym, 'Between "Administrative Mindset" and "Constitutional Imagination" (n 2) 156.
[74] Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (2nd edn, University of Chicago Press 2008) 31.
[75] Case C-638/16 PPU *X and X* (n 20).
[76] Spijkerboer (n 2) 12.

also argued that the Court was possibly aware of the political controversies surrounding the *A.S.* and *Jafari* judgments and that this may have contributed to the technical style of argumentation.[77] At the time, Member States fought back against EU measures to increase cooperation among them.[78] Even though the border states had an unprecedented burden of examining the refugees' applications, it may not have been plausible for the Court to argue that Member States should act 'in a spirit of solidarity' to manage the great inflows of migrants.

Essentially, the Court is acting in a constraining context in asylum law which explains the road taken. While the EU Charter for Fundamental Rights lends further credence to deepen human rights work, interest in keeping it within the parameters of EU law remains. Protectionist EU policies limit the potential for dynamic rulings. Nevertheless, while these factors explain the Court's behaviour, they are not completely convincing *de sentencia ferenda*. Human rights could carry more weight in EU asylum law. When human rights are at stake, the Court could do more to ensure compatibility with EU fundamental rights and principles. To generally embark on this line of reasoning, the Court would need to say that one of the fundamental purposes of the EU is to create a space for human rights, which could counter the strong political interests in the area. Such a purposive mode is, however, only likely to be triggered by a new political project that emphasises rights more.

5 CONCLUSION

In cases where the EU asylum system is tested, the CJEU does not explore broader teleological perspectives. In *A.S.* and *Jafari* the Court refrained from expressing itself on the legal implications of the principle of solidarity for asylum policy, in *X and X* the Court did not rule on the implications of the principle of *non-refoulement*, and in *NF v Council* the Court did not elaborate on the legality of the EU-Turkey Statement. These cases presented an opportunity for the Court to apply the kind of contextual and teleological analyses that it has undertaken in free movement but has not used to the same extent regarding asylum law. In the cases studied, other methods of interpretation were available, and by considering the context of the cases in conjunction with more expansive legal approaches, the Court could have reached other outcomes that were more rights-sensitive.

Certainly, one must keep in mind that asylum and free movement are two different legal fields. As academics have argued, the EU is different now compared to when the free movement cases were decided and the salience of political debates on asylum limits the possibilities for expansive court rulings. The Treaties provide the legislator with the discretion to balance rights and control objectives in secondary law. Human rights may not therefore vindicate a different outcome, but the in-depth analysis shows that values and rights could have been considered more than they currently are by the Court. As the Court

[77] Thym, 'Court of Justice Judicial maintenance of the sputtering Dublin system on asylum jurisdiction' (n 30) 556.

[78] See e.g. Council Decision (EU) 2015/1523 of 14 Sept. 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece [2015] OJ L239/146; and Council Decision (EU) 2015/1601 of 22 Sept. 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] OJ L248/80. See also CJEU rulings in Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council of the European Union* EU:C:2017:631, and Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v Poland, Hungary, and the Czech Republic* EU:C:2020:257.

discovers how the legal rules play out in real life, it should assess the effects on human rights as part of its constitutional function. In a democratic system, it cannot only be the legislator that decides on the road to be taken within the confines of human rights.

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THE LOST TRADERS? CONSIDERING THE DISTINCTION BETWEEN PROFESSIONAL AND NON-PROFESSIONAL ACTORS IN EU LAW IN THE LIGHT OF NEW TYPES OF ECONOMIC ACTORS

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Since the beginning of the new millennium, the landscape of cross-border commerce has been altered significantly, with more and more individuals having the possibility to engage in commercial activities online, for example through so-called online platforms. This has led to the EU legislator undertaking legislative activities in the field, aimed at creating a safer environment for online commerce and enhancing the internal market. This article discusses the legislation in question in relation to a certain group of economic actors, namely those that operate in the grey area between acting for purely private, non-professional, purposes and those engaging in commerce as a part of a business for professional purposes. The article discusses the way in which EU legislation, applicable to online commerce, draws the line between non-professional and professional actors, in particular with regard to ascertaining the legal position of actors that find themselves on the borderline between professional and non-professional actors, referred to as participants in the gig economy.

1 INTRODUCTION

This article concerns a group of economic actors that has been growing fast in recent years and their legal position under EU law. The actors in question are private individuals – natural persons – that sell products or provide services using the internet as a medium, in particular through so-called online platforms, without having formally established a business or doing so as part of their main profession.

In most commercial relationships, a basic distinction is made between a seller and a buyer. These two economic actors can subsequently be subject to further definitions. For example, a variety of EU legislation, which aims at protecting *consumers,* draws a distinction between parties to a commercial relationship based on whether they are acting in a professional capacity or not. A common feature in such legislation is to impose certain obligations on the business or professional actor for the protection and overall benefit of the non-professional actor. Legislation based on the distinction between the professional and the non-professional has (perhaps) proven to be an effective way of regulating economic actors participating in the traditional economy, where it is relatively easy to determine the professional – for example a large business company – and the non-professional – the private individual buying products for household purposes. However, questions arise as to whether this way of legislating adequately encompasses – and regulates – situations where the non-professional starts engaging in

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commercial activities with increasing regularity and takes on work traditionally dominated by companies and their employees.

The article examines the way in which EU law draws a distinction between a non-professional actor, who engages in online commercial activity, and a professional actor, who engages in commercial activity and is subject to certain obligations in relation thereto, due to his professional capacity. The aim is to contribute to clarifying the legal position of those economic actors that operate in the grey area between acting for purely private, non-professional, purposes and those engaging in commerce as a part of a business for professional purposes. To this end, the article begins by describing the nature of the work of these actors (referred to as gig work) (section 2) before outlining some of the main obligations that EU legislation, governing online cross-border commerce, imposes on sellers of products and service providers (section 3). Subsequently, the article examines the way in which EU law draws the distinction between the private individual, engaging in online commerce, and persons that are acting for the purposes of their business or in a professional capacity (section 4) before offering some concluding thoughts (section 5).

The scope of the article is demarcated in two important ways. First, the article is limited to discussing the legal position of sellers of products and providers of service. It does thus not examine the legal position of *buyers and recipients of services*, although the legal position of such actors will necessarily be mentioned from time to time, particularly when discussing matters falling within the field of EU consumer law. Secondly, the scope of the article is limited to assessing the legal positions of economic actors that are *not* in an employment relationship with online intermediaries (platforms). However, recent legislative developments in this field, i.e., concerning the relationship between online intermediaries (e.g., platforms) and actors using the intermediaries for selling products or as a part of providing services, cannot be wholly ignored, as the legislation in question contributes to clarifying the legal position of users of online platforms under EU law.

2 THE GIG ECONOMY

2.1 EMERGENCE

Technological developments and ever-increasing globalisation have had two interrelated, albeit a bit paradoxical, consequences. First, increasing use of machines (technology) and substituting local workforce for, less expensive, foreign workforce (globalisation) have led to a loss of traditional jobs.[1] Secondly, the internet (technology) and the ability to connect to people all over the world (globalisation) have led to new online working opportunities, i.e., the possibility of leveraging access to the internet and online networks to carry out an economic activity. In that

[1] See e.g. Erik Brynjolfsson and Andrew McAfee, *The second machine age : work, progress, and prosperity in a time of brilliant technologies* (W. W. Norton & Company 2014) 5-6.

way, technological advancements provide new types of jobs and occupations where the internet is used as a medium to match workers and jobs.[2]

The beginning of the 21st century has seen the internet significantly alter the business landscape in Europe. In particular, online platforms have created new possibilities for individuals for doing business and earning a living outside the traditional role of a company employee. Individuals are able to find work and income through online platforms that match them with buyers of products and services. These developments have given rise to a phenomenon referred to as *gig economy*. Dictionaries describe gig economy as 'an economic system in which many short periods of work are available rather than permanent jobs'[3] and as a 'way of working that is based on people having temporary jobs or doing separate pieces of work, each paid separately, rather than working for an employer […]'.[4] Based on such descriptions, the *gig economy* and *gig* workers have existed for a long time. However, rapid technological developments in the online world since the beginning of the new millennium have added to the significance of this part of the economy.[5]

2.2 ONLINE PARTICIPATION IN THE GIG ECONOMY

Different organisations and commentators researching the gig economy have come across the same problem, namely the difficulties that accompany efforts to try to precisely locate, categorise, and define, its main actor – the individual working in gig economy, in particular those that work through only mediums (digitally). As pointed out by the OECD, it is difficult to define self-employed gig economy workers due their wide range of different activities and sectors:

> For example, this type of self-employment work includes very small-scale, short-term activities undertaken by individuals (e.g. tasks completed through online platforms such

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[2] See e.g. Derek Thompson, 'A World Without Work' (*The Atlantic*, July-August 2015 issue) <https://www.theatlantic.com/magazine/archive/2015/07/world-without-work/395294> accessed 1 October 2023.

[3] See Oxford Learner's Dictionaries, 'Gig economy' <https://www.oxfordlearnersdictionaries.com/definition/english/gig-economy?q=gig+economy> accessed 1 October 2023.

[4] See Cambridge Dictionary, 'Gig economy' <https://dictionary.cambridge.org/dictionary/english/gig-economy> accessed 1 October 2023. The same definition is used to describe *gig workers* in Chartered Institute of Personnel and Development (CIPD), *To gig or not to gig? Stories from the modern economy Survey report March 2017* (2017) 4. *Investopedia* explains that the term *gig* derives from the world of music, 'where performers book "gigs" that are single or short-term engagements at various venues'. See Investopedia, 'Gig Economy: Definition, Factors Behind It, Critique & Gig Work' <https://www.investopedia.com/terms/g/gig-economy.asp> accessed 1 October 2023.

[5] As early as 2005, gig workers have been described as accounting for around two to four percent of all workers in the US, see statistics from the U.S. Bureau of Labour Statistics (BLS) and the U.S. Census Bureau in Elka Torpey and Andrew Hogan, 'Working in a gig economy' (*US Bureau of Labor Statistics*, May 2016): <https://www.bls.gov/careeroutlook/2016/article/what-is-the-gig-economy.htm> accessed 1 October 2023. Further, research by McKinsey has found that 20-30% of the working population have 'engaged in some form of independent earning' and that 15% of this independent working population did so by using 'digital platforms such as Upwork, Uber, Airbnb, or Etsy [and that] these online marketplaces could eventually have a transformative impact by efficiently matching a larger pool of workers with consumers of their services'. See James Manyika et al, 'Independent work: Choice, necessity, and the gig economy' (McKinsey Global Institute report, 10 October 2016), 1 <https://www.mckinsey.com/featured-insights/employment-and-growth/independent-work-choice-necessity-and-the-gig-economy> accessed 1 October 2023. Textual editions by Author.

as Task Rabbit), but it also includes collaborative work in online markets (e.g. Amazon Mechanical Turk) and work undertaken by individuals as part of well-resourced networks (e.g. Uber).[6]

The lack of data and information on such online gig economy workers, particularly as to the number of workers and the nature of their work, poses a challenge when comparing this new form of work to existing forms (such as traditional employment) and assessing whether existing legal frameworks fit this new form of work.[7] However, the EU has taken steps in terms of clarifying the legal position of individuals that work through online platforms, with regard to their employment status and related issues. The recent proposal for a directive on *digital labour platforms* and the research it is based on serves as a tool to further define and categorise participants in the gig economy. The research in question shows that more than 28 million individuals in Europe work via online platforms 'more often than just sporadically' and that the majority of those individuals are considered to be self-employed, despite being subordinated to an online platform with a varying degree and thus enjoying limited autonomy as to structuring their work.[8]

2.3 ONLINE PLATFORMS

Online platforms have been described as 'online intermediaries [that] provide platforms for and facilitate the exchange of goods, services or information in the online environment [and] perform or provide activities such as search, e-commerce [and] social networks and cloud computing […]'.[9] The OECD has proposed defining 'Internet intermediaries' as entities that bring different actors together and/or facilitate business by giving access to, hosting or transmitting 'content, products and services originated by third parties on the Internet or provide Internet-based services to third parties'.[10] It has been estimated that in terms of consumption of goods and services on the internet, 60% of private consumption and 30% public consumption goes through the channels of online platforms.[11]

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[6] See OECD/European Union, *The Missing Entrepreneurs 2017: Policies for Inclusive Entrepreneurship* (OECD Publishing 2017) 125.

[7] See ibid and Manyika et al (n 5) 15.

[8] See Egidijus Barcevičius et al, *Study to support the impact assessment of an EU initiative to improve the working conditions in platform work* (Luxembourg: Publications Office of the European Union 2021) 5, and Willem Pieter de Groen et al, *Digital labour platforms in the EU: Mapping and business models* (Luxembourg: Publications Office of the European Union 2021) 10.

[9] See Martin H Thelle et al, 'Online Intermediaries: Impact on the EU economy', 7 <https://copenhageneconomics.com/wp-content/uploads/2021/12/edima-online-intermediaries-eu-growth-engines.pdf> accessed 1 October 2023.

[10] See OECD definition of 'Internet Intermediaries' in Karine Perset, 'The Economic and Social Role of Internet Intermediaries' (*OECD Digital Economy Papers*, 8 April 2010) <https://www.oecd-ilibrary.org/science-and-technology/the-economic-and-social-role-of-internet-intermediaries_5kmh79zzs8vb-en> accessed 1 October 2023. Textual editions by the Author. Examples of online platforms are eBay (e-commerce platform), Facebook (social media platform), Google (search platform), Spotify (entertainment platform), accommodation/transportation platforms, such as AirBnB and Uber (examples taken from figure in Thelle et al (n 9) 8).

[11] See Thelle et al (n 9) 9.

It is safe to assume that the participation of many actors in the gig economy is contingent upon the facilitation provided by online platforms.[12] Through such platforms, 'ordinary people' have a venue to seek other forms of work than traditional forms and employment.[13] Precise quantifications and exact numbers aside, it is clear that the online economy has dramatically altered the nature of work for significant parts of the population and the business environment in general. In Europe, it has opened up work and income opportunities for millions of people while increasing the options for those buying products and services (consumers).

When categorising online platforms, an important distinction needs to be made based on whether the platform acts only (or primarily) as intermediary – between a buyer and a seller – or whether the platform acts as intermediary for services requested by consumers that also exercise a certain degree of control over the (natural) person that physically provides the service in question. The latter type of online platforms has been referred to as *digital labour platforms*[14] in recent legislative proposals, which aim at clarifying the legal position of those providing services through the platforms.[15] According to the proposal, the purpose of such a directive is to 'ensure the correct determination of […] employment status' and provide certain minimum rights (under EU labour law) to those economic actors that are deemed to be in an employment relationship with an online platform.[16]

The proposal for digital labour platforms provides that it shall be 'legally presumed' that if a platform *controls* the work of a person working through the platform, then the contractual relationship (between the platform and the worker) is an employment relationship.[17] The codifies the criteria established in the case law of the CJEU for determining the status of a worker[18] and for determining whether a platform controls the performance of the work.[19] Among the criteria are the platform deciding (unilaterally) the level of remuneration; setting binding rules for how the work should be carried out; supervising the work; restricting the worker's freedom (in terms of e.g. working hours and whether to accept or refuse tasks); and restricting the worker's possibilities of building his or her own client base.[20] If two or more are

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[12] As an example, research has showed that the majority (63%) of independent workers that sell goods do so via online platforms, see Manyika et al (n 5) 34.

[13] See David Gierten and Vincenzo Spiezia, 'New Forms of Work in the Digital Economy: 2016 Ministerial Meeting on The Digital Economy. Technical Report' (*OECD Digital Economy Papers*, 21 June 2016), 5 <https://www.oecd-ilibrary.org/docserver/5jlwnklt820x-en.pdf?expires=1670594099&id=id&accname=guest&checksum=167182FE8E2C5A14AB98315A069C54C1> accessed 1 October 2023. Textual editions by Author.

[14] See e.g. Willem Pieter de Groen et al (n 8) 7.

[15] See Commission, 'Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work' COM (2021) 762 final, Art 2(1)(1).

[16] ibid 32, Art 1.

[17] ibid Art 4(1).

[18] See ibid Preamble, Recitals (20)-(24). In Case C-692/19 *B v Yodel Delivery Network Ltd* EU:C:2020:288 the ECJ laid down certain parameters for determining whether a self-employed independent contractor, carrying out courier services, should be considered a 'worker' for the purpose of applying the directive on the organisation of working time (in particular para 45 of the order).

[19] See Commission, 'Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work' COM (2021) 762 final, Preamble, Recitals (20)-(24).

[20] See Commission, 'Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work' COM (2021) 762 final, Preamble, Art 4(2).

fulfilled, according to the proposal, the worker shall be deemed to be in an employment relationship with the platform, which in turn means that the worker enjoys certain minimum rights as a platform worker in an employment relationship with the platform. The proposal does, however, not regulate the obligations of workers vis-à-vis the recipients of the service they provide, for example by way of mandating employer liability (in case a worker is considered to be in an employment relationship). Thus, while the proposal helps in terms of clarifying the employment status of many gig economy participants and enhances the rights of some of those participants, it does not specifically address the issue of obligations and liability towards the recipient of the service provided online.

As to the other type of platforms, i.e., commercial non-labour platforms, persons operating through such platforms have been described as enjoying greater autonomy when using platforms 'to develop their entrepreneurial activities'.[21] Unlike labour platforms, such platforms are not involved in *organising* work carried out by individuals. Their role is limited to serving as an intermediary between a seller or service provider and the buyer or user of such services.[22]

The EU legislator has enacted a regulation on promoting fairness and transparency for business users of online intermediation services (the Online Platform Regulation).[23] Further, a comprehensive legislation concerning online intermediary services has been enacted, which covers both social networks and online platforms that allow traders to conclude contracts (at a distance) with consumers. The legislation in question is in the form of two regulations, named the Digital Services Act[24] and the Digital Markets Act.[25] The Online Platform Regulation concerns online intermediators – online platforms. Their central role to the European economy is what pushes the EU to make them subject to further regulation. As activities of more than a million economic actors in the EU depend on their products or services being available through online platforms,[26] the main aim of the regulation is to limit the possibility for platforms to engage in harmful trading practices to the detriment of their users. Such practices are, for example, changes in the terms and conditions without prior notice or explanation, delisting goods or services or suspending user's accounts without providing reasoning, non-transparent ranking systems and platforms potentially creating more favourable conditions for their own, competing, goods or services. Thus, the regulation aims at creating a fairer, transparent and, consequently, more effective, business environment for trading via online platforms, by

[21] See ibid 2.
[22] ibid 24, Recital (18).
[23] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services [2019] OJ L186/57 (Online Platform Regulation).
[24] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC [2022] OJ L277/1 (the Digital Services Act).
[25] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 [2022] OJ L265/1 (Digital Markets Act).
[26] See Commission, 'Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services of 26 April 2018' COM (2018) 238 final (Online Platform Regulation Proposal), 1-2.

protecting their users through imposing obligations on platform providers.[27] The Digital Services Act provides rules that aim at creating 'rules for a safe, predictable and trusted online environment that facilitates innovation and in which fundamental rights enshrined in the Charter, including the principle of consumer protection, are effectively protected'.[28] As discussed further below, some of those rules concern traders specifically and their obligations vis-à-vis consumers. The scope of the Digital Markets Act is more specific, as it lays down obligations on actors that perform 'core platform services', referred to as 'gatekeepers'.[29]

3 OBLIGATIONS IMPOSED ON SELLERS AND SERVICE PROVIDERS UNDER EU LEGISLATION

3.1 GENERAL

Cross-border commerce is one of the core economic purposes of the European Union and EU law provides numerous legislative act that might apply to such activities. This sub-section lays down some of the main obligations that EU legislation, applicable to online commerce, imposes upon sellers of products or service providers. This is primarily to give the reader an overview of the obligations that online participants in the gig economy are subject to, *if* they fall under the scope of said legislation. The section thus neither provides an exhaustive list of obligations nor examines all EU legislation concerning online commerce (hereinafter also referred to as *e-commerce*).

An obvious point of departure for such examination is EU legislation that is specific to online commerce, namely directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (the E-Commerce Directive)[30]. Two of the core objectives of the E-Commerce Directive are to enhance legal certainty for concerned actors and increase 'consumer confidence'.[31] These objectives fall within the broader aim of increasing the willingness to engage in online, distance (cross-border),

[27] Notably, the legislation aims at not only protecting businesses that use online platforms (business users) but also other users for the benefit of 'all players'. See Online Platform Regulation Proposal (n 26) 2-3: 'Whilst primarily resulting in impacts for business users, this situation affects all actors in the multi-sided online platform ecosystems, including consumers, which could face a reduced choice of competitive goods and services. […] The [proposal aims to create] a clear, transparent and stable legal environment for online B2C service providers and their business users, to tackle market fragmentation and to allow all players to tap into the new market dynamics under fair and balanced conditions and with an appropriate degree of transparency'. Textual editions by the Author.

[28] Digital Services Act (n 24) Art 1(1).

[29] ibid Arts 1-3. For determining what amounts to 'core platform service' the regulation provides the following criteria: The actors whose (market) position is such that they have 'significant impact' on the internal market, they serve as 'important gateway for business users to reach end user[s]' or they 'enjo[y] an entrenched and durable positio[n]'. See Digital Markets Act (n 25) Art 3. Textual editions by the Author.

[30] Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market of 8 June 2000 [2000] OJ L178/1 (E-Commerce Directive).

[31] ibid Preamble, Recital (7).

commerce to strengthen the provision of *information society services* in the internal market.[32] Such services have been defined as meaning services provided for remuneration and at a distance by electronic means, at the request of the service recipient.[33] The directive expressly states that its provisions are without prejudice to other EU law that aims to protect the interests of consumers and public health.[34] In this regard, the directive specifically mentions a number of such legislative acts concerning, for example, unfair trading terms (including misleading advertisement) and rules on distance contracts as well as directives on product safety and liability for defect products, which apply 'in their entirety' and 'fully' to information society services. It follows that Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market (the Unfair Commercial Practices Directive), [35] Directive 2001/95/EC on general product safety (the Product Safety Directive),[36] and Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods (the Sales Contract Directive),[37] are of relevance for those engaging in online commercial activity.

In recent years, the focus of the EU legislator has been on regulating those acting as intermediaries between, on one hand, sellers or service providers, and, on the other hand, buyers and service recipients. The previously mentioned Online Platform Regulation, the Digital Services Act and the Digital Markets Act, as well as the proposal for a directive on digital labour platforms, are all concerned with laying obligations on such actors, to varying extent. However, their applicability is primarily limited to the relationship between the intermediary and its users rather than the relationship between the user (e.g., seller and service provider) and other users (buyer or recipient of services). The Online Platform Regulation is mainly concerned with imposing obligations on platforms for the protection of sellers or service providers rather than on sellers or service providers as such. Further, the Digital Markets Act is primarily concerned with regulating intermediaries that are of significant importance due to their market position (referred to as 'gatekeepers'). The Digital Services Act, however, lays down obligations on intermediaries *in relation to* the obligations of sellers or service providers.

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[32] See e.g. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A comprehensive approach to stimulating cross-border e-Commerce for Europe's citizens and businesses of 25 May 2016' COM (2016) 320 final, 3.
[33] See further discussion in sub-section 4.3.
[34] E-Commerce Directive (n 30) Preamble, Recital (11).
[35] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L149/22 (Unfair Commercial Practices Directive).
[36] Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety [2001] OJ L11/4 (Product Safety Directive), as amended by Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 [2008] OJ L218/30, and Regulation (EC) No 596/2009 of the European Parliament and of the Council of 18 June 2009 [2009] OJ L188/14.
[37] Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [2019] OJ L13/28 (Sales Contract Directive).

3.2 PROVIDING THE BUYER WITH NECESSARY INFORMATION ON NATURE OF OPERATION AND CONTRACT

The first of obligations that are of relevance to those engaging in online commerce are obligations in relation to entering into a commercial relation or agreement. The E-Commerce Directive sets forth general rules on the provision of e-commerce services. In this regard, the directive mandates that a service provider shall make directly and permanently available clear information about itself, including name, location, contact details and whether it is subject to value added tax (VAT) payment obligations,[38] as well as making the commercial communication itself clearly identifiable.[39] As to a proposed contract, the directive stipulates that the service provider shall make available clear information on the matters such as the necessary steps to conclude the contract, the filing of the contract, possibilities as to correct irregularities with an order, and the obligation to acknowledge the receipt of the order without undue delay.[40]

The aforementioned obligations in the E-Commerce Directive are complemented by the obligations the Digital Services Act imposes on providers of online platforms. More precisely, the Digital Services Act obliges online platforms to ensure the *traceability* of economic actors defined as *traders*, including ensuring that consumers have certain basic information on the trader, including its name, identification documents, payment account details, official trade registration (if available) etc.[41] The information shall be made clearly available on the platform.[42] Moreover, the platform shall take steps to make sure the information (provided by the trader) is correct and request remedies from the trader, if necessary. If the trader fails to comply the platform shall suspend the services it provides to the trader.[43]

It follows that while the Digital Services Act does not directly impose obligations on those using intermediaries for selling products or providing services – defined as *traders* in the regulation, it complements the E-Commerce Directive by requiring intermediaries to examine whether traders fulfil their obligations, such as providing consumers with the necessary commercial information and suspending non-complying traders from their platforms. Further, it should be mentioned that the Digital Services Act provides certain rules for the exemption of liability of providers of intermediary services, i.e., situations where the provider (e.g. a platform) cannot be held liable in relation to unlawful acts (or omissions) of the recipient of its service (e.g. the seller).[44] The potential liability of a provider of an intermediary service does, however, not exclude the liability of the recipient of the service, e.g. a seller of a product, vis-à-vis its counterparty (e.g. the buyer of the product). The Digital Services Act does neither address nor regulate liability in the relationship between a seller and a buyer (or provider and recipient of the service). Neither does the proposal on digital labour platforms, despite laying down rules for determining whether service providers should be considered to be in an employment

[38] E-Commerce Directive (n 30) Art 5.
[39] ibid Art 6.
[40] ibid Arts 10 and 11.
[41] Digital Services Act (n 24) Art 30(1).
[42] ibid Art 30(7).
[43] ibid Art 30(2)-(3).
[44] ibid Art 30(2)-(3), Preamble, Recital (17), and Arts 4-6.

relationship with a digital platform. In other words, the proposal does not address the issue of whether the individual service provider is or can be exempt from liability (vis-à-vis the service recipient), e.g. because of a breach of EU commercial laws, based on the fact that he or she is an employee of an online platform. The eventual liability of a platform, based on controlling the activities of the service provider to the extent that it is deemed to be an employer of the provider, is therefore *in addition* to any liability of the provider, as opposed to excluding the liability of the provider.

3.3 PROHIBITION ON ENGAGING IN UNFAIR COMMERCIAL PRACTICES

The purpose of the Unfair Commercial Practices Directive is to 'achieve a high level of consumer protection by approximating [national laws] on unfair commercial practices harming consumer economic interests'.[45] The essence of the directive is to prohibit certain types of commercial practices deemed to be unfair for the consumer and detrimental to their economic interests. Naturally, these practices can be of various kinds and degrees. The Unfair Commercial Practices Directive does not provide an exhaustive list of such unfair practices. Instead, the directive opts for a general description as well listing some practices that should always be considered as unfair.[46] A commercial practice shall be deemed unfair if it goes against requirements of professional diligence and materially distorts, or is likely to distort, the 'economic behaviour with regard to the product of the average consumer whom it reaches'. Particularly, misleading or aggressive practices (as further outlined in the directive) are to be considered as unfair.[47]

It should be noted that many (if not all) of the commercial practices which the directive describes as unfair are of such nature that they are likely to be captured by national contract and sales laws and not only by national law specific to consumers. Communicating false or otherwise untruthful information when transacting (misleading) or using threatening language to complete a transaction (aggressiveness) are two examples of such practices, as are many of the practices listed as being unfair in all circumstances.[48] As a result, it is quite reasonable for a gig economy participant to expect to be subject to legal rules prohibiting unfair commercial actions, irrespective of whether such rules stem from EU consumer legislation or from national law. Further, none of the new legislation applicable to online platforms and their users provides rules that exclude or limit the liability of such economic actors, for example based on the determination that they are in an employment relationship with the platform.

As to the consequences of carrying out a prohibited commercial practice, the Unfair Commercial Practices Directive leaves it for the Member States to put in place effective legal means and remedies to combat such practices. This includes, for example, access to

[45] Unfair Commercial Practices Directive (n 35) Art 1. Textual editions by Author.
[46] ibid Annex I, which lists commercial practices that are in all circumstances considered unfair, including the trader falsely claiming to be a signatory to a code of conduct or claiming that the good sold has been approved by public authorities.
[47] ibid Art 5(2)-(4).
[48] ibid Annex I.

administrative authorities and courts, availability of remedies such as interim measures and making damage claims, as well as laying down penalties for infringements.[49]

3.4 OBLIGATIONS RELATION TO THE SAFETY AND QUALITY OF PRODUCTS

The Product Safety Directive aims to contribute to the free movement of goods (and related services) by harmonising rules on the safety of products and obliging economic operators to market products that are safe, in particular for the protection of consumers.[50] The main purpose of the directive is to ensure that 'products placed on the market are safe' and its essence lies in imposing obligations on producers and distributors of products. The Product Safety Directive imposes several obligations on distributors as to the safety of products they sell, including the obligation to act with due care and help with ensuring that safety requirements are complied with. Distributors are prohibited from supplying products they know, or should know, that do not comply with applicable requirements. Presumed knowledge is directly tied to standard of knowledge expected of a professional in the field in question.[51] Additionally, distributors shall participate in monitoring the products on the market, for example by providing information on product risk, make sure that they have all information required for locating product origin and collaborate with producers and authorities with respect to risk-avoiding measures.[52] If distributors become aware of – based on their knowledge as professionals – that a product places consumers at risk they are obliged to take immediate action by contacting relevant authorities and providing assistance to prevent the product from causing harm to the consumer.[53] The obligations the directive imposes on manufacturers and distributors only become relevant in case of products marketed for consumers in the course of commercial activity, irrespective of whether the product is new or used.[54] Given that the economic actors discussed in this article (participants in the gig economy) are commonly not manufacturers of products (as manufacturing usually requires a firmly established and ongoing economic operation), the Product Safety Directive is arguably mostly relevant to them in their capacity as *distributors* of products. The directive defines distributors as 'any *professional* in the supply chain whose activity does not affect the safety properties of a product […]'.[55] The directive does not define the term *commercial activity* nor does it provide any elements or parameters for determining when a person has reached the status of a *professional* distributor.

The Sales Contract Directive[56] lays down two overarching aims, to enhance cross-border trade in the internal market by '[striking] the right balance between achieving a high level of

[49] Unfair Commercial Practices Directive (n 35) Arts 11-13.
[50] Product Safety Directive (n 36) Preamble, Recitals (2)-(4).
[51] ibid Art 5(2).
[52] ibid Art 5(2).
[53] ibid Art 5(3).
[54] With the exception of '[…] second-hand products supplied as antiques or as products to be repaired or reconditioned prior to being used […]', to which the directive does not apply. See Product Safety Directive (n 36) Art 2(1)(a), second paragraph.
[55] Product Safety Directive (n 36) Art 2(1)(f). Textual editions by Author.
[56] Sales Contract Directive (n 37).

consumer protection and promoting the competitiveness of enterprises […]'.[57] The directive puts particular emphasis on the significance of e-commerce with the preamble stating that such commerce is the 'key driver for growth within the internal market […]' and that the '[…] full potential of the internal market can only be unleashed if *all market participants* enjoy smooth access to cross-border sales of goods including in e-commerce transactions'.[58] The Sales Contract Directive imposes certain requirements and obligations on sellers of goods. Some of the requirements are restatements of rules that were already part of EU consumer legislation under the (repealed) Consumer Rights Directive (albeit differently formulated, as the Sales Contract Directive aims to increase the level of consumer protection offered in the Consumer Rights Directive).[59] Among such rules are the requirement of goods being in full conformity with contract law and fit for (both) particular use and for what similar goods are generally used for, a consumer right to repair or replacement, and provisions on seller's guarantees.[60] Significantly, the directive includes a complete set of remedies that shall be available for a consumer in case of default by the seller of his obligations under a sales contract.[61] These remedies include the right – and corresponding obligation for the seller – to have the product repaired or replaced, the price reduced, and the right to terminate the contract. The directive also includes provisions that add legal clarity for the benefit of both parties to a sales contract, including on how to determine the time for establishing whether a good is in conformity with contract and time limits for consumer demanding remedies.

4 DRAWING A LINE BETWEEN PROFESSIONAL AND NON-PROFESSIONAL ACTORS

4.1 GENERAL

EU law does not provide single uniform definitions for parties to a commercial relationship, such as seller and service provider or buyer and service recipient. Neither does EU law provide a uniform definition of the terms of such as *business* or *consumer*.[62] The scope of the legislation discussed in section 3 above – and the obligations it imposes on sellers and service providers – is marked by defining the actors providing products and/or services based on whether they act in a business or professional capacity. A seller, as an example, does not fall within the scope of the Unfair Commercial Practice Directive, unless he or she fulfils one or more elements of the definition of the term *trader*. A seller that is not a *trader* is therefore not subject to the obligations in the directive.

[57] ibid Preamble, Recital (2). Textual editions by Author.
[58] ibid Preamble, Recital (4). Textual editions by Author.
[59] ibid Preamble, Recital (10).
[60] ibid Arts 5-7, 13-14 and 17.
[61] ibid Art 13.
[62] See James Devenney and Mel Kenny, *European consumer protection: theory and practice* (Cambridge University Press 2012) 125. See also Jarmila Lazíková and Ľubica Rumanovská, 'The Notion of Consumer in the EU Law' (2016) 5(2) EU Agrarian Law 1, 1-2.

Acting in a business or professional capacity serves to mark the scope of applicability of EU consumer law. While EU consumer law is a field marked by a vast number of enacted legislative acts (mainly in the form of directives),[63] most of the legislative acts contain the following elements as part of the core of defining a *consumer*: A consumer is a *natural* person who is acting for purposes *outside* his or her trade, business, or profession.[64] Conversely, the commercial counterparty of the consumer *is* acting for the purposes of his or her trade, business or profession. This section describes and discusses the terminology used in EU legislation for determining when a seller or service provider acts for the purposes of his or her business or in a professional capacity.

4.2 COMMON TERMS USED FOR DETERMINING THE EXISTENCE OF THE PROFESSIONAL

In the E-Commerce Directive, 'Service providers' are defined as 'any natural or legal person providing an information society [service]'.[65] Information society services are, in turn defined, as 'any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of service[s]'.[66] The preamble to the directive further explains that information society services cover 'a wide range of economic activities which take place on-lin[e]', including selling and delivering products and providing services.[67] However, the directive carves out certain activities that should *not* be defined as informational society services, and thus lie outside the scope of the directive. As to individuals engaged in e-commerce, the preamble states that '[the] use of electronic mail or equivalent individual communication […] by natural person acting outside their trade, business, or profession including their use for the conclusion of contracts between such persons is *not* an information society service […]'.[68] As can be seen, there are two main conditions for this exemption from the scope of the directive. The exemption applies to *natural persons* that are acting outside their *trade*, *business* or *profession* but only in cases where the persons in question engages in commercial activity through email or *equivalent* individual communication. Such *non-professional* persons are therefore not subject to the obligations of providing certain basic information about themselves and the contract that is

[63] See e.g. Jana Valant, 'Consumer protection in the EU: Policy overview' (2015), 5 <http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/565904/EPRS_IDA(2015)565904_EN.pdf> accessed 1 October 2023.
[64] See also Devenney and Kenny (n 62) 124, and Valant (n 63) 3.
[65] E-Commerce Directive (n 30) Art 2(1)(b). The directive defines 'Informational Society Services' as 'any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services'.
[66] ibid Art 2(1)(a), which refers to a definition in Art 1(1)(2) of the now repealed Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services [1998] OJ L204/37. That directive was repealed and replaced by Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services [2015] OJ L241/1, which provides the same definition of *information society services* in Art 1(1)(b). Textual editions by Author.
[67] E-Commerce Directive (n 30) Preamble, Recital (18). Textual editions by Author.
[68] ibid Preamble, Recital (18). Textual editions by Author.

being entered into (see discussion in sub-section 3.2). If a person offers a product to sale by online advertisement to an undisclosed group of recipients through an online platform the person is arguably *not* acting exclusively by way of individual communications, irrespective of whether any eventual contract is concluded by way of such communication. Following this interpretation, the person in question is *not* exempt from the obligations in the directive and needs to provide its counterparty (the buyer) with certain basic information about itself and regarding the necessary steps to conclude a contract, despite having the position of a non-professional.

The newly enacted Digital Services Act complements the E-Commerce Directive. The obligation it imposes on online intermediaries, in relation to sellers or service providers, is, however, demarcated only based on whether these actors are defined as *traders*. The term trader is defined as meaning 'any natural person, or any legal person irrespective of whether it is privately or publicly owned, who is acting, including through any person acting in his or her name or on his or her behalf, for purposes relating to his or her trade, business, craft or profession[…]'.[69] The result is that the Digital Services Act does not complement the E-Commerce Directive as to obligations imposed on non-professional actors that use online platforms to engage in commerce in a public manner, i.e. not only through individual communication.

The *Unfair Commercial Practices Directive* applies to business-to-consumer commercial practices – the communications (for example advertising and other marketing) and other behaviour of businesses towards consumers in the course of promoting and selling a product.[70] The scope of the directive is not limited to goods – the directive also covers services.[71] In terms of drawing the line between businesses and consumers, the directive uses the term *trader* to describe the person engaged in selling a good or providing a service. A trader, within the directive, 'means any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, *craft* or profession and anyone acting in the name of or on behalf of a trader[…]'.[72] 'Business-to-consumer commercial practices' are in turn defined as any act or omission (including commercial communication in the form of advertising and marketing) that is 'directly connected with the promotion, sale or supply of a product to consumers[…]'.[73] The Directive on Misleading and Comparative Advertising[74] provides an almost identical definition of a *trader*, without however, the additional demarcation of defining business-to-consumer commercial practices.[75] This is understandable,

[69] Digital Services Act (n 24) Art 3(1)(f).
[70] Unfair Commercial Practices Directive (n 35) Art 3.
[71] ibid Art 2(1)(c).
[72] ibid Art 1(2)(c). Textual editions by Author.
[73] ibid Art 2(1)(d). Textual editions by Author.
[74] Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising [2006] OJ L376/21 (Directive on Misleading and Comparative Advertising).
[75] ibid Art 2(1)(d): "'trader" means any natural or legal person who is acting for purposes relating to his trade, craft, business or profession and anyone acting in the name of or on behalf of a trader'.

since the aim of the directive is not to protect consumers but traders (against misleading advertising).[76] The directive thereby concerns business-to-business relationships.

When compared to the Consumer Rights Directive – applicable at the time but since repealed by the Sales Contract Directive[77] – the definition includes the term *craft* as one of the elements that can define a person as a *trader* and thereby bringing that person within the scope of the directive. The initial proposal for the directive by the Commission[78] followed the then applicable Consumer Rights Directive definitions. The word *craft* was added under the legislative procedure, most likely in response to the position of the European Parliament, which had argued for a much wider definition of the term *trader*. The view of the Parliament was that persons offering or selling products or services under (any) commercial activity on a non-profit basis should fall within the definition, thus including every person offering goods or services for whatever purpose.[79] However, there was no agreement on adopting such a wide definition, with the eventually adopted directive adding the word *craft*, as one of the constitutive elements in the definition of a *trader*.

Broadly speaking, the Sales Contract Directive builds on the same traditional distinction between a seller and a consumer as the Consumer Rights Directive it repeals, albeit with a bit more detailed definition of the term seller,[80] which follows the definition provided in the Unfair Commercial Practices Directive, discussed above. Under the Sales Contract Directive, a seller 'means any […] person […] that is acting, including through any other person acting in that natural or legal person's name or on that person's behalf, for purposes relating *to that person's trade, business, craft or profession* in relation to contracts covered by this Directive[…]'.[81] As was the case with the Unfair Commercial Practices Directive, with the criterion *craft* added to the definition in the later stages of the legislative procedure in order to satisfy the demands of the European Parliament, which pushed for a more encompassing definition.[82]

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[76] Directive on Misleading and Comparative Advertising (n 74) Art 1.

[77] See further discussion in sub-section 3.4.

[78] Commission, 'Proposal for a Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive) of 18 June 2003' COM (2003) 356 final.

[79] See Report on the proposal for a European Parliament and Council directive concerning unfair business-to-consumer commercial practices in the Internal Market and amending Directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive) (COM(2003) 356 – C5-0288/2003 – 2003/0134(COD)) final A5-0188/2004, 12/87, Amendment 14, Art 2, point (c), which read as follows (suggested additions to the proposal marked *in italics*): '(c) "seller or supplier" (hereinafter referred to as "trader") means - any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business or profession, *or with a view to achieving his statutory objective; the trader shall be held responsible for an action which he deliberately promotes by means of his own behaviour or which he makes possible in the first place; […] - the persons who, whether in their own name or in the name or on behalf of a third party which may or may not have legal personality, on a profit- or non-profitmaking basis, carry on a commercial, financial or industrial activity and offer for sale or sell products or services;*'. Other textual editions by the Author.

[80] The repealed Consumer Rights Directive built on a distinction between *seller* and *consumer*. The directive applied to sale of goods by a seller to a consumer (consumer good), with the seller defined as follows: '[Seller] shall mean any natural or legal person who, under a contract, sells consumer goods in the course of his trade, business or profession;'.

[81] Sales Contract Directive (n 37) Art 2(1)(c). Textual editions by the Author.

[82] See discussion above.

4.3 TERMINOLOGY IN LEGISLATION GOVERNING ONLINE PLATFORMS

As explained in sub-section 2.3, *the Online Platform Regulation* aims to offer protection to users by putting in place transparency obligations imposed on online platforms as well as an effective redress mechanism. The proposal for the regulation limited the scope of the regulation to *business users*, outlined as '[…] any natural or legal person which through online intermediation services offers goods or services to consumers for purposes relating to its trade, business, craft or profession[…]'. [83] Accordingly, the proposal used the same terminology as the Unfair Commercial Practices Directive, the Sales Contract Directive and, to an extent, the E-Commerce Directive and the Directive on Misleading and Comparative Advertising, for determining its scope vis-à-vis economic actors. This approach (by the Commission) is somewhat surprising in light of its prior statements on the vastness of online economy and its participants.[84] If accepted, it would arguably have led to the exclusion of a significant part of users of online platforms, the scope of the regulation, and thereby the protection it affords *to users* of online platforms.

The definition proposed by the Commission was rejected under the legislative procedure. The enacted regulation defining *business users* as meaning 'any private individual acting in *a commercial* ***or*** *professional* capacity who, or any legal person which, through online intermediation services offers goods or services to consumers for purposes relating to its trade, business, craft or profession[...]'.[85] As can be seen, the definition captures private individuals using online platforms to commerce *in addition* to the individuals that use online platforms *for the purposes of their profession*. This way of defining the constitutive elements of *business users* allows for a distinction between the professional users, using a platform as a part of its ongoing business operation, and the non-professional ones, who certainly use the platform to commerce, albeit not necessarily as part of their profession. The widening of the regulation's scope under the legislative procedure can certainly be explained by the fact that, unlike other legislation discussed in this section, the Online Platform Regulation provides rules for the protection of those using platforms to engage in commerce, as opposed to imposing obligations on them.

By means of comparison, although the Digital Services Act certainly aims at creating a safe and predictable online environment for all actors concerned, it is *neither exclusively nor specifically* aimed at protecting those that use the service *for selling products or providing a service*. Accordingly, recipients of services of providers of intermediary services (e.g. online platforms) are defined in a broad manner as 'any natural or legal person who uses an intermediary service, in particular for the purposes of seeking information or making it accessible[…]'.[86] Intermediary services, in turn, involve the transmission and/or storage of information in different forms, further

[83] See Online Platform Regulation Proposal (n 26) Art 2(1)(1).
[84] In its proposal, the Commission had described the vastness of this online economy, inter alia by stating that 'more than a million EU enterprises trade through online platforms to reach their customers […]'. See Online Platform Regulation Proposal (n 26) 1.
[85] Online Platform Regulation (n 23) Art 7.
[86] Digital Services Act (n 24) Art 3(1)(b). Textual edition by Author.

denominated as 'mere conduit', 'caching' and 'hosting',[87] which fall within the umbrella term of *information society service*.[88]

As previously discussed, the Digital Services Act does not impose obligations upon those using an online platform to sell products or provide services. However, the regulation imposes obligations on the online platform *in relation to* the obligations sellers or service providers are under as a result of other EU laws, in particular obligations of an actor to identify themselves before engaging in commercial transactions.[89] In this regard, the scope of the platform's obligations is limited to *traders*, defined in the same way as in other EU legal acts on online commerce (discussed in sub-section 4.2 above), namely as persons acting for purposes relating to their trade, business, craft or profession. This can be said to be in accordance with the complementary nature of the Digital Services Act.[90] As the provisions in the relevant chapter are primarily intended to create a safer environment for online commerce and to protect the buyer of products and recipient of services (the consumer), it is notable that the EU legislator has opted for applying the common way for defining *trader* and drawing the line of applicability based on consumer protection considerations. The result is that an online platform is only obliged to ensure that *traders* are sufficiently identified (traceable), as opposed to defining traders as *all* other actors that engage in information society services through the platform.[91]

4.4 GIVING AN ACTOR THE STATUS OF A PROFESSIONAL BASED ON CONSUMER PROTECTION ARGUMENTS

Determining whether an economic actor has the legal position of a professional needs to be assessed on a case-by-case basis. There might be cases where an actor appears to fulfil the constitutive elements of a consumer but has in fact the legal position of a trader.[92] Indeed, examples in CJEU case law show that the court has not been restrictive in its approach in terms of giving individuals the status of a professional with the effect that the individual in question

[87] Digital Services Act (n 24) Art 3(1)(g).
[88] Defined as in the same manner as in the E-Commerce Directive (n 30), namely as 'any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient'. See Digital Service Act, Preamble, Recital (5).
[89] See discussion in sub-section 3.2.
[90] The preamble of the regulation clearly states that it does not replace, but complements, EU legislation concerning online commerce, including EU consumer protection law and legislation such as the Product Safety Directive and the Unfair Commercial Practices Directive. See Digital Services Act (n 24) Preamble, Recital (10).
[91] See, in this, regard, Digital Services Act (n 24) Preamble, Recital (24): 'In order to ensure the effective protection of consumers when engaging in intermediated commercial transactions online, certain providers of hosting services, namely online platforms that allow consumers to conclude distance contracts with traders, should not be able to benefit from the exemption from liability for hosting service providers established in this Regulation, in so far as those online platforms present the relevant information relating to the transactions at issue in such a way as to lead consumers to believe that that information was provided by those online platforms themselves or by traders acting under their authority or control, and that those online platforms thus have knowledge of or control over the information, even if that may in reality not be the case. Examples of such behaviour could be where an online platform fails to display clearly the identity of the trader, as required by this Regulation, [...]'. Textual editions by the Author.
[92] See Commission Notice – Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market C/2021/9320 [2021] OJ C526/1 (Guidance on Unfair Commercial Practices), 27.

cannot invoke legal rules aimed at protecting consumers. Actions such as preparing the sale of a business (i.e., an activity that is not the core activity of the business under sale)[93] or starting a future business[94] fall within the definition of a trader and are thereby outside the consumer definition, even if the actor in question is acquiring services from another professional in relation to said activities. The ECJ has also declined to extend the scope of protection under relevant EU consumer legislation to those undertaking guarantees on behalf of traders, even though the guarantors were not traders themselves.[95] The court has held the same to apply in cases where a guarantor has close professional ties with the primary debtor, such as being its executive director or a controlling shareholder.[96] Furthermore, consumer protections cannot be invoked if products bought are for 'trade or professional purposes' even if they are also intended for private (family) use.[97]

In the aforementioned case, the ECJ finds a correlation between the *trader* and the *consumer* concepts – when a party fulfils the constitutive elements of the *trader* definition the party is most likely not *a consumer*. This can be said to be in accordance with the core rationale of consumer law, i.e. the notion that the private individual buying products or services – the consumer – is in a weaker position as compared to its counterparty (the commercial actor).[98] Indeed, the CJEU has repeatedly cited this as one of the main arguments behind EU rules protecting consumers, holding that the consumer is in a weaker position both economically and with regard to other matters such as knowledge and experience of the legal rules – than its commercial counterparty.[99] This, of course, is premised upon the consumer engaging in such activity for private purposes (e.g. in relation to household or family life) and its counterparty engaging for purposes related to business or profession. In such a commercial relationship, legislators have generally presumed

[93] See case C-361/89 *Criminal proceedings against Patrice Di Pinto* EU:C:1991:118, in particular para 16.
[94] See Case C-269/95 *Francesco Benincasa v Dentalkit Srl.* EU:C:1997:337, e.g. paras 16-17: 'only contracts concluded for the purpose of satisfying an individual's own needs in terms of private consumption come under the provisions designed to protect the consumer as the party deemed to be the weaker party economically'.
[95] See Case C-45/96 *Bayerische Hypotheken- und Wechselbank AG v Edgard Dietzinger* EU:C:1998:111. Reference can also be made to Case C-208/98 *Berliner Kindl Brauerei AG v Andreas Siepert* EU:C:2000:152. In this case the ECJ also declined to extend the scope of protection under EU consumer legislation (a directive on credit agreements) to a guarantor, albeit not on the basis that the primary debtor was acting for trade purposes but on the basis that the directive did not cover *guarantees* as financial instruments.
[96] See case C-419/11 *Česká spořitelna , a.s. v Gerald Feichter* EU:C:2013:165.
[97] See case C-464/01 *Johann Gruber v Bay Wa AG* EU:C:2005:32, in particular para 40-41. Notably, the EU law aspect of the dispute mainly revolved around a jurisdictional issue, i.e., whether the farmer could rely on an exemption in EU consumer law on procedural matters, which afforded consumers the option of bringing proceedings before a court in their home jurisdiction instead of having to go before a court in the defendant's jurisdiction.
[98] See Norbert Reich et al, *European consumer law* (Ius Communitatis: 5, Intersentia 2nd edn 2014) 48.
[99] See e.g. Case C-269/95 *Francesco Benincasa* (n 94) para 17, Case C-240/98 *Océano Grupo Editorial and Salvat Editores* EU:C:2000:346 para 25, and Case C-464/01 *Johann Gruber* (n 97) para 34. See also the following reasoning in Opinion of AG Mischo in Joined cases C-541/99 and C-542/99 *Cape Snc v Idealservice Srl (C-541/99) and Idealservice MN RE Sas v OMAI Srl (C-542/99)* EU:C:2001:337 paras 13-16: '[The system of consumer protection is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of the terms [.] By contrast, legal persons and companies do not generally find themselves in that weaker position and there is therefore no reason to grant them protection which, as an exception to contractual freedom, must, moreover, be strictly interpreted'. Textual editions by the Author.

that the natural person is in a weaker position vis-à-vis business companies in terms of matters such as economical position (strength of resources), legal knowledge, professionalism, and access to (and possession of) information of importance to the transaction at hand, while also (potentially) acting under economic pressure.[100]

The judgment in *Zentrale zur Bekämpfung unlauteren Wettbewerbs*[101] is another example of a case where the legal position of one actor is determined based on its counterparty being a consumer. In this case, BKK Mobil Oil, a public health insurance fund in Germany, had been charged by the German competition authorities for disseminating misleading information to its members, in breach of, *inter alia*, the provisions of the Unfair Commercial Practices Directive. It was not disputed that BKK members were consumers. BKK argued that it should not be defined as a trader or business as it was a non-profit public law body. Based on the wording of the directive, the court found that 'the EU legislature has conferred a particularly broad meaning on the term "trader", which refers to "any natural or legal person" which carries out gainful activity […]', including public law bodies.[102] The court further stated that the full meaning of the term *trader* could not be determined by such reasoning and in isolation, but has to be done in direct 'relation to the related but diametrically opposed concept of "consumer"'.[103] Relying on the fact that BKK members were consumers and the importance of granting consumers – as the weaker party in a commercial relation – certain protection, the court concluded that BKK had to be considered as a *trader* within the meaning of the directive.[104] According to the court, this was the only way to 'to give full effect to the Unfair Commercial Practices Directive, by ensuring that, in accordance with the requirement of a high level of consumer protection, unfair commercial practices are effectively combatted'.[105]

4.5 ADDITIONAL FACTORS AND PARAMETERS FOR DETERMINING THE EXISTENCE OF A PROFESSIONAL

The case law discussed above shows the importance the ECJ attaches to the position of actors buying products or service in determining whether their counterparty is a *professional* and thereby subject to certain obligations for consumer protection. In terms of determining the existence of a professional without necessarily assessing the legal position of its commercial counterparty, the Commission has stated that it will consider whether a seller has a profit motive, the number

[100] See Lazíková and Rumanovská (n 62) 1-2, who also point out that these factors, as part of determining strength of position in a contractual relationship, are not undisputed and that the business-consumer relationship is dynamic and subject to change over time. As an example, the presumption of the consumer's weak position, and the enactment of corresponding protection legislation, stems from a period in the 20th century when consumer's access to information was much less than what it is today, in which is to a large part due to the internet.

[101] Case C-59/12 *Zentrale zur Bekämpfung unlauteren Wettbewerbs* EU:C:2013:634.

[102] ibid para 32. Art 1(2)(c) of the Unfair Commercial Practices Directive (n 35) defines *trader* as 'any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession […]'. Textual editions by the Author.

[103] Case C-59/12 *Zentrale* [n 101] para 33.

[104] ibid paras 34-38.

[105] ibid para 39.

and frequency of their transactions, sales turnover and whether he or she is involved in buying products to resell them.[106] Hence, more frequent transactions and bigger turnover are more likely to result in one being in the position of a trader, and thus falling within the scope of the Unfair Commercial Practices Directive and its obligations to refrain from certain unfair practices. The Commission attempts to clarify the situation as to the potential, and, indeed, likely application of the directive to online gig economy actors, by stating that persons 'whose main activity is to sell products online on a very frequent basis, purchasing products to resell them at a higher price, could for example fall within the definition of trader'.[107]

In this context, it is also of relevance to mention that the Study Group on a (proposed) European Civil code and the Research Group on EU Private Law published a draft to a common frame of reference (DCFR) containing common principles, definitions and models for application and implementation of EU contract law.[108] The DCFR suggested the following as the common definition of a *business* for future application of EU commercial law. A business, according to the DCFR, should mean 'any natural or legal person, irrespective of whether publicly or privately owned, who is acting for purposes relating to the person's self-employed trade, work or profession, even if the person does not intend to make a profit in the course of the activity'.[109] In explanatory notes, the DCFR outlines a few factors that are of relevance when determining whether a certain activity amounts to a business. A *Business* has to be carried out on a 'somewhat regular basis' in return for some kind of compensation.[110] It does not matter, however, whether the activity is for profit or not, or whether the activity is the main activity of the person in question (or whether it is only ancillary or temporary). As to intermediaries (between the consumer and the business), the DCFR proposes that the intermediary the consumer uses to finalise a transaction (for example an agent or broker) should be bound by consumer protection obligations. By contrast, the DCFR proposed that intermediaries in the form of online platforms should not be bound by consumer protection obligations.[111] The Digital Services Act did not follow this approach, as evidenced by the obligations it imposes on platforms in relation to the traceability of traders vis-à-vis consumers.[112]

The factors and parameters discussed here are part of criteria used to determine whether an actor has the legal position of a *professional* (or trader, business etc.). If an actor has such status,

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[106] See Guidance on Unfair Commercial Practices (n 92) 30. Textual editions by Author.
[107] ibid.
[108] See Christian von Bar and Eric Clive (eds), *Principles, definitions and model rules of European private law : draft common frame of reference (DCFR)* (2010) 3-7.
[109] See ibid, I. – 1:105. Textual editions by Author.
[110] See ibid, I. – 1:105.
[111] See ibid, I. – 1:105: 'The extension of consumer protection should not include person to person trading platforms, e.g. online market places, where the platform provider is not involved in the conclusion of the contract." The DCFR proposal focus on the importance of being involved in the contract at hand is in line with the position of European Consumer Protection Cooperation Network on online app stores, see Guidance on unfair Commercial Practices, 30: "[…] although liability for the content of an app primarily rests with the app developer, an app store provider could also be held responsible for ensuring that games on their platforms do not contain direct exhortations to children'.
[112] As outlined in sub-section 3.2.

he or she falls within the scope of the relevant EU legislation, which might lead to the application of its provisions to a single transaction.[113]

In *Kamenova*,[114] the ECJ reiterated that even though a certain practice might be considered commercial, the national court still needed to determine whether the actor involved had the legal position of a trader. Otherwise, the actor in question – and his activities – would not fall under the scope of the relevant EU legislation. In this case, an economic actor (Kamenova) had been fined for breaching (Bulgarian) national laws, which incorporated the Directive on Unfair Commercial Practices, when selling products via online platforms.[115] The disputed commercial activity consisted of publishing *simultaneously* eight advertisements for the sale of new and second-hand products on an online platform.[116] The question arose whether Kamenova could be held liable for said breaches based on having the legal position of a *trader* or solely based on the commercial activity in question. As to the activity in question, the court held that while it was commercial in nature, it did not amount to a *commercial practice* within the meaning of the directive unless it *originated from a trader*.[117] It follows that even though Kamenova engaged in commercial activity and her counterparty had the legal position of a consumer, she would not fall within the scope of the directive unless she herself could be defined as a trader. As to the term trader, the ECJ reaffirmed that the directive defines the term very broadly.[118] Yet the term only refers to actors that engage in commerce *for purposes that are related to trade, business, craft or profession*.[119] The court subsequently lists the criteria that are relevant for determining whether an actor is a *trader* within the meaning of the directive. Among the criteria are whether the activity (sale) was organised, whether it was done with a profit motive, and whether the seller had superior technical information and expert knowledge vis-à-vis the consumer.[120] The court added that the criteria put forward were 'neither exhaustive nor exclusive', meaning that fulfilling one or more of the criterion does not automatically lead to an economic actor being defined as a *trader*.[121] The court concluded that the commercial activity of simultaneously advertising eight watches for sale on an online platform, with the intention of making profit, was *not* sufficient to determine that

[113] See e.g. C-388/13 *Nemzeti Fogyasztóvédelmi Hatóság v UPC Magyarország kft* EU:C:2015:225, in particular paras 32-35. In this case, the ECJ invoked the legislative aim of 'ensuring a high level of consumer protection' when coming to the conclusion that a trader (a provider of cable television services) provided wrongful information, which constituted a 'misleading commercial practice' even though it was only directed at one single consumer. The ECJ held that the Unfair Commercial Practices Directive 'is characterised by a particularly wide scope *ratione materiae*' and cited Article 2(d) of the directive, holding that 'the sole criterion referred to in that provision is that the trader's practice must be directly connected with the promotion, sale or supply of a product or service to consumers'.

[114] Case C-105/17 *Komisia za zashtita na potrebitelite v Evelina Kamenova* EU:C:2018:808.

[115] Kamenova was fined for, *inter alia*, failing to provide sufficient information on herself and the product sold as well as for failing to inform the consumer of his rights (including the right to withdraw from the contract), see further Case C-105/17 *Kamenova* (n 114) paras 13-16.

[116] See further Case C-105/17 *Kamenova* (n 114) para 37.

[117] See further ibid paras 41-42.

[118] See further ibid para 30.

[119] See further ibid paras 32-34.

[120] For full list of the relevant criteria, see ibid para 38.

[121] See further ibid paras 39-40.

Kamenova was a *trader*, unless it was determined that she did so 'for purposes relating to [her] trade, business, craft or profession'.[122] This was left to the referring national court to determine.

5 CONCLUDING REMARKS

Since the beginning of the new millennium, the landscape of cross-border commerce has been altered significantly. Technological developments have opened the door for individuals to engage in commercial activities at a distance through online platforms. The EU legislator has followed these developments by taking legislative acts aimed at regulating various aspects of online commerce. However, the primary focus of the legislative activities in question has *not* been on clarifying the legal position of online participants in the gig economy *vis-à-vis their counterparties, i.e., buyers or recipients of services*. Instead, the focus has been on (i) clarifying the relationship between such economic actors and the online intermediaries they use to engage in commerce (e.g., by providing criteria for determining whether the actors are under the control of the intermediary and thereby in an employment relationship) and (ii) regulating intermediaries, for example by imposing obligations on them vis-à-vis their users.

As an example, the Digital Services Act does provide rules that concern the relationship between a seller or service provider, on the one hand, and a buyer or service recipient, on the other, the rules are imposed *on online intermediaries* with the aim of clearly identifying *a trader* to a potential *consumer*. Furthermore, the new proposal for a directive on digital labour platforms is concerned with clarifying whether providers of services are in an employment relationship with the platform they use and, if that is the case, providing said workers with certain minimum rights (vis-à-vis the platform). The proposal does not address or otherwise regulate whether an eventual employment relationship affects the liability of a worker (service provider) vis-à-vis its counterparty (service recipient). Further, although both the Online Platform Regulation and the Digital Services Act provide rules on liability, the rules are confined to liability of online intermediaries and platforms and do not address, let alone limit, the liability of the user (a seller or service provider) towards another user (a buyer or service recipient).

In terms of providing rules for the protection of those using online intermediaries for engaging in commerce, the Online Platform Regulation provides a wide definition, which encompasses everyone using a platform for commercial *or* professional activity. In terms of obligations and liabilities, imposed on sellers of products or providers of services vis-à-vis their counterparties, and the obligations of online intermediaries in relation to the same, the scope of the relevant EU legislation is still based on a traditional definition of the concepts of *trader* and *consumer*. Accordingly, ascertaining the legal position of economic actors that participate in the gig economy online is still primarily based on whether they fall within the definition of a *trader*. The E-Commerce Directive, enacted in 2000, is an exception in this regard, as it arguably covers individuals engaging in online commerce without having the status of a trader, i.e., in cases where activity of such non-professional actors is not limited to emails or other individual communication.

[122] See further Case C-105/17 *Kamenova* (n 114) paras 44-45. Textual editions by the Author.

It follows from the above that a key matter for any person engaging in online commerce within the EU is to determine whether his or her activities are of such nature that they fall within the definition of a trader, i.e., whether they are acting for purposes relating to their *trade*, *business*, *craft* or *profession*. As evidenced by these definitional elements and the case law of the CJEU, the term *trader* is wide and encompasses various forms of commercial activity. Further, the CJEU has pursued an effect-based approach when determining whether an actor falls within the definition - the fact that one of the parties to a commercial relationship has the legal position of a consumer has been used as an argument for determining that the other party has the legal position of a trader.

However, the concepts trader and consumer are self-standing and individual terms, with the effect that although one party might fulfil the definitional requirements of being a consumer that does not automatically mean that the other party has the legal position of a trader. As articulated by the ECJ in *Kamenova*, whether an online seller of products has the position of a trader is based on factors, such as the activity in question being organised (e.g., established and/or regular), whether the activity is carried out with a profit motive, or whether the actor is in a superior position vis-à-vis its counterparty. However, these are only examples of the factors that can lead to the definition of a trader – the factors are neither exhaustive nor exclusive.

The legislative steps that have been taken with regard to obligations imposed on online intermediaries have led – or are likely to lead (depending on whether legislative proposals are enacted as legislation) – to added clarity for actors operating in the grey zone between professional and non-professional actors *as regards their relationship with intermediaries*. As a result, the legal position of those participating in the gig economy online is arguably clearer as regards their relationship with online platforms and their rights in that respect. As regards the relationship between gig economy participants and their commercial counterparties (buyers or recipient of services), determining the legal position is still based on a case-by-case assessment on whether gig participants should be considered as traders, inter alia by taking into account the position of the counterparty. It remains to be seen whether the EU legislator finds it necessary to provide further clarity to online participants in the gig economy on their legal position under EU law, for example in the legislative procedure regarding the proposal for the directive on online labour platforms.

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DIRECTORS' DUTIES DURING THE GREEN TRANSITION UNDER EU LAW - REFORM AND RAMIFICATIONS FROM CORPORATE SUSTAINABILITY DUE DILIGENCE

RADU MARES*

In response to the climate emergency, the European Union seeks to establish a new model of inclusive growth and depicts this shift as a 'green, fair and competitive transition'. The article examines the EU sustainable corporate governance initiative commenced in 2018 that has crystalized after four years in a Commission's proposal for a Directive on corporate due diligence, which is expected to be adopted by early 2024. The focus herein is on why and how directors' duties under company law are being discussed and potentially reformed in the EU through this new Directive. At stake are current corporate governance arrangements that have enshrined powerful norms regarding profit-maximization and shareholder primacy that can hinder the green transition. This inquiry aims to map, simplify and explain the vast and rapidly evolving EU regulatory landscape. Drawing on EU materials from 2018 to 2023, the article documents the 'misunderstanding problem' and the 'incentives problem' that create a dissonance between the legal norm advanced by company law and the business norm practiced by the corporate governance system. Currently mired by profound disagreements between the Commission and the Council, the EU has a rare opportunity to deliver an innovative and noteworthy reform of directors' duties in company law by creating new legal and market incentives while remaining faithful to the core tenets of this body of law.

1 INTRODUCTION

Recognizing the climate emergency and the imperative for the green transition, the EU set in motion a comprehensive regulatory agenda to advance sustainable business conduct. In this unprecedented legislative process started in 2018, the EU is turning many stones. One such stone is company laws (CL) as embedded in the wider corporate governance (CG) regime.[1] Misgivings about CG stem from the norm of profit-maximization, especially when set against short-term horizons and reduced to financial value measurements. This turn to financialization and short-termism coupled with an almost exclusive focus on shareholder interests can be seen as a cause of undesirable business conduct generating externalities and inefficiencies.

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[1] Corporate governance, according to the OECD, refers to 'a set of relationships between a company's management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined.' OECD, 'OECD/G20 Principles on corporate governance' (OECD Publishing Paris 2015) (hereinafter OECD Principles) 9.

With its sustainable finance agenda, the EU seeks to systematically integrate sustainability in economic decision-making, mobilize private finance and incentivize the real economy to adopt responsible business practice throughout supply chains.[2] In this context, the EU has examined the need for reforming corporate governance. That includes reforming directors' duties[3] under CL so at the minimum they do not hinder, and preferably contribute to, this large-scale transformation. In its analysis the European Commission acknowledged 'market failures' and 'regulatory failures'[4] in CG that present a major obstacle in the green transition. What separates this EU setting from previous critiques and reforms is the EU willingness to regulate comprehensively a variety of sustainability-related aspects of CG in both the real economy and finance.

The article focuses on directors' duties under CL and related CG aspects in the EU space. It looks into the 'sustainable corporate governance' process initiated in 2018[5] that advanced in 2022 with the proposed Corporate Sustainability Due Diligence Directive (CSDDD),[6] which is a component of the broader EU policy framework for the green transition. The article aims to document and explain the impetus and features of a remarkable EU legislative reform. What is the need for such reform of directors' duties under CL? What are the features of the EU regulatory reform that might distinguish it from other precedents?

It was aptly noted that 'the ecosystem is buzzing with activity'.[7] The sources for the present analysis consist of a multitude of EU laws and policies, European Commission's assessments and proposals, the negotiation positions of the Council and Parliament, expert studies, feedback during public consultations, and academic commentary. As these EU initiatives are approaching the level of an impenetrable jungle,[8] the article seeks to map the instruments, explain key features and inflection points throughout the process, and thus facilitate further evaluation of this potential reform of CL. For those interested in externalities and distributional aspects of economic activity, this legislative agenda is unprecedented: not only is the EU ahead globally, but the days when the EU was extolling the virtues of corporate voluntarism and soft law are gone.[9]

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[2] Commission, 'Sustainable finance' <https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance_en> accessed 1 October 2023.

[3] In line with the proposed Directive, this article refers to 'directors' to encompass both executive and non-executive members of the board, which fulfils a supervisory function in the company. Commission, 'Proposal for a Directive on Corporate Sustainability Due Diligence' COM (2022) 71 final (hereinafter CSDDD), Art 3(o-p).

[4] See Table in section 2.2.

[5] Commission, 'Action Plan on Financing Sustainable Growth' COM (2018) 97 final (hereinafter 2018 Action Plan) 11.

[6] CSDDD (n 3).

[7] World Economic Forum, 'Measuring Stakeholder Capitalism - Towards Common Metrics and Consistent Reporting of Sustainable Value Creation' (in collaboration with Deloitte, EY, KPMG and PwC) White Paper (2020), 44 <www3.weforum.org/docs/WEF_IBC_Measuring_Stakeholder_Capitalism_Report_2020.pdf> accessed 1 October 2023.

[8] Charlotte Villiers, 'New Directions in the European Union's Regulatory Framework for Corporate Reporting, Due Diligence and Accountability: The Challenge of Complexity' (2022) 13(4) European Journal of Risk Regulation 548.

[9] Radu Mares, 'Corporate self-regulation and the climate: The legal trajectory of sustainability due diligence in the European Union' in Ottavio Quirico and Walter F Baber (eds), *Implementing Climate Policies* (Cambridge University Press 2023).

2 THE CASE FOR REFORM OF CORPORATE GOVERNANCE

In its proposed CSDDD, the Commission insists on directors' supervisory role to ensure that sustainability due diligence is embedded in corporate strategies and thus is given more weight in corporate decision making and effective compliance.[10] Indeed, the focus of the CSDDD is on corporations rather than directors, and on rendering mandatory human rights and environmental due diligence[11] ('sustainability due diligence'). This legislative design combines corporate governance (i.e., directors' duties) and corporate accountability (i.e., corporate due diligence and liability), but has proven controversial. Criticized as redundant and/or intrusive, the proposed CSDDD does not contemplate more prescriptive options such as directors' individual liability[12] or independent and non-executive directors being appointed on the board to further sustainability due diligence.[13] Even so, the Council's position is to remove all provisions on directors' duties except those related to climate change[14] while the Parliament wishes to retain only a general directors' duty while removing the specific duties the Commission proposed.[15]

This section examines the directors' duties and their enforcement in a comparative perspective and accounts for the core tenets of CL. It explains the difficulties posed by diverging norms promoted by CL and the CG system, and then synthesizes the EU process leading to the CSDDD proposal in early 2022.

2.1 DIRECTORS' DUTIES UNDER COMPANY LAW

There are three elements that form the bedrock of company law approach to directors' duties in most advanced jurisdictions around the world. First, despite national variations, it is generally understood that directors must comply with legal duties of care and loyalty.[16] Second, these duties are commonly owed to their company and not to their shareholders. Third, directors are protected by the 'business judgement rule' – or judicial self-restraint – against overreaching minority shareholders and intrusive judicial oversight. Methodologically, this section points at commonalties and foundational aspects about

[10] CSDDD (n 3) 16 and para 63.
[11] ibid Art 4.
[12] Nick Friedman, 'Corporate Liability Design for Human Rights Abuses: Individual and Entity Liability for Due Diligence' (2021) 41(2) Oxford Journal of Legal Studies 289.
[13] The study written for the European Commission only refers briefly to such aspects when summarizing its survey responses. Some respondents suggested non-executive directors for trade unions or an external stakeholders committee. E&Y, 'Study on directors' duties and sustainable corporate governance - Final Report' (2020) 57-58.
[14] The Council deleted the relevant articles (25 and 26 as well 15(3)) due to the 'strong concerns' expressed by Member States that considered these to be 'an inappropriate interference with national provisions regarding directors' duty of care, and potentially undermining directors' duty to act in the best interest of the company'. Council of the European Union, 'Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 - General Approach' 2022/0051 (COD) (30 November 2022) 9-10.
[15] The Parliament deleted article 26 (specific duties) while retaining unchanged article 25 (general duty), in a deviance from the Parliament's own JURI report that embraced the Commission's proposal in its Report of 8.5.2023 (pp. 443-4). European Parliament, 'Amendments on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence' 2022/0051 (COD) (1 June 2023) Amendment 391.
[16] OECD Principles (n 1) 45-46.

directors' duties by noting the principles distilled in international soft law instruments such as the OECD Principles for corporate governance, and the convergence of civil law and common law jurisdictions.[17] Therefore, the following comparative analysis does not insist on specificities and details on national jurisdictions in order not to risk missing the forest for the trees. Furthermore, the CSDDD is a regional, EU wide instrument which means the EU lawmakers seek to accommodate differences among EU national traditions of corporate governance while still harmonizing the directors' duties under company laws.

The basic legal norm in CL is that directors are expected to pursue the best interests of the company and make their business decisions with due care while enjoying a fair amount of discretion to discharge their mandate. However, this legal picture is at odds with perceptions that directors are legally obliged to pursue the interest of their shareholders. Thus, directors' duties are at times understood as being about the exclusive pursuit of shareholder interests (exclusivity), about pursuing short term profitability rather than for the longer-term (short-termism), and about measuring corporate success solely/primarily in financial value terms (financialization). By now, corporate governance has become the home of powerful norms such as profit-maximization and shareholder primacy.[18] Therefore the question is whether these two norms thus defined are legal norms under CL, and if not, what is exactly the contribution of CL to these business norms taking hold in practice in the CG system?

A comparative review reveals that each of the above elements of profit-maximization and shareholder primacy can be countered by a textual reading of hard and soft law instruments in CL. Exclusivity and financialization elements are absent in the legal formulations of directors' duties. Short-termism is equally absent or at times expressly rejected by reference to long termism, as international soft law indicates.[19] As to the shareholders as beneficiaries of directors' duties, company laws sometimes omit shareholders altogether and refer solely to the 'interest of the company'.[20] Other times, shareholders are mentioned but with various additions. Thus, the OECD indicates that 'Board members

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[17] Robert McCorquodale and Stuart Neely, 'Directors duties and human rights impacts: a comparative approach' (2022) 22(2) Journal of Corporate Law Studies 605.

[18] Lynn Stout, *The shareholder value myth: How putting shareholders first Harms investors, corporations, and the public*, (Berrett-Koehler Publishers 2012).

[19] The OECD points out that 'The governance framework should recognise the interests of stakeholders and their contribution to the long-term success of the corporation' (OECD Principles (n 1)). The investor-led International Corporate Governance Network, states that 'The board should promote the long-term best interests of the company by acting on an informed basis with good faith, care and loyalty, for the benefit of shareholders, while having regard to relevant stakeholders'. (ICGN, 'ICGN Global Governance Principles' (2021), Principle 1 <https://www.icgn.org/sites/default/files/2021-11/ICGN%20Global%20Governance%20Principles%202021.pdf> accessed 1 October 2023).

[20] In Germany, both the Management Board and the Supervisory Board are bound to pursue the 'best interests of the enterprise' (Principles 1 and 10 of German Corporate Governance Code (2019)). That applies even to employee representatives on the Supervisory Board: 'Shareholder representatives and employee representatives are obliged in equal measure to act in the best interests of the enterprise' (Principle 10) <www.dcgk.de//files/dcgk/usercontent/en/download/code/191216_German_Corporate_Governance_Code.pdf> accessed 1 October 2023. In France, 'the manager may undertake all managerial decisions in the interest of the company' (Article 13 of the 1966 Company Law). In the US, a director should act 'in a manner the director reasonably believes to be in the best interests of the corporation' (§ 8.30 of American Bar Association, 'Model Business Corporation Act' (2016). <www.americanbar.org/content/dam/aba/administrative/business_law/corplaws/2016_mbca.authcheckdam.pdf> accessed 1 October 2023.

should act […] in the best interest of the company and the shareholders.'[21] Still other times company laws add qualifications and use varying terms: 'collective',[22] 'long-term'[23] or 'common'[24] interests of shareholders. Finally, company laws can refer explicitly to the interests of stakeholders (e.g., employees, customers, the community and even the market system) that should be taken into account.[25]

From a director perspective, conceptually and practically, there is nothing like THE interest of the shareholders. Cadbury noted that 'interests differ among shareholders. Some are more concerned with trading in a company's shares than in holding them; others will differ over the relative importance which they attach to dividends and to capital appreciation. Shareholders are not a homogenous group with a common set of interests, as chairmen soon discover'.[26] It is counterproductive to conceive the interests of the company simply as the sum of interests of stakeholders,[27] or even of its shareholders.[28]

It appears that legal texts on directors' duties do not explicitly support the norms of shareholder primacy and profit-maximisation. On the contrary, other concepts are employed in CL to guide managerial decision-making and clarify directors' duties. In law, shareholders do not own the company, but shares. This is not a legal technicality, but a fundamental aspect resulting from the existence of the firm as a legal person.[29] Thus the shareholders' interests are transformed once they are pursued in a corporate form:

> [A] company is an association of shareholders who have agreed to subordinate their individual interests in the undertaking and to organise their protection in accordance with a set of jointly accepted rules and institutions – the company's constitution. Shareholders therefore normally assert their rights *collectively* in *accordance with those rules* (to the extent that they have not been delegated to directors) and are bound to accept the decisions which emerge.[30]

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[21] OECD Principles (n 1) Art VI.A.
[22] In the UK, CL 'sets as the basic goal for directors the success of the company in the collective best interests of shareholders'. Company Law Review Steering Group, Company Law Review Steering Group, 'Modern Company Law for a Competitive Economy: Final Report' (2001) para 3.8.
[23] In the UK, directors shall have regard to 'the likely consequences of any decision in the long term', Companies Act 2006, Art 172.1.
[24] In France, the company contract should have as its main objective 'the common interest of the company members' (Article 1833 of the Civil Code).
[25] Under UK law, directors shall 'promote the success of the company for the benefit of its members as a whole' and have regard to employees, the community and the environment (Companies Act 2006, Art 172.1). See also OECD Principles (n 1) Art VI.C.
[26] Sir Adrian Cadbury, *Corporate Governance and Chairmanship: A Personal View* (Oxford University Press 2002) 42–43.
[27] 'The interest of the company may be understood as the over-riding claim of the company considered as a separate economic agent, pursuing its own objectives which are distinct from those of shareholders, employees, creditors including the internal revenue authorities, suppliers and customers. It nonetheless represents the common interest of all of these persons, which is for the company to remain in business and prosper. The Committee thus believes that directors should at all times be concerned solely to promote the interests of the company' - Viénot I Report, 'The Boards of Directors of Listed Companies in France' (1995), 7 <https://www.ecgi.global/sites/default/files/codes/documents/vienot1_en.pdf> accessed 1 October 2023.
[28] Thus 'the board of directors collectively represents all company shareholders, and is not the sum of conflicting interests' (ibid 12).
[29] Jean-Philippe Robé, 'The Legal Structure of the Firm' (2011) 1(1) Accounting, Economics, and Law.
[30] Company Law Review Steering Group, 'Modern Company Law for a Competitive Economy – Developing

To clarify what directors are 'actually' expected to do, theories wedded to the shareholder primacy norm argue for the resolute protection of shareholders in different ways. Such economic theories recognize as fundamental the 'agency problem' since the separation of ownership and control in modern corporations, falling on the corporate governance system to address this problem first and foremost.[31] On the one hand, Friedman and 'property rights' models of corporate governance saw shareholders as 'owners' and directors as owing them 'fiduciary duties' based on trust; solely pursuing profitability for shareholders is an ethical imperative but also a political economy necessity or else socialism ensues, Friedman argued in his famous rebuttal of CSR and unchecked managerial discretion.[32]

On the other hand, the 'nexus of contracts' theory of the firm or 'finance model' of corporate governance sees shareholders as residual risk-bearers that are uniquely vulnerable to directors' misconduct as well as uniquely positioned to hold them accountable. However, faith is placed in the market as the ultimate means of disciplining management and protecting shareholders, rather than counting on boards and directors' duties enforced in court. As Hill noted,

> While the contractual theory deprecates shareholder participatory rights in corporate governance, it resurrects shareholder interests to preeminence, through the guiding principle of 'profit maximization' […] [Thus] the hub of shareholder protection should be located outside the corporation, in ensuring a fair and open market, offering shareholders ease of entry and, crucially, exit.[33]

In short, such shareholder-oriented models deem the directors' (management, corporate) duties in CL as either oriented exclusively towards the interests of shareholders, as 'owners', or as a practically unimportant, according to the nexus of contracts view. Furthermore, affording directors the power to pursue and balance stakeholders' interests widens the discretion of managers aggravating the agency problem; a legal duty to do such balancing also creates discretion for courts leading to a judiciary management of companies.[34]

So, what causes the misunderstanding problem around directors' duties? This has to do with the silence and generality in CL formulations (section 2.2 infra) and with the peculiar enforcement of the directors' duty of care under CL. A core tenet of CL is the 'business judgement rule' (BJR) that grants managers large discretion in making decisions. As long as they operate with good faith and not in terms of their own interest, and the business complies with the law, courts will be disinclined to review their business decisions and thus not hold

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the Framework', para 4.19 (emphasis added) <https://webarchive.nationalarchives.gov.uk/ukgwa/20070603235054/http://www.dti.gov.uk/bbf/co-act-2006/clr-review/page25086.html> accessed 1 October 2023.

[31] Lynn Stout, 'Corporate Entities: Their Ownership, Control, and Purpose' (2016) 16-38 Cornell Legal Studies Research Paper <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841875> accessed 1 October 2023.

[32] Milton Friedman, 'The Social Responsibility of Business is to Increase its Profits' (September 13, 1970) The New York Times Magazine 17.

[33] Jennifer Hill, 'Visions and Revisions of the Shareholder' (2000) 48(1) American Journal of Comparative Law 39, 58.

[34] Company Law Review Steering Group, 'Modern Company Law for a Competitive Economy – Completing the Structure' (2000), 34 <https://webarchive.nationalarchives.gov.uk/ukgwa/+/http://www.berr.gov.uk/whatwedo/businesslaw/co-act-2006/clr-review/page25080.html> accessed 1 October 2023.

them liable for lapses of care. That entails two aspects: the standard of care triggering a director' liability is gross negligence rather than ordinary negligence, and courts will exercise self-restrain rather than interfere in business decisions.

The BJR is recognized in soft law such as the OECD Principles and explained for example in the US as following:

> In determining the corporation's 'best interests', the director has wide discretion in deciding how to weigh near-term opportunities versus long-term benefits as well as in making judgments where the interests of various groups of shareholders or other corporate constituencies may differ.[35]

Across jurisdictions, company laws converge on similar reasoning: courts should not rule on the wisdom of a business decisions with hindsight; instead, it is directors – as influenced by investors and other actors – that are rightfully positioned to discharge the task. The BJR creates a divergence of standards of conduct and review that Eisenberg persuasively explained.[36] Basically, the BJR robs company law of judicial enforcement normally expected from other bodies of law.[37]

CL in the formulations and enforcement of directors' duties is biased towards directors and fundamentally protects their discretion against encroachment by disaffected shareholders. That means CL is a sharp sword with one edge only in the relation between directors and shareholders: it protects directors but cannot compel them to use higher levels of care, that is, making decisions for longer time horizons, encompassing more stakeholders, and undertaking different balancing acts. This extremely limited enforcement potential for the directors' duty of care together with silences and generalities in CL formulations have generated diverging interpretations and even misunderstanding around the legal duties of directors, especially the duty of care.

2.2 PROBLEMS RAISED BY DIRECTORS' DUTIES

The analysis so far points to a 'misunderstanding problem': the legal norm CL explicitly advances through the duty of care is at odds with how CG actors interpret it. This problem pales in significance when the set of incentives the CG system delivers toward shareholder primacy and profit-maximization (the 'incentive problem') are accounted for. Thus, the very weak enforcement of the duty of care translates into almost no legal incentives to observe the legal norm while the market system advances very strong incentives aligned with a different norm. Such skewed incentives render directors' duties at best ripe to be misunderstood, and at worst irrelevant. How does the EU 'sustainable corporate governance' process account for the misunderstanding and incentives problems in CG?

The regulatory impact assessment (IA) for the CSDDD contains the problem tree (table) identifying the problem and two subproblems the CSDDD seeks to address, as well as the drivers (underlying causes). Starting with the latter, the IA speaks of market and regulatory failures: 'Problem drivers are market failures, like short-term focus of companies

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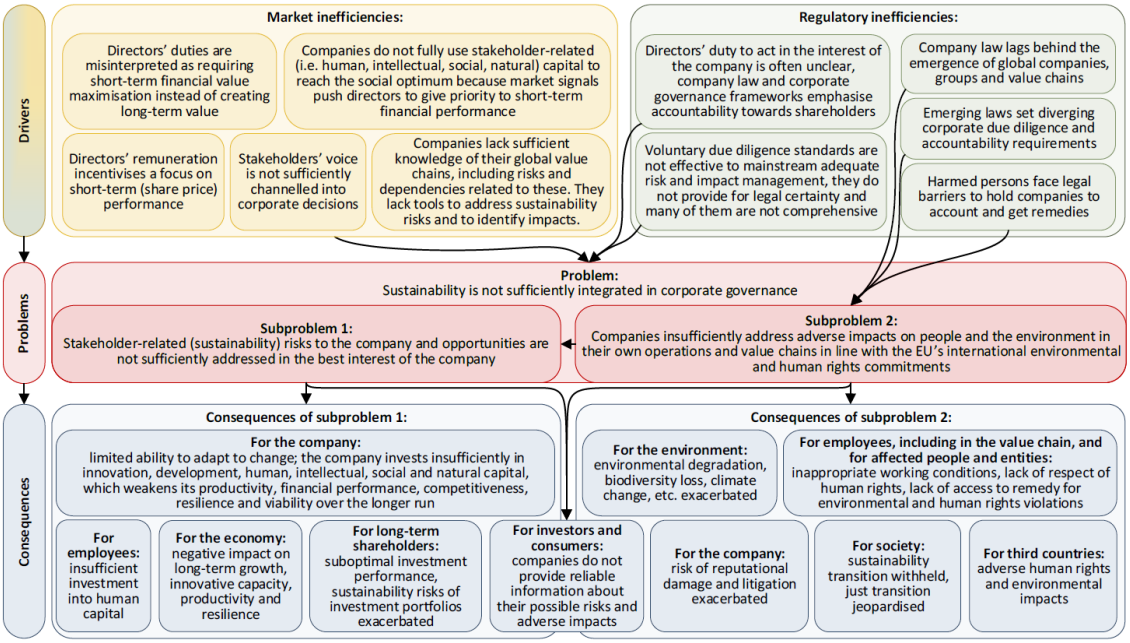
[35] Commentary to § 8.30 of Model Business Corporation Act (n 20).
[36] Melvin Aron Eisenberg, 'The Divergence of Standards of Conduct and Standards of Review in Corporate Law' (1993) 62(3) Fordham Law Review 437.
[37] Radu Mares, *The Dynamics of Corporate Social Responsibilities* (Brill Nijhoff 2007) 27-72.

and directors, and regulatory failures from unclear and diverging national rules (including emerging ones) and ineffective voluntary frameworks'.[38] These generate the main problem: 'sustainability is not sufficiently integrated in corporate governance' which contains two sub-problems: one for companies as they do not sufficiently address stakeholder-related risks to the company, and another for society as companies do not sufficiently manage their impact on people and the environment.



Commission, 'Impact Assessment Report on Corporate Sustainability Due Diligence' SWD (2022) 42 final, 7

The European Commission sees the subproblems as interlinked and creating a lose-lose dynamic that the CSDDD should reverse. In this way, the IA recognizes the misunderstanding problem and further indicates that the incentive problem is composed of undesirable incentives (linked to short termism) as well as missing incentives (due to failure to regulate). In diagnosing the problems, the Commission looks beyond directors' duties and their legal enforcement under CL and expands to the entire CG system and the role of investors and markets. Indeed, the CG reform is part of the EU push for sustainable finance[39] commended in 2018 under the European Green Deal.

Regarding the misunderstanding problem, the Commission noted that CL in all EU Member States already provides that the directors owe their duties to the company, and they are to act in the best interest of the company.[40] However laws are silent on what the interest of the company means, what specific interests should be taken into account, how to balance and prioritize some stakeholder interests, and how to handle the long-term consequences of

[38] Commission, 'Impact Assessment Report on Corporate Sustainability Due Diligence – Executive Summary' SWD (2022) 43 final (hereinafter Impact Assessment, Summary), 3.
[39] 'Sustainable finance generally refers to the process of taking due account of environmental and social considerations in investment decision-making, leading to increased investments in longer-term and sustainable activities' - 2018 Action Plan (n 5) 2.
[40] Commission, 'Impact Assessment Report on Corporate Sustainability Due Diligence' SWD (2022) 42 final (hereinafter Impact Assessment CSDDD), 24.

decisions.[41] 'As a result, interpretations, mostly by courts or academia, diverge in terms of interests to be protected [and] the focus of directors on the short-term financial performance has become a widely used practice […]'.[42] Arguably it is impossible altogether for a legal formulation of the duty of care to meet such expectations for clarity and specificity. What a reform of CL can do is to dispel misleading simplifications and refer expressly to long-term horizons and sustainability issues (or stakeholders). But such references in themselves are not sufficient; they leave legal enforcement untouched (BJR) and market failures unaddressed.[43] Dealing only with the misunderstanding problem ignores that other (market) incentives bear much more forcefully on directors' conduct than their (unenforceable) legal duties under CL. The 'incentives problem' remains and takes two forms.

Regarding one facet of the 'incentives problem' (i.e., missing legal incentives), the Commission clearly acknowledged that relying on corporate voluntarism is insufficient and deprives corporate governance and sustainability of much needed legal incentives. The IA as well as the three expert studies – on directors' duties,[44] on due diligence in supply chains,[45] and on the operation of the NFRD[46] – revealed the inadequacy of soft law and the insufficiency of light-touch disclosure regulations. Based on this evidence and analysis, the Commission decided to propose new legislation: the Corporate Sustainability Reporting Directive (CSRD)[47] repeals the Non-Financial Reporting Directive (NFRD)[48] and renders reporting obligations more stringent, and the CSDDD seeks to reform directors' duties under CL and couple them to new mandatory human rights and environmental due diligence for companies.

Regarding the other facet of the 'incentives problem' (i.e., undesirable market incentives), the 2018 High-Level Expert Group on Sustainable Finance (HLEG) report zeroed in on short-termism as a fundamental problem in corporate governance and as incompatible with the green transition which 'axiomatically' requires longer-term business horizons. Short-termism is referred to as the 'tragedy of horizons' and manifests itself in

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41 'The law is often unclear about whether and how broader stakeholder interests have to be taken into account in directors' decisions, i.e. when decisions are being made in the interest of the company. International policy frameworks and voluntary standards […] because of their non-mandatory nature and guidance-like language, they do not provide legal certainty for businesses and cannot be expected to counter market pressure to reduce operating costs' - Impact Assessment CSDDD (n 40) 10.

42 Impact Assessment CSDDD (n 40) 24.

43 These encompass both competitive pressures and investor short-termism: 'As regards market failures, competitive pressure makes companies apply purchasing practices which prioritise short-term cost reductions. […] Another well-documented pressure takes the form of short-termism of investors […] Partly as a response to such pressures, and often reinforced by the incentives built in their remuneration schemes, corporate directors tend to interpret their duties vis-a-vis the company as requiring a focus on short-term financial performance' (references omitted) - ibid 9.

44 E&Y (n 13).

45 Lise Smit et al, *Study on due diligence requirements through the supply chain - Final report* (Publications Office of the European Union 2020).

46 Willem Pieter de Groen et al, *Study on the Non-Financial Reporting Directive - Final report* (Publications Office of the European Union 2020)

47 Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting [2022] OJ L 322/15.

48 Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L 330/1.

both the financial economy and real economy.[49] As defined by HLEG, short-termism in finance is about placing 'too much weight on short-run profitability at the expense of the long run'.[50] In the real economy, short-termism leads to under-investment and financialization.[51] As short-termism emerged on the agenda in 2018, the Commission proceeded agnostically and called for empirical evidence. 'The key question is how finance contributes to such short-termism and influences the behaviour of executives to focus on short-term financial optimisation',[52] the HLEG report wrote. Evidence that finance displays short-termism seemed strongest. What was unclear was the extent of short-termism in the real economy, and whether finance short-termism caused business short-termism. The HLEG report reviewed many types of financial intermediaries[53] and the extent to which they take ESG factors into account; this drew an informative baseline of the financial sector in Europe.

The Commission accepted the HLEG's problem assessment and recommendation for further analysis on short-termism: 'Sustainability and long-termism go hand in hand […] [A] central focus of the sustainability agenda is to reduce the undue pressure for short-term performance in financial and economic decision-making […]'.[54] The Commission's Plan of Action maintained the same agnostic and tentative language and requested studies on shorter-termism in the financial sector[55] as well as the real economy. Regarding the latter, Ernst & Young (E&Y) was tasked with the corporate governance study and had as its objective to 'assess the root causes of "short termism" in corporate governance'.[56] It found evidence of 'a trend for publicly listed companies within the EU to focus on short-term benefits of shareholders rather than on the long-term interests of the company'.[57]

The E&Y study met massive criticism from academic[58] and business[59] quarters that

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[49] However, see Mark J Roe, *Missing the Target: Why Stock Market Short-Termism Is Not the Problem* (Oxford University Press 2022) (challenging the evidence behind charges of short-termism).
[50] High-Level Expert Group on Sustainable Finance (HLEG), *Financing a Sustainable European Economy* (2018).
[51] As explained by HLEG, 'Short-termism in business may be characterised as a tendency to under-investment, whether in physical assets or in intangibles such as product development, employee skills and reputation with customers, and as hyperactive behaviour by executives whose corporate strategy focuses on restructuring, financial re-engineering or mergers and acquisitions at the expense of developing the fundamental operational capabilities of the business' - ibid 45.
[52] ibid.
[53] Banks, insurers, asset managers, pension funds, credit rating agencies, sustainability rating agencies stock exchanges, consultants, and investment banks.
[54] 2018 Action Plan (n 5) 3-4.
[55] The Commission requested studies from three European Supervisory Authorities within their respective areas of oversight. European Securities and Markets Authority, *Undue short-term pressure on corporations* (2019) Report ESMA30-22-762, 9.
[56] E&Y (n 13) vi.
[57] ibid.
[58] Copenhagen Business School indicated that 'the report builds on the unsubstantiated assumption that management decisions suffer from short-termism. The whole report is biased by this basic assumption' - Feedback from: Copenhagen Business School, Center for Corporate Governance (7 October 2020) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/F584003_en> accessed 1 October 2023. European Company Law Experts point out that 'The study appears biased towards producing preconceived results rather than containing a dispassionate, impartial and comprehensive analysis. It proceeds by unsupported assertions – managers and investors are short-termist and corporate law is responsible for it – rather than rigorous demonstration' - Feedback from: European Company Law Experts (28 September 2020) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/F555384_en> accessed 1 October 2023.
[59] 'The underlying assumptions of the survey are simplistic and the questions are in many cases biased towards finding evidence of short-term value maximization on the part of EU companies' - The Swedish Corporate

challenged its key findings regarding corporate short-termism in the EU. Some considered that the report's 'flaws are elementary and fundamental'.[60] While the Commission did not repudiate the study's findings despite acknowledging weaknesses, it still decided to remove references to short-termism from the proposed CSDDD at the last minute. This setback problematized the case for CG reform based on short-termism but did not extinguish it. As the Harvard feedback points out, the failure to empirically demonstrating short-termism in the EU real economy is a categorical failure rather than evidence that CL does not contribute to genuine problems:

> The Report conflates externalities and distributional concerns with truncated, short-term horizons. While most of the Report's discussion and all of its ostensible evidence is framed in terms of short-termism, most of the troubling consequences it points to are externalities and inequitable distributions that have little to do with short-termism […] [T]he Report's proposals stand on shaky foundations because their ostensible target — short-termism inducing declining investment — may be modest or even a mirage […], whereas the real problems — externalities and distribution — are not even clearly articulated in the Report.[61]

In sum, CG faces a compounded problem that if left unaddressed can slow or derail the green transition. CL is a peculiar body of law marked by curtailed judicial enforcement of its legal norms, exhortations of acting with care with historically limited impact, and strong market incentives produced by the CG system. This creates a divergence of legal and market norms resulting in the preeminence of shareholder primacy and profit maximization,[62] as Sjåfjell noted:

> Shareholder primacy, with its narrow and short-term fixation on maximization of returns for shareholders, is reinforced through the intermediary structures of capital markets. This social norm has taken over the space that company law gives to individual companies to define their own over-arching purpose, and for the board, to make its own assessment of what the interests of the company are and how they should be pursued. The systemically entrenched shareholder primacy drive has thereby taken the disembedding of the economy from society that Polanyi identified to an even deeper extreme of abstraction.[63]

Governance Board, *The European Commission's study on directors' duties and sustainable corporate governance* (6 December 2019) <http://www.bolagsstyrning.se/Userfiles/Publikationer/Remissvar/191206_swedish_corporate_governance_board_re_study_on_directors_duties.pdf> accessed 1 October 2023.

[60] Harvard feedback (8 October 2020) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/F594640_en> accessed 1 October 2023.

[61] ibid.

[62] In short, 'while company law in general gives directors ample scope to take account of sustainability, company law has also facilitated the development of an almost exclusive focus on short-term financial value maximisation to the point of constituting the main barrier to more sustainable companies' - Impact Assessment CSDDD (n 40) 21.

[63] Beate Sjåfjell, 'How Company Law has Failed Human Rights – and What to Do About It' (2020) 5(2) Business and Human Rights Journal 179.

2.3 THE ROAD TO CSDDD

This section maps the CG provisions in the CSDDD and offers a succinct chronology of its place in the broader legislative ecosystem (see also Annex 1). The revised directors' duties in the Commission's proposal are contained in articles 15, 25 and 26. They provide for a general duty of care (art 25), specific duties regarding due diligence (art 26), and directors' obligations on climate (art 15).

As to the general duty of care, the CSDDD provides:

> Member States shall ensure that, when fulfilling their duty to act in the best interest of the company, directors of companies referred to in Article 2(1) take into account the consequences of their decisions for sustainability matters, including, where applicable, human rights, climate change and environmental consequences, including in the short, medium and long term.[64]

This is the *general* duty of care, reformulated to point expressly at social and environmental issues (or stakeholders[65]) and time horizons (the longer term). *Specific* duties are the novelty, creating distinct obligations on due diligence policy and strategy:

> 1. Member States shall ensure that directors of companies referred to in Article 2(1) are responsible for putting in place and overseeing the due diligence actions referred to in Article 4 and in particular the due diligence policy referred to in Article 5, with due consideration for relevant input from stakeholders and civil society organisations. The directors shall report to the board of directors in that respect.
> 2. Member States shall ensure that directors take steps to adapt the corporate strategy to take into account the actual and potential adverse impacts identified pursuant to Article 6 and any measures taken pursuant to Articles 7 to 9.[66]

By specifying the directors' duty of care to include 'Setting up and overseeing due diligence', the CSDDD thus requires the management of ESG risks to be formalized in policies, and the overall business strategy (or business model) should be reviewed to ensure consistency with due diligence. Further, specific directors' duties relate to combating climate change. Under article 15, directors are asked to adopt a climate plan (meant 'to ensure that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C'), identify risks (i.e., 'the extent to which climate change is a risk for, or an impact of, the company's operations.'), and take action on such principal risks/impacts (e.g., adopt 'emission reduction objectives'). Director remuneration is also mentioned with the aim for variable remuneration be 'linked to the contribution of a director to the company's business strategy and long-term interests and sustainability'.[67]

This proposed Directive has a dual nature. It is a corporate accountability legislation because it protects societal interests from wrongful business conduct by mandating

[64] CSDDD (n 3) Art 25.1.
[65] ibid Art 3(n) defines stakeholders as those affected by a company's operations.
[66] ibid Art 26.
[67] ibid Art 15

environmental and human rights due diligence (articles 4-22). It is also a corporate governance instrument requiring directors to discharge 'their duty to act in the best interest of the company' by taking a longer-term perspective, being more mindful of their stakeholders and overseeing corporate strategic outlook on sustainability. It is perhaps surprising that it has been the corporate governance elements that met more criticism and resistance in the business sector than the novel due diligence provisions. But how did sustainable CG and mandatory due diligence appear on the EU agenda?

The obscure origins of the CSDDD can be traced to the 2018 Final Report of the HLEG on sustainable finance. It made two recommendations regarding (1) the contribution of finance to sustainable growth; and (2) financial stability by incorporating ESG factors into investment.[68] In response, the EC identified three priorities, among which to 'foster transparency and long-termism in financial and economic activity'.[69] Therefore the Commission committed to take two actions: regarding transparency, to revise the Non-Financial Reporting Directive (NFRD), and regarding long-termism, to reform corporate governance. As part of the latter reform, the Commission used tentative language and made an oblique reference to due diligence: the 'Commission will carry out analytical and consultative work with relevant stakeholders to assess: (i) the possible need to require corporate boards to develop and disclose a sustainability strategy, including appropriate due diligence throughout the supply chain, and measurable sustainability targets.'[70]

The sustainable corporate governance agenda was set in motion with the Commission inviting three expert studies[71] that gathered evidence, analysed policy options and made a strong case for legislative intervention. Armed with these massive studies, the Commission announced in 2020 its intention to propose the CSDDD. The Commission produced a regulatory impact assessment for the CSDDD where it painstakingly outlined and weighed regulatory options. The Regulatory Board twice called into question the Commission's proposal through 'negative opinions'.[72] At the very last moment the CSDDD proposal was altered to eliminate references to short-termism and to narrow the provisions on directors' duties. Public consultation on the CSDDD proposal has garnered almost 300 replies offering a wealth of insight from various CG actors.[73]

What are the key milestones and actors pushing forward this legislative reform around the Green Deal and sustainable finance? The sustainable finance agenda evolved through the work of expert groups that issued important reports every two years and enabled the Commission to advance with policy papers and legislative proposals. Three expert reports are notable. The High-Level Expert Group (HLEG) on sustainable finance appointed in December 2016 issued its final report in 2018;[74] it enabled the EC to issue its 2018 Action Plan on Financing Sustainable Growth.[75] The HLEG report was followed by the Technical

[68] 2018 Action Plan (n 5) 1.
[69] ibid 2.
[70] ibid 11.
[71] See supra notes 44-46.
[72] Commission, 'Follow-up to the second opinion of the Regulatory Scrutiny Board on Corporate Sustainability Due Diligence' SWD (2022) 39 final.
[73] Feedback website for the SCDDD proposal <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/feedback_en?p_id=29288521> accessed 1 October 2023.
[74] HLEG (n 50).
[75] 2018 Action Plan (n 5).

Expert Group (TEG) on sustainable finance set up in 2018, which issued its final report in 2020[76]; it enabled the EC to issue the 2020 Taxonomy Regulation.[77] Work continues now through the permanent Platform on Sustainable Finance (PSF) established in 2020.[78] It issued the Social Taxonomy Final report in 2022[79] and soon after the report on minimum (social) safeguards in the Green Taxonomy.[80]

Where does the CSDDD fit in the broader reform ecosystem? The EU policy framework for the green transition is made of two Communications: the 2019 Green Deal Communication[81] and the 2021 Fit for 55 Agenda.[82] The 2021 Financing strategy develops the sustainable finance framework as a key component of this broad policy framework.[83] The work on corporate governance is part of this sustainable finance push. Thus positioned, the twin obligations – directors' duties under CL and corporate due diligence – are needed in a comprehensive reform agenda to mobilize sustainable private finance, which in turn is critical for funding the green transition.[84] It can be concluded that reforming directors' duties appear as a distinct piece of the puzzle in the EU transformational push for a 'green, fair and competitive transition'.[85]

3 REFORM THROUGH THE CSDDD AND ITS REGULATORY CONTEXT

The analysis so far presented the problems identified by the Commission and its choice to build on the established tenets of company law. What is then the novelty brought by CSDDD regarding directors' duties? This section highlights two new linkages around the directors' duty of care, and then compares CSDDD with two other reform options: the UK reform of CL undertaken in early 2000s and a reform proposal grounded in human rights. The analysis thus seeks to gauge the potential of modified directors' duties by examining the legislative design of the CSDDD as part of the EU legislative ecosystem for the green transition.

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[76] TEG, 'Taxonomy: Final report of the Technical Expert Group on Sustainable Finance' (2020).
[77] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 [2020] OJ L198/13.
[78] Platform on Sustainable Finance (*European Commission*, visited 25.11.2022) <https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/overview-sustainable-finance/platform-sustainable-finance_en>.
[79] Platform on Sustainable Finance, 'Final Report on Social Taxonomy' (2022).
[80] Platform on Sustainable Finance, 'Final Report on Minimum Safeguards' (October 2022).
[81] Commission, 'The European Green Deal' COM (2019) 640 final.
[82] Commission, '"Fit for 55": delivering the EU's 2030 Climate Target on the way to climate neutrality' COM (2021) 550 final.
[83] Commission, 'Strategy for Financing the Transition to a Sustainable Economy' COM (2021) 390 final (explaining that since 2018, the Commission has worked on financing sustainable growth and its framework has three building blocks: the 'taxonomy' as a classification system of sustainable activities, a disclosure framework for non-financial and financial companies, and investment tools, such as benchmarks, standards and labels).
[84] ibid - to reach its green transition objectives and mobilize 'EUR 1 trillion in sustainable investments over the next decade from private and public actors' the EU considers that 'the alignment of all sources of finance – public and private, national and multilateral – is required' as well as that 'Risk-sharing between public and private investors can effectively address market failures'.
[85] Commission, 'Updating the 2020 New Industrial Strategy: Building a stronger Single Market for Europe's recovery' COM (2021) 350 final.

3.1 COUPLING 1: DIRECTORS' DUTIES – CORPORATE DUE DILIGENCE

The CSDDD puts forward a 'general directors' duty to act in the company's best interest […] underpinned by some specific directors' duties'.[86] By inserting sustainability issues and long termism in the general duty of care, the CSDDD addresses the misunderstanding problem. Adding specific directors' duties to set up and oversee due diligence measures offers further clarity. Do these general specific duties also tackle the more serious incentives problem given the unchanged applicability of the BJR in CL, on the one hand, and the Commission's concerns about market pressures towards short termism, on the other?

To address short-termism, the CSDDD seeks integration of sustainability and CG through the double materiality concept.[87] Indeed, the two sub-problems identified in the IA are framed as risks to society and risks to companies.[88] 'Double materiality' covers 'the impact of a company's activities on the environment and society, as well as the business and financial risks faced by a company due to its sustainability exposures'.[89] It was the EU disclosure regulations that introduced 'double materiality' as a comprehensive approach – at times referred as 'outside-in' and 'inside-out' approach – to systematically integrate sustainability risks in corporate decision-making. With the CSDDD the legislators seek to apply this concept to the area of due diligence. The key vehicle in this effort are the specific directors' duties in article 26 rather than the general duty of care in article 25.

Earlier versions of CSDDD made double materiality more explicit through several specific directors' duties. Following criticism from the Regulatory Scrutiny Board and the business sector, the CSDDD text was scrubbed to eliminate references to risks to the company which are now left implicit in the general duty of care. Also, some specific duties were eliminated, as the EC explains:

> The specific duty to identify stakeholders' interests and dependencies of the company on such stakeholder interests are not specified as a separate duty in the proposal (but are implicitly included in the clarified duty of care). The broader duty to manage risks to the company related to stakeholders and their dependencies, as well as the broader duty to include the management of sustainability risks to the company in the corporate strategy (going beyond the requirement to specify indicative emission reduction objectives in case climate change is a principal risk to, or a principal impact of, the company) were not retained. Similarly, the specific duty to set up and oversee the implementation of processes related to the management of sustainability risks to the company, and the mandatory adoption and disclosure of science-based targets were not retained either.[90]

Laying down specific *director* duties in article 26 (titled 'setting up and overseeing due diligence') is enabled by the momentum behind mandatory *corporate* due diligence. Indeed,

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[86] Impact Assessment, Summary (n 38) 3.
[87] 'Sustainability in corporate governance encompasses encouraging businesses to frame decisions in terms of their environmental, health, and human rights impact, as well as in terms of the company's good performance and resilience in the longer term' - Impact Assessment CSDDD (n 40) 2.
[88] Impact Assessment, Summary (n 38) 3.
[89] Commission, 'Strategy for Financing' (n 83) 3.
[90] Commission, 'Follow-up to the second opinion' (n 72).

the link directors' duties – corporate due diligence is the innovation pursued in the CSDDD proposal. This link however proved controversial in the feedback process. Critics questioned the necessity of specific directors' duties and pointed to their redundancy as the companies already must comply with their due diligence obligations, which constitute the bulk of the CSDDD. Thus, the Regulatory Scrutiny Board 'commented that the impact assessment is not sufficiently clear about the need to regulate directors' duties on top of due diligence requirements'.[91]

There are further reasons for scepticism. Some business feedback saw references to CL as a way for the state to intrude in private governance, and for the EU to encroach on national systems of corporate governance evolved with their own traditions and particularities.[92] However, the Commission saw the merits of maintaining the link as a way to 'embed' corporate due diligence in CG and prevent due diligence becoming a mere compliance exercise:

> It allows due diligence to become strategic and to infiltrate into relevant corporate functions. A due diligence obligation without a proper corporate governance backing and without directors' responsibilities could become a mere compliance issue of secondary relevance.[93]

This reasoning is supported by data and analyses from the Corporate Human Rights Benchmark, which found that board and senior management level responsibility 'appears to be key for better action on human rights due diligence'.[94] In short, coupling directors' duties to corporate due diligence allows for developments in sustainability due diligence to slip into CL and reform what directors' care means. The linkage general duty of care – specific directors' duties – corporate due diligence is the novelty introduced through the CSDDD to alter the status quo in CL.

The existence of specified directors' duties deals with the misunderstanding problem in CL but also begins to address the 'incentive problem'. Some mild legal incentives might be generated through CL itself: the BJR continues to apply to duty of care aspects, but the more specific the duties are the less deferential courts need to be toward directors. Indeed, courts can make the process-versus-substance distinction already established in CL[95] to review compliance with proper decision-making processes necessary to discharge directors' duties (article 26); furthermore, these processes get specified through the risk management provisions on due diligence (articles 4-22). In this way, the specific directors' duties require some rather detailed actions that otherwise would have been optional and covered by the 'business judgement' of managers, a discretion conferred by company laws.

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[91] CSDDD (n 3) 22.
[92] See e.g. feedback from Federation of Finnish Enterprises (23 May 2022) and Confederation of Swedish Enterprise (23 May 2022), available at supra note 73.
[93] Commission, 'Follow-up to the second opinion' (n 72).
[94] World Benchmarking Alliance, 'Corporate Human Rights Benchmark 2022 - Insights Report' (2022), 3 <https://assets.worldbenchmarkingalliance.org/app/uploads/2022/11/2022-CHRB-Insights-Report_FINAL_23.11.22.pdf> accessed 1 October 2023.
[95] In the 1990s, the American Law Institute's Principles of Corporate Governance indicated that the judicial review of the process that directors used to arrive at a decision can be tighter than the level of judicial scrutiny of the directors' decision itself. See also Franklin A Gevurtz, 'The Business Judgment Rule: Meaningless Verbiage or Misguided Notion?' (1994) 67 Southern California Law Review 287, 297-303.

To summarize, the first coupling between directors' duties and corporate due diligence is made possible by the CSDDD having a dual nature as a corporate accountability and corporate governance instrument. While new legal incentives might emerge through judicial enforcement of directors' duties under CL, the BJR will cast a long shadow over attempts to tackle the incentives problem as it remains a fundamental tenet of CL that the CSDDD does not question. However, it is the broader EU regulatory ecosystem that mainly deals with the incentives problem, and this is enabled by the second linkage between the CSDDD and the new ecosystem.

3.2 COUPLING 2: CORPORATE DUE DILIGENCE – REGULATORY ECOSYSTEM

Since 2018 the EU moved at a furious pace and set up a regulatory ecosystem for the green transition. Indeed, the CSDDD does not exist in isolation but has wide ramifications in various policy areas. This ecosystem is generating new and likely significant incentives bearing on directors and their duties under CL. The EU's legislative 'jungle' could be mapped and simplified around three facets of the CSDDD.

First, in addition to its CL provisions discussed herein, CSDDD is mainly a corporate due diligence instrument. It delivers 'horizontal' due diligence applicable across all industries and sustainably issues, and the CSDDD points out to 'the strong consensus amongst stakeholder groups that a horizontal framework is necessary'.[96] The CSDDD provides thus a generic but mandatory risk management framework for corporate sustainability. There are also other EU laws as well as national laws in EU Member States that are referred to as 'vertical' due diligence, such as the Deforestation Regulation,[97] because they cover only selected sectors, products, or sustainability issues.[98] As the Commission indicates, the CSDDD has the role to 'complement' and fill gaps left open by a growing number of EU laws that deal with 'some specific sustainability challenges or apply in some specific sectors'.[99]

Second, the CSDDD is also a 'global value chains' instrument because due diligence covers not only the company's own operations but also those of its subsidiaries, suppliers and business partners. As a result the CSDDD is embedded in the EU's international trade and development frameworks, which increasingly refer to corporate responsibilities as well as to human rights and sustainability under the banner of 'value-based trade'.[100] Such frameworks are mentioned in the CSDDD because they have a supportive role in securing compliance with due diligence; indeed they are meant to incentivize and increase the capacity of developing countries and non-EU suppliers to participate in supply chain due diligence.[101]

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[96] CSDDD (n 3) 22.
[97] Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 [2023] OJ L 150/206 (hereinafter Deforestation Regulation).
[98] Gabrielle Holly and Signe Andreasen Lysgaard, 'How Do The Pieces Fit In The Puzzle? Making sense of EU regulatory initiatives related to business and human rights' (2022) The Danish Institute for Human Rights.
[99] CSDDD (n 3) 3.
[100] Commission, 'Trade Policy Review - An Open, Sustainable and Assertive Trade Policy' COM (2021) 66 final.
[101] International Trade Centre, 'Making Mandatory Human Rights and Environmental Due Diligence Work

The Commission recognizes the risk that, once subjected to mandatory due diligence, EU companies will either be in impossibility to comply or will be incentivized to simply offload responsibility for improvements to their partners in the supply chains.[102]

Third, being part of the sustainable finance package, CSDDD is part of an ecosystem of public and private finance. The EU legislative ecosystem on sustainable finance works the interface between the real economy and the financial economy. It is the supply-demand equation on sustainability/ESG data that the EU intends to regulate and facilitate. On the supply side, real economy companies have to supply sustainability information under the 2014 Non-Financial Reporting Directive (NFRD) to be replaced soon by a more stringent Corporate Sustainability Reporting Directive (CSRD).[103] The proposal of CSDDD is meant to further enhance the information flow as it mandates companies to set up risk management systems; previously, these due diligence systems were optional and expected as a by-product from a mere obligation to report under the NFRD. As real economy businesses come under new sustainability performance and reporting obligations, new data is generated that can addresses the needs of financial sector and create fresh opportunities to invest sustainably.

On the demand side, financial actors are obligated to be more transparent; the 2019 Sustainable Finance Disclosure Regulation (SFDR) mandates financial actors to disclose how they integrate sustainability risks in their decision-making.[104] Furthermore, to facilitate financial actors achieving such integration, the EU adopted the 2020 Taxonomy Regulation which provides criteria to distinguish green economic activities from the rest and contains reporting requirements.[105] Herein, respect for human rights is a criterion to qualify as taxonomy-compliant and are referred to as 'minimum safeguards'. Work on a complementary Social Taxonomy legislation commenced in 2021[106] but was postponed; meanwhile the Commission began work to elaborate in more detail the minimum safeguards criterion.[107]

To further strengthen the demand from the financial sector, the Commission indicated the possibility to mandate due diligence for some financial actors.[108] Already now, some large financial companies within the scope of the proposed CSDDD will have to undertake their own environmental and human rights due diligence.[109] Other enabling measures have been outlined in the 2018 Plan, including eliciting preferences, labels, benchmarks, credit ratings.[110]

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for All, Guidance on designing effective and inclusive accompanying support to due diligence legislation' (European Union 2022).

[102] CSDDD (n 3) 14.

[103] European Commission, 'Corporate sustainability reporting' (visited 25.11.2022) <https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en>.

[104] Regulation (EU) 2019/2088 Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector [2019] OJ L 317/1 (hereinafter SFDR).

[105] Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment (n 77) Arts 5-8.

[106] Final Report on Social Taxonomy (n 79).

[107] Final Report on Minimum Safeguards (n 80).

[108] Commission, 'Strategy for Financing' (n 83) 12-13 (indicating the possibility to mandate due diligence for some financial actors (banks, insurers, credit agencies), i.e., 'ensure ESG factors are consistently included in the risk management systems').

[109] Financial actors are insurance undertakings, credit institutions and investment firms (art 3.a.iv). A scaled-down due diligence obligation for such actors is in Arts 6.3 and 7.6.

[110] 2018 Action Plan (n 5) 4-5.

The demand from the investor side (sustainable finance) is notable which has translated into support for CSDDD, both for mandatory due diligence[111] and clarified directors' duties.[112] Through all these diverse interventions, the EU creates new legal and market incentives for the financial sector to invest sustainably and require improved ESG performance from the real economy.

The EU legislative ecosystem is rich in cross-references and shows how these laws are mutually reinforcing. Indeed, comprehensive frameworks for trade (Trade Policy Review), labour (Decent Work Communication), finance (Sustainable Finance Strategy), and the social side of the Taxonomy (minimum safeguards) offer different vantage points into the ecosystem. This boils down to the EU presenting a 'whole of the supply chain' approach for sustainable production, consumption and investment; the legislative ecosystem covers actors from investors to companies to consumers, and both public entities and private actors that affect the governance of European value chains. However, in the overarching green transition framework – the Green Deal and Fit for 55 communications – corporate governance is referred in passing and its significance as an enabler for sustainable finance seems understated.

How does this ecosystem approach respond to the two problems in CL? Regarding the misunderstanding problem in CL, the CSDDD presents corporate due diligence as a feasible and balanced approach grounded in established risk management principles as pioneered by the UN Guiding Principles on business and human rights.[113] The directors' duty of care is thus clarified and specified in new and potentially consequential ways through the corporate due diligence obligation. In parallel with these developments in the real economy, the EU work on sustainable finance has clarified the investors' fiduciary duties to their end beneficiaries, so ESG aspects can be legitimately considered.[114]

Regarding the incentives problem, the EU is keen to explain why it regulates as it pursues as 'a fair, competitive and green transition',[115] and emphasizes the crucial role – and information needs – of private finance in funding the transition. From the avalanche of laws targeting a multitude of actors throughout the real economy and financial sector as well as

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[111] Investor Alliance for Human Rights, 'The Investor Case for Mandatory Human Rights Due Diligence' (2020).

[112] The organization PRI (Principles for Responsible Investment) considered that the CSDDD is a missed opportunity regarding directors' duties: 'Compared to the Commission's initial impact assessment, the coverage of director's duties in this proposal is extremely limited. This is a missed opportunity. Furthermore, while we welcome the intention with regards to directors' duty of care and oversight of due diligence processes, the language used in Articles 15, 25 and 26 is too high-level to lead to strong, harmonised duties throughout the EU' PRI Statement (2 March 2022) <https://www.unpri.org/download?ac=15897>.

[113] UN Working Group, 'Guiding Principles on Business and Human Rights at 10: taking stock of the first decade' A/HRC/47/39 (2021) <https://www.ohchr.org/sites/default/files/Documents/Issues/Business/UNGPs10/Stocktaking-reader-friendly.pdf> accessed 1 October 2023.

[114] The Commission adopted six amending Delegated Acts on fiduciary duties on 21 April 2021 – Commission, 'Sustainable Finance and EU Taxonomy: Commission takes further steps to channel money towards sustainable activities' (*European Commission Press Corner*, 21 April 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1804>(financial actors have an obligation to take ESG into account and but the law falls short of a due diligence obligation. Beyond clarification of duties, enforcement is through disclosure obligations under the SFDR, which asks for a statement on ESG impacts and DD policies, or alternatively to provide reasons for not considering ESG impacts. SFDR n 104, Art 4.).

[115] Commission, 'Fit for 55 Communication' (n 82).

from the variety of enabling, light touch and prescriptive interventions, the EU demonstrates a willingness to produce a significant change in the incentives mix facing companies.

To summarise, the second coupling in the EU's attempt to reform directors' duties is between corporate sustainability due diligence and the new ecosystem. The CSDDD does not stand in isolation. By placing CSDDD as part of the sustainable finance package, the EU might tackle the incentives problem in CL in an unprecedently comprehensive manner. Both legal and market incentives are created through the green transition. This second linkage works on the shareholder side of corporate governance (including financial intermediaries) rather than solely on the directors' duties side. In this manner, the interface financial sector – real economy has the potential to problematize the norms of profit-maximization and shareholder primacy, at least in their more extreme forms.

Notably, corporate due diligence has emerged as the key connector between directors' duties in CL and the legislative ecosystem. A testament to lingering controversies and difficulties in corporate governance, there have been ebbs and flows in this CSDDD legislative process. It started as a 'sustainable *corporate governance*' initiative with a potential due diligence component mentioned in passing and has now mutated into a proposal for 'corporate sustainability *due diligence*' with a minuscule – and contested – CG element as the centre weight has moved towards the corporate due diligence element. It is this latter element that allows a fresh attempt to address the chronic problems regarding directors' duties.

3.3 ALTERNATIVE MODELS FOR REFORM

To evaluate the EU reform of directors' duties explained herein by the two linkages, one can further gauge new elements as well as continuity with established tenets in CL by looking at what the CSDDD does not challenge and what other models for reforming CL propose.

For sceptics, the CSDDD preserves too many elements of CL that allowed the norms of shareholder primacy and profit maximization to get entrenched. The Commission's Impact Assessment of the CSDDD explains the choices made. First, the BJR is not altered, thus perpetuating the judicial enforcement deficit in CL: 'the initiative does not aim at affecting the "business judgement rule" whereby the Courts refrain from substituting themselves for directors when it comes to business decision, nor enlarging the conditions for bringing enforcement actions'.[116] Second, the interests directors should pursue are not changed away from the company's interest: 'It should also be underlined that directors' duties do not go beyond the interest of the company and they do not require the directors to make, for example, environmental investments which are not in the (long-term) interest of the company (even if such investments would provide a general benefit)'.[117] Third, the personal liability of directors is not altered as 'the initiative does not aim at creating new actions against directors'.[118] Fourth, modifying the law on director renumeration (except the provisions in article 15) was postponed in order to wait for the impact of the Shareholder Rights Directive.[119] Finally, the directors' specific duties have been trimmed in face of sustained

[116] Impact Assessment CSDDD (n 40) 75.
[117] ibid 76.
[118] ibid 75.
[119] ibid. With this directive, the EU promotes long termism for shareholders. Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement [2017] OJ L132/1.

criticism and might vanish from the final Directive.[120]

In this way the EU builds on the tenets of CL. This is hardly old wine in new bottles. Instead, the proposed CSDDD reform of directors' duties adds to the mix a new element (corporate due diligence), couples it with a reformulated general duty of care and some more specific directors' duties, and places these in a more enabling legislative ecosystem. It is a comprehensive design. However, there are suggestions for another comprehensive set of coherent tweaks undertaken at multiple levels of CL that could be undertaken.

According to Sjåfjell, such reform of CL entails first dealing with the *purpose of the company* and EU company law should set the purpose as 'creating sustainable value within planetary boundaries, respecting the interests of its investors and other involved and affected parties'.[121] This would be the overarching purpose while a company's articles of association could formulate 'a more detailed purpose, specific to the business of the company' consistent with the overarching purpose.[122] To operationalize the overarching purpose, directors' duties need to be redefined. Specifically such duties would relate to the model, strategy and managerial systems of the company: the duties entail 'the board (i) ensuring that the business model of the company is in line with the purpose and (ii) developing and publishing a strategy that enables the achievement of this purpose throughout the business, integrating it in the internal control and risk management systems'.[123] Finally, several tools would be needed to be deployed in such managerial systems: a sustainability assessment, sustainability due diligence, corrective actions as rectification and continuous improvement plan, annual reporting, and external audits of due diligence and corporate reports.[124]

The CSDDD proposal can be compared to the UK reform of CL from early 2000s.[125] How did those legislators address the two problems? On the one hand, both reforms deal similarly with the misunderstanding problem.[126] They promote the 'enlightened shareholder value' approach that refers explicitly to the long-term horizon and the various interests that directors should accounted for (i.e., diversity of stakeholders in the UK, and diversity of sustainability issues in the CSDDD). On the other hand, the EU and UK reforms deal differently with the incentives problem: while the UK remained wedded to light-touch regulation through disclosure obligations (i.e., mandatory 'business review' introduced in CL),[127] the EU goes further through mandatory corporate due diligence and a regulatory ecosystem. In comparison and retrospect, the UK reform of CL was light touch, compartmentalized to the real economy, and devoid of an enabling legislative environment. It could not generate the legal and market incentives to counter profit-maximization and

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[120] See text accompanying supra note 90.
[121] ibid. The British Academy considers that the purpose of business is 'to solve the problems of people and planet profitably, and not profit from causing problems'. British Academy, 'Principles for Purposeful Business' (Future of the Corporation project, 2019), 8 <www.thebritishacademy.ac.uk/documents/224/future-of-the-corporation-principles-purposeful-business.pdf> accessed 1 October 2023.
[122] Sjåfjell (n 63).
[123] ibid.
[124] ibid.
[125] All documents from the UK company law review available at <https://webarchive.nationalarchives.gov.uk/ukgwa/20070603185134/http://www.dti.gov.uk/bbf/co-act-2006/clr-review/page22794.html> accessed 1 October 2023.
[126] Companies Act 2006, Art 172.
[127] ibid Art 417(2).

shareholder primacy and did not put a dent in the dissonance of norms plaguing directors' duties under CL.[128] It merely dealt with the misunderstanding problem in a formulaic manner counting on the expressive function of law.[129]

With the CSDDD embedded in a legislative ecosystem, the European Commission puts forward a multi-level and multi-actor form of supply chain governance to tackle some of the limitations of CL regarding the directors' duty of care. It takes such a comprehensive regulatory approach to regain the space CL has always created for directors (i.e., discretion to take sustainability aspects into account as needed to pursue the best interests of the company) and to guide them on aspects of care (i.e., exercise care by responding to new legal and especially market incentives created by the green transition). This is an attempt to reform and overcome the limitations of CL without sacrificing its three key tenets mentioned in the beginning, that is, directors' duties owed to the company, duties of care and loyalty, and the business judgement rule as the standard for judicial review. With its back to the basics of CL approach, the Commission seems intent to moderate and counter the norms of profit-maximization and shareholder primacy (exclusivity).

Still, critics challenge this proposed Directive for including specific duties of directors (article 26) and even for covering directors' duties to begin with. Thus, while some charge redundancy given that the CSDDD main thrust is on corporate due diligence, others charge intrusiveness in corporate governance of private entities. At the time of writing, the CSDDD is not finalized. Removing the specific directors' duties under article 26 would shortcut the first coupling between the directors' general duty of care and corporate due diligence, which brings the CSDDD close to the UK model and its unwarranted reliance on legal symbolism. Such specific duties of directors facilitate to some extent judicial enforcement within CL and stakeholder evaluations of corporate leadership; indeed, they add something to merely stating that directors should act 'with care'. However, the same comparison with the UK model shows that even a complete deletion of directors' duties does not nullify two ingredients the UK model never had: the mandatory corporate due diligence and the legislative ecosystem. Thus, even the extreme scenario (i.e., deletion) would not compromise the legal and market incentives the EU law has created for corporations; it possibly could reduce the clarity and coherence in this legislative ecosystem by keeping CL insulated from the sustainability imperative.

4 CONCLUSIONS

The article examined why and how directors' duties under company laws and corporate governance are being reformed in the EU. In the assessment of the European Commission, directors' duties are affected by both a 'misunderstanding problem' and an 'incentives problem' that together ended up creating a striking dissonance between the legal norm in CL texts and the business norm that the CG system practices. With its 'sustainable corporate governance' initiative, the Commission decided in 2018 to apply the 'double materiality'

[128] 'Enlightened Shareholder Value' as implemented in the 'has not had a major impact in the sense of making substantial changes to the way that boards and companies operate and/or report' – Andrew Keay and Taskin Iqbal, 'The Impact of Enlightened Shareholder Value' (2019) 4 Journal of Business Law 304, 327.
[129] Melvin Aron Eisenberg, 'Corporate Law and Social Norms' (1999) 99(5) Columbia Law Review 1253, 1269.

concept to the area of corporate governance. This ambition to cover both risks to the company and to society in one single initiative has now crystallized in the CSDDD proposal. Rather than existing in isolation, CSDDD is embedded in an EU legislative ecosystem, a comprehensive framework for 'sustainable finance, sustainable production and consumption'.[130] In the transition to a green economy, CG appears as an important lever in a task that is politically important and urgent.[131] Thus contextualized, the CSDDD provisions on directors' duties indicate that the Commission is outlining a fresh approach to the problematic norms of profit maximization and shareholder primacy (exclusivity) entrenched in CG.

The EU reform of directors' duties under CL can be synthetized in terms of creating two new 'couplings': directors' duties - corporate due diligence, and corporate due diligence - regulatory ecosystem. The former coupling reflects the dual nature of the CSDDD as a corporate accountability and corporate governance instrument; the latter coupling represents the comprehensive regulatory approach of the EU to the green transition. The CSDDD is not a revolutionary attempt in the meaning that it does not alter the foundational blocks of CL in a manner that Sjåfjell's ambitious proposal would. It builds on the core tenets of CL and still the CSDDD is a noteworthy and unprecedented legislative design that creates new market and legal incentives in a way the UK reform of CL in early 2000s did not attempt with its 'enlightened shareholder value' approach. Years ago, the UNGPs put forward the human rights due diligence concept, rooted in risk management and backed by 'policy mixes', as the way to break the impasse in the business and human rights area. Corporate sustainability due diligence is now the centrepiece of the CSDDD and backed by a comprehensive regulatory ecosystem might hold one key to unlocking the modernization of directors' duties under CL as well.

[130] Commission, 'Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on decent work worldwide for a global just transition and a sustainable recovery' COM (2022) 66 final.
[131] CSDDD (n 3) 20-21.

ANNEX 1

Chronology and EU documents

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[New Industrial Strategy of EU] *Communication Updating the 2020 New Industrial Strategy: Building a stronger Single Market for Europe's recovery*, COM(2021) 350 final https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2021:350:FIN

['Fit for 55'] *Communication 'Fit for 55': delivering the EU's 2030 Climate Target on the way to climate neutrality*, COM/2021/550 final https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021DC0550

European Commission, *Trade Policy Review - An Open, Sustainable and Assertive Trade Policy*, COM(2021) 66 (2021) https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_645

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INTERNATIONAL OBLIGATIONS CALLING FOR CONSTITUTIONAL PROTECTION OF THE RIGHT TO A HEALTHY ENVIRONMENT – AN ICELANDIC PERSPECTIVE

SNJÓLAUG ÁRNADÓTTIR*

The international recognition of a universal right to a healthy environment is reaching its pinnacle. At least 156 States have recognised this right through the adoption of international treaties and 161 States have recognised it through their endorsement of UN General Assembly Resolution 76/300. While codified in several regional agreements, the right is not binding on all States through treaty law. The European Convention on Human Rights makes no explicit reference to the environment which might lead to the conclusion that States Parties are under no obligation to implement a right to a healthy environment into their domestic legal systems. However, the jurisprudence of the European Court of Human Rights indicates that this right may be a precondition to the enjoyment of other rights safeguarded by the Convention. Furthermore, it may be becoming universally binding as a standalone right under customary international law. This article concludes that various international obligations require States to ensure an explicit or implicit right to a healthy environment and that such a right should enjoy constitutional status. It explains that elements of the right may be implicitly embedded in constitutions even if they have no environmental provisions, as is the case of the Icelandic constitution. However, that is not an appropriate implementation of the standalone right to a healthy environment.

1 INTRODUCTION

Environmental constitutionalism has developed swiftly over past decades.[1] There was no mention of the environment in early human rights instruments, such as the 1948 Universal Declaration of Human Rights,[2] or constitutions from that time.[3] However, this has changed with increased understanding of the importance of a healthy environment as a precondition for the enjoyment of other human rights and with the realisation that environmental rights can be made more operational by framing them as human rights.[4] The link between environmental protection and anthropocentric interests was clearly established in the 1990s[5]

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1 For a thorough discussion on environmental constitutionalism see James R May and Erin Daly, *Global Environmental Constitutionalism* (Cambridge University Press 2014); and Louis J Kotzé, *Global Environmental Constitutionalism in the Anthropocene* (Hart 2016).

2 UNGA, 'Universal Declaration of Human Rights' (10 December 1948) UN Doc A/RES/217 (III) A.

3 UNGA, 'Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox' (24 December 2012) UN Doc A/HRC/22/43, para 7.

4 See Alan E Boyle, 'Human Rights or Environmental Rights? A Reassessment' (2007) 18(3) Fordham Environmental Law Review 471.

5 UN Doc A/HRC/22/43 (n 3) para 9.

and environmental rights have now unequivocally entered the sphere of human rights. Indeed, the entry of environmental norms into human rights law is fitting due to the interdependence between environmental protection and human rights.[6] Environmental rights can be procedural and substantive, and a majority of constitutional provisions concerning the environment are rights-based and anthropocentric. Growing awareness of the interconnection between human rights and the environment has led to the greening of pre-existing human rights, e.g. the right to life and private life, and to the emergence of a new explicit right to a clean, 'healthy, safe, satisfactory or sustainable' environment.[7]

States' constitutions increasingly recognise an explicit and implicit right to a healthy environment. Environmental constitutionalism is flourishing, partly due to the growing recognition of the right to a healthy environment in regional treaties, protocols and case law. The right has not become universally binding through treaty law and that has allowed several States to refrain from implementing it into their domestic legal systems. For example, there is no explicit reference to a right to a healthy environment in the European Convention on Human Rights (ECHR)[8] and so Iceland, a State Party, has deemed justified not to ensure such a right in its domestic legal system. However, this may be changing as the right to a healthy environment becomes enshrined in other rights already safeguarded by the Convention and/or universally binding as a standalone right under customary international law. The European Court of Human Rights (ECtHR) has already indicated that provisions of the ECHR entail certain environmental safeguards and the Grand Chamber is expected to specifically address the right to a healthy environment in three upcoming judgments. Furthermore, the United Nations General Assembly (UNGA) recently adopted a resolution confirming the existence of a universal right to a healthy environment, both as an independent right and as an inherent precondition for the enjoyment of other human rights.[9] This resolution might be seen merely as soft law, a non-binding declaration. On the other hand, it might reflect *opinio juris* which, in combination with widespread state practice, can demonstrate the emergence of a new rule of customary international law binding for all States.

This article explores whether there are international obligations requiring States to ensure an explicit or implicit right to a healthy environment and whether such obligations demand constitutional status. Chapter 2 provides an overview of the evolution and definition of the right to a healthy environment. Chapter 3 examines relevant international obligations, including international and regional conventions, as well as potential customary international law. Chapter 4 explains why it may be necessary to implement these international obligations at the constitutional level and discusses different types of provisions. Chapter 5 shifts the focus to Iceland and considers whether an implicit right to a healthy environment can be derived from certain provisions or unwritten norms of the Icelandic Constitution. It also considers recent proposals for a new constitutional provision safeguarding the right to a healthy environment. The objective of the article is twofold; first, to assess the status of the

[6] UN Doc A/HRC/22/43 (n 3) para 10.
[7] ibid para 11.
[8] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.
[9] UNGA, 'The human right to a clean, healthy and sustainable environment' (28 July 2022) UN Doc A/RES/76/300, paras 1 and 2.

universal right to a healthy environment and the need for implementation of that right. Second, to inform the ongoing debate concerning the need for an environmental provision in the Icelandic Constitution.

2 EVOLUTION AND DEFINITION OF THE RIGHT TO A HEALTHY ENVIRONMENT

The right to a healthy environment can be traced back to the 1972 Stockholm Declaration.[10] The UNGA decided to convene the Stockholm Conference due to 'the continuing and accelerating impairment of the quality of the human environment' and its impacts on 'the condition of man, his physical, mental and social well-being, his dignity and his enjoyment of basic human rights, in developing as well as developed countries'.[11] The Declaration establishes most of the general principles of international environmental law and lays the foundation for the human right to a healthy environment. It is anthropocentric and fleshes out the inherent link between economic growth, pollution and prosperity for mankind.[12] It explicitly states that:

> Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.[13]

This right continued to evolve and in 1990, the General Assembly declared that 'all individuals are entitled to live in an environment adequate for their health and well-being'.[14] It is not as explicitly referenced in the Rio Declaration of 1992,[15] which stipulates only that human beings are 'entitled to a healthy and productive life in harmony with nature'.[16]

International support for the right to a healthy environment has grown in recent decades. Several international and regional treaties now codify the right, as detailed in chapter 3.1. Moreover, non-governmental organisations and the States most heavily impacted by the adverse effects of climate change, such as the Maldives, have pushed for the recognition of a universal right to a healthy environment.[17] This movement has relied heavily on the work of the two Special Rapporteurs for Human Rights and the Environment, John Knox and David Boyd, advocating for UN recognition of the right to a healthy environment due to the greening of basic human rights such as the rights to life, health, food, water,

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[10] UN Conference on the Human Environment, 'Stockholm Declaration on the Human Environment' (concluded 16 June 1972, adopted by the UNGA 15 December 1972) see UN Docs A/RES/27/2994, A/RES/27/2995 and A/RES/22/2996 (Stockholm Declaration).
[11] UNGA, 'Problems of the human environment' (3 December 1968) UN Doc A/RES/23/2398.
[12] See particularly the Preamble, paras 2-6.
[13] Stockholm Declaration (n 10) principle 1.
[14] UNGA, 'Need to ensure a healthy environment for the well-being of individuals' (14 December 1990) UN Doc A/RES/45/94.
[15] See Alan E Boyle, Catherine Redgwell, and Patricia W Birnie, *Birnie, Boyle & Redgwell's International Law and the Environment* (Oxford University Press 2021) 286; and UN Doc A/HRC/22/43 (n 3) para 14.
[16] Principle 1 of the Rio Declaration on Environment and Development (13 June 1992) 31 ILM 874.
[17] UN News, 'UN General Assembly declares access to clean and healthy environment a universal human right' (*UN News*, 28 July 2022) <https://news.un.org/en/story/2022/07/1123482> accessed 1 October 2023.

housing, culture, development, property, home and private life.[18] The efforts have culminated in two monumental resolutions affirming the right to a healthy environment: a resolution by the UN Human Rights Council (UNHRC), dated 8 October 2021,[19] and a UNGA resolution from 28 July 2022.[20] These resolutions 'recognize the right to a safe, clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights'.[21] They note that 'the right to a clean, healthy and sustainable environment is related to other rights and existing international law'.[22] Paragraphs 1 of both resolutions confirm that the right to a healthy environment is a self-standing right; the recognition of this 'as a human right' underpins its independence while paragraph 2 emphasises the importance of a healthy environment for the enjoyment of other human rights. Paragraphs 3 of both resolutions specify that the right calls for 'the full implementation of the multilateral environmental agreements under the principles of international environmental law'[23] and urge States to adopt policies and cooperate to secure this right for all.[24] These resolutions represent a remarkable step forward in the development of this universal right and are expected to prove useful in future environmental and climate litigation cases.[25]

These developments have been followed by further notable actions on the international arena. In particular, on 27 September 2022, the Council of Europe urged its 46 States Parties to 'reflect on the nature, content and implications of the right to a clean, healthy and sustainable environment and, on that basis, actively consider recognising at the national level this right as a human right that is important for the enjoyment of human rights and is related to other rights and existing international law'.[26] This recommendation is put forth as a response to 'the increased recognition of some form of the right to a clean, healthy and sustainable environment in, *inter alia*, international instruments, including regional human rights instruments, and national constitutions, legislation and policies'.[27] It thus underlines the growing number of international and domestic (including constitutional) law recognising the right to a healthy environment and affirms the need for implementation of the international obligations into national laws and/or constitutions. More recently, on 16-17 May 2023, the Heads of State and Government of the Council of Europe referred to the right to a healthy environment in Appendix V to the Reykjavik Declaration.[28] Here, States Parties to the Council of Europe noted 'the increased recognition of the right to a clean,

[18] European Parliament, 'At a Glance: A universal right to a healthy environment' (2021) <https://www.europarl.europa.eu/RegData/etudes/ATAG/2021/698846/EPRS_ATA(2021)698846_EN.pdf> accessed 1 October 2023; see Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (19 July 2018) UN Doc A/73/188.
[19] Human Rights Council, 'The human right to a clean, healthy and sustainable environment' (8 October 2021) UN Doc A/HRC/RES/48/13.
[20] UN Doc A/RES/76/300 (n 9).
[21] UN Doc A/HRC/RES/48/13 (n 19) para 1 and UN Doc A/RES/76/300 (n 9) para 1.
[22] UN Doc A/RES/76/300 (n 9), para 2 and UN Doc A/HRC/RES/48/13 (n 19) para 2.
[23] UN Doc A/RES/76/300 (n 9) para 3 and UN Doc A/HRC/RES/48/13 (n 19) para 3.
[24] UN Doc A/RES/76/300 (n 9) para 4 and UN Doc A/HRC/RES/48/13 (n 19) para 4.
[25] European Parliament (n 18).
[26] Council of Europe, 'Recommendation CM/Rec(2022)20 of the Committee of Ministers to member States on human rights and the protection of the environment' (27 September 2022) article 1.
[27] ibid preamble.
[28] 'Reykjavík Declaration: United around our values', Reykjavík Summit, 4th Summit of Heads of State and Government of the Council of Europe (16-17 May 2023).

healthy and sustainable environment in, *inter alia*, international instruments, regional human rights instruments, national constitutions, legislation and policies' and 'the extensive case-law and practice on environment and human rights developed by the European Court of Human Rights and the European Committee of Social Rights'. In that context, they committed 'to actively consider recognising at the national level this right as a human right that is important for the enjoyment of human rights and is related to other rights and existing international law'.[29]

There is no single definition of the right to a clean, healthy or sustainable environment. The lack of definitions and difficulties involved when invoking the right in concrete situations may reduce its practical significance,[30] although the recent resolutions give reason for optimism.[31] There is some difference in the terminology adopted in different instruments. Terms like 'safe', 'suitable', and 'adequate' entail a rather anthropocentric approach because they imply a reference to human well-being. However, the words 'clean', 'healthy' and 'non-polluted' suggest that the state of the environment should be assessed more objectively.[32] The word 'safe' was omitted from the UNHRC resolution last minute due to concerns over potential state responsibility.[33] The right to a healthy environment, as referred to in this article, generally relates to access to clean air, clean water, decent food and sanitation, as well as a stable climate, healthy biodiversity and healthy ecosystems.[34] The aforementioned resolutions make clear that it is both an independent right and closely related to other human rights; an implicit precondition for the enjoyment of other rights such as the right to life. Recognition of the right to a healthy environment in connection to other human rights essentially entails the 'greening' of human rights, a process that has long been underway.[35] In contrast, the explicit recognition of an independent right to a healthy environment could be 'truly revolutionary', particularly if it involves an individual human right.[36]

3 INTERNATIONAL LAW ON THE RIGHT TO A HEALTHY ENVIRONMENT

The right to a healthy environment is explicitly recognised in numerous international instruments. It is codified in several regional human rights treaties as well as the Aarhus Convention[37] but not explicitly mentioned in the ECHR. However, the right to a healthy

[29] Reykjavík Declaration (n 28) Appendix V: The Council of Europe and the environment, ii.
[30] Ke Tang and Otto Spijkers, 'The Human Right to a Clean, Healthy and Sustainable Environment' (2022) 6 Chinese Journal of Environmental Law 87, 103; Amirouche Debichie, 'The Third Generation of Human Rights: The Right to A Healthy Environment' (2021) 4(3) Economics and Sustainable Development Review 413.
[31] Tang and Spijkers (n 30) 105.
[32] ibid 103.
[33] ibid 102.
[34] UN Human Rights Council, 'Issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environmen' (8 January 2019) UN Doc A/HRC/40/55 para 17. See also David R Boyd, 'The Implicit Constitutional Right to Live in a Healthy Environment' (2011) 20(2) RECIEL 171, 171.
[35] Tang and Spijkers (n 30) 88; James McClymonds, 'The Human Right to a Healthy Environment: An International Legal Perspective' (1992) 37(4) The New York Law School Law Review 583; Sumudu Atapattu, 'The Right to a Healthy Life or the Right to Die Polluted: The Emergence of a Human Right to a Healthy Environment under International Law' (2002) 16(1) Tulane Environmental Law Journal 65.
[36] Tang and Spijkers (n 30) 88.
[37] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447.

environment has been read into international treaties even without any explicit reference to the environment[38] and is, to some extent, implicitly incorporated into the ECHR. Furthermore, the growing state practice recognising a right to a healthy environment may suggest that the right has become binding on all States under customary international law. This chapter will first explain how the right to a healthy environment appears in international and regional human rights treaties and then assess whether it has entered the corpus of customary international law.

3.1 HUMAN RIGHTS TREATIES

This section gives an overview of the most relevant treaties. It pays special attention to the ECHR and the jurisprudence of the ECtHR as that is particularly relevant for deciphering the human rights obligations of Iceland.

3.1[a] UN Treaties

Several international human rights treaties allude to a right to a healthy environment. Most of these treaties, as well as the Universal Declaration on Human Rights, predate the developments that led to the creation of this right and therefore, do not clearly articulate a right to a healthy environment. Nonetheless, certain provisions indicate that a right to a healthy environment underpins other human rights. For example, the 1966 International Covenant on Economic, Social and Cultural Rights ensures the right to the highest attainable standard of physical and mental health, and obliges States Parties to take steps to improve all aspects of environmental and industrial hygiene.[39] Similarly, the 1989 Convention on the Rights of the Child provides that States Parties shall combat disease and malnutrition *inter alia* by providing adequate nutritious foods and clean drinking water with consideration for the dangers and risks of environmental pollution.[40] Moreover, decisions of human rights treaty bodies of the UN and case law of regional courts and commissions, demonstrate that the deterioration of the environment threatens the enjoyment of various human rights, such as the right to life, health and nutrition.[41]

The UN regime on climate change can also be seen as a human rights treaty regime. Its primary objective is environmental protection, i.e., adaptation and mitigation of climate change, and it has a strong anthropocentric focus. Principle 3(1) of the UN Framework Convention on Climate Change (UNFCCC)[42] stipulates that the climate system shall be protected 'for the benefit of present and future generations of humankind' and the Paris Agreement strikes a similar cord, noting that 'climate change is a common concern of humankind'.[43] The preamble of the Paris Agreement also makes clear that efforts to combat

[38] Boyd, 'The Implicit Constitutional Right to Live in a Healthy Environment' (n 34) 178.
[39] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, Art 12.
[40] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, Art 24.
[41] See UN Doc A/HRC/22/43 (n 3) para 34.
[42] United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.
[43] See the preamble of Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UN Doc FCCC/CP/2015/L.9/Rev/1.

climate change serve the purpose of preventing hunger due to the 'vulnerabilities of food production systems to the adverse impacts of climate change'. It urges States Parties to 'consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity' when addressing climate change and affirms the need for public participation, access to information and cooperation in the implementation of the Agreement.[44] All of this makes the UNFCCC and the Paris Agreement environmental human rights treaties with the overarching objective of ensuring the right to a healthy environment. The supreme court of Brazil recently endorsed this view.[45]

3.1[b] Regional Treaties

Numerous regional treaties entail references to a healthy environment. The 1998 Aarhus Convention states, in its preamble that 'every person has the right to live in an environment adequate to his or her health and well-being'. Article 1 of the convention prescribes 'the right of every person of present and future generations to live in an environment adequate to his or her health and well-being'. Similarly, article 24 of the 1981 African Charter on Human and Peoples' Rights states that 'all peoples shall have the right to a general satisfactory environment favorable to their development'. [46] The 2004 Arab Charter on Human Rights provides that 'every person has the right […] to a healthy environment'[47] and the Protocol on Economic, Social and Cultural Rights to the American Convention on Human Rights stipulates that 'everyone shall have the right to live in a healthy environment'.[48] The Association of Southeast Asian Nations Human Rights Declaration affords individuals 'a right to an adequate standard of living, including the right to a safe, clean and sustainable environment'.[49] Additionally, the Escazú Agreement from 2018, which resembles the Aarhus Convention but is applicable in Latin America and the Caribbean, refers to 'the protection of the right of every person of present and future generations to live in a healthy environment'.[50] These are examples of explicit provisions establishing a right to a healthy environment but regional courts and commissions have found that environmental degradation can impact the enjoyment of well-established human rights such as the right to

[44] ibid.
[45] *PSB et al v Brazil* (on Climate Fund) (Federal Supreme Court of Brazil) (30 June 2022) unofficial English translation, para 17 <http://climatecasechart.com/non-us-case/psb-et-al-v-federal-union/> accessed 1 October 2023.
[46] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217.
[47] Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008), reprinted in 12 Int'l Hum Rts Rep 893 (2005), Art 38.
[48] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) (adopted 14 November 1988, entered into force 16 November 1999) 28 ILM 156, Art 11.
[49] ASEAN Human Rights Declaration (adopted November 18, 2012), para 28 (f) <https://asean.org/asean-human-rights-declaration/> accessed 1 October 2023.
[50] Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (adopted 4 March 2018, entered into force 22 April 2021) C.N.196.2018.TREATIES-XXVII.18, Art 1.

life, right to health, property, home and privacy, even in the absence of explicit environmental provisions.[51]

3.1[c] European Convention on Human Rights

The ECHR does not includeprovisions explicitly relating to a right to a healthy environment. However, it shall be interpreted in light of the circumstances existing at the time of application. This evolutive interpretation is necessary to ensure the effective protection of human rights[52] and has led to the classification of the ECHR as a living instrument.[53] It allows for the convention to be applied to issues not specifically anticipated at the time of its adoption, insofar as they impact basic human rights. One example is environmental harm and the unprecedented environmental degradation caused by climate change. There have been discussions about the adoption of an annex to the ECHR on environmental protection but such proposals have been rejected due to the rapid development of case law in the field.[54] Indeed, the jurisprudence of the ECtHR indicates that the convention already incorporates a right to a healthy environment, at least insofar as it relates to the enjoyment of other human rights explicitly protected therein.

The environmental jurisprudence of the ECtHR has developed quickly over the past three decades. The first case indirectly addressing a right to healthy environment was the *López Ostra v Spain* case of 1994, where the court found that Spain had violated article 8(1) ECHR[55] by failing to sufficiently consider the impacts of a waste treatment plant on local residents. [56] Four years later, in *Guerra v Italy*, the ECtHR found that article 8 was applicable due to the emissions of toxic fumes at a distance of approximately one kilometre from the applicants' homes.[57] The court went on to note that article 8 would, in such cases, not only protect individuals from arbitrary interference from the government but that it could also impose positive obligations on States.[58] This meant that States could be held liable for failure to take measures to protect against environmental degradation impacting the right to private and family life. In the *Kyrtatos v Greece* case of 2003, the court referred to its established

[51] UN Doc A/HRC/22/43 (n 3) para 24. See e.g., African Commission on Human and Peoples' Rights, communication No 155/96 *Social and Economic Rights Action Center v Nigeria (Ogoniland Case)*, decision, para 67; *Öneryildiz v Turkey* App no 48939/99 (ECtHR, 30 November 2004) para 118; Inter-American Commission on Human Rights, report on the situation of human rights in Ecuador, document OEA/Ser.L/V/II.96 doc 10 rev 1; European Committee of Social Rights, complaint No 30/2005 *Marangopoulos Foundation for Human Rights v Greece* para 221; *Saramaka People v Suriname*, Series C No 172, (Inter-American Court of Human Rights, 28 November 2007) paras 95, 158; *Indigenous Community of Yakye Axa v Paraguay*, Series C No 125 (Inter-American Court of Human Rights, 17 June 2005) para 143, 156; Inter-American Commission on Human Rights, *Maya Indigenous Community of the Toledo District v Belize*, case 12.053, report no 40/04, document OEA/Ser.L/V/II.122, doc 5 rev 1, para 153; *Fadeyeva v Russia* App no 55723/00 (ECtHR, 9 June 2005) para 134; *Taşkin and others v Turkey* App no 46117/99 (ECtHR, 10 November 2004) para 126; *López Ostra v Spain* App no 16798/90 (ECtHR, 9 December 1994) para 58.

[52] *Golder v United Kingdom* App no 4451/70 (ECtHR, 21 February 1975) para 35; *Tyrer v United Kingdom* App no 5856/72 (ECtHR, 25 April 1978) para 31.

[53] *Tyrer v United Kingdom* (n 52) para 31.

[54] Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23(3) The European Journal of International Law 615.

[55] The provision establishes a right to respect for an individual's private and family life, home and correspondence.

[56] *López Ostra v Spain* (n 51) para 58.

[57] *Guerra and others v Italy* App no 14967/89 (ECtHR, 19 February 1998) para 57.

[58] ibid para 58.

jurisprudence confirming that 'severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health'.[59] The majority concluded that for environmental pollution to constitute a violation of article 8, there had to be harmful impacts on an individual's rights and not merely a 'general deterioration of the environment' and that this threshold was not met in that case.[60] Still, in a partly dissenting opinion judge Zagrebelsky found that the adverse impacts on birds and other wildlife did affect the applicant's rights under article 8 of the ECHR because the fauna had previously made the area exceptionally enjoyable.[61]

Similar cases have also involved article 2 ECHR concerning the right to life. The ECtHR confirmed a violation article 2 ECHR in the case of *Budayeva and Others v Russia* in 2008 after Russian authorities failed to protect the lives of people killed in mudslides that devastated the town of Tyrnauz.[62] Here the court confirmed that the environmental considerations relevant under article 8 ECHR could also be relied on under article 2 ECHR.[63] *Taskin and others v Turkey* addressed alleged violations of articles 2, 6 and 8 ECHR. This case concerned a decision by a Supreme Administrative Court which had concluded that 'the use of sodium cyanide in the mine represented a threat to the environment and the right to life of the neighbouring population, and that the safety measures which the company had undertaken to implement did not suffice to eliminate the risks involved in such an activity'.[64] The applicant claimed that the decision to authorise a gold mine to use a cyanidation process and failure to abide by decisions of administrative courts amounted to a violation of the right to life, under article 2 ECHR. However, the court found it unnecessary to address this application specifically as it had already found a violation under article 8 ECHR.[65] In *Tatar and Tatar v Romania* of 2009, the ECtHR found that Romania had failed to prevent an environmental disaster due to the use of sodium cyanide in a goldmine. The case concerned the right to home and private life as well as the right to life but was decided under article 8.[66] The Court confirmed that article 8 could be relevant in environmental cases regardless of whether the pollution was directly caused by the State or due to inadequate safeguards.[67] The Court went on to explain that the overriding positive obligation in relation to environmental matters was to enact legislation and take administrative measures to effectively prevent damage to the environment and human health.[68] Finally, it confirmed that the obligation to take measures to respect the parties' right to home and private live extended, more generally, to the protection of a healthy environment.[69]

The ECtHR elaborated on the positive obligations of States in the *Fadeyeva v Russia* case of 2007. It found a violation of article 8 ECHR because the State involved had not

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[59] *Kyrtatos v Greece* App no 4166/98 (ECtHR, 22 May 2003) para 52.
[60] ibid paras 52-53.
[61] ibid partly dissenting opinion of Judge Zagrebelsky.
[62] *Budayeva and Others v Russia* App nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (ECtHR, 20 March 2008) paras 158-160.
[63] ibid para 133.
[64] *Taşkin and others v Turkey* (n 51) para 112.
[65] ibid paras 126, 139-140.
[66] *Tatar and Tatar v Romania* App no 67021/01 (ECtHR, 27 January 2009) para 71.
[67] ibid para 87.
[68] ibid para 88.
[69] ibid para 107.

struck 'a fair balance between the interests of the community and the applicant's effective enjoyment of her right to respect for her home and her private life' when licensing the operation of a heavily polluting plant.[70] The State had designated a safety zone near the plant where no one should live but it failed to properly implement this legislation and provide the applicant with an effective solution to help her relocate.[71] More recently, in 2011, the court summarised its case-law relating to article 8 and environmental harm, concluding that no provision of the ECHR ensures environmental protection as such and that article 8 will not be activated unless the harm in question exceeds the general hazards inherent to life in modern cities. Yet, there may be a violation of article 8 if the environmental harm reaches the level of causing considerable impairment of the enjoyment of the rights to home, private or family life. This depends *inter alia* on 'the intensity and duration of the nuisance and its physical or mental effects on the individual's health or quality of life'.[72] This particular case involved the operation of two factories causing major industrial pollution and the State's efforts to limit their impacts on the applicants' rights under article 8. The court confirmed that the State had a broad margin of appreciation and that it would not be obliged to provide 'free new housing at the State's expense' as the 'complaints could also be remedied by duly addressing the environmental hazards'.[73]

More environmental cases are currently pending before the ECtHR Grand Chamber. In particular, three cases involve the impact of climate change on the enjoyment of human rights safeguarded by the ECHR and have the potential to significantly impact the future application of the convention. The first of these cases is *Carême v France* which involves a complaint by an individual and former mayor of a municipaility in France who alleges that France's failure to take sufficient steps to abate climate change amounts to a violation of articles 2 and 8 ECHR.[74] The second climate case before the Grand Chamber is *Verein KlimaSeniorinnen Schweiz et al v Switzerland*, which involves a Swiss climate organization whose members include older women and four additional women between the ages of 78 and 89. The applicants claim that the Swiss government is contributing to global warming, causing, among other things, heat waves that are having negative impacts on their health and living conditions.[75] The third case is *Duarte Agostinho et al v Portugal et al*, involving a complaint by Portuguese youth regarding the emission of greenhouse gases by 33 States Parties to the ECHR. The case links the UN climate regime to the ECHR, alleging that the lack of adequate measures to combat the adverse effects of climate change constitutes a violation of the ECHR.[76] It is particularly noteworthy that in preparation for hearing the case, the Grand Chamber *propriu motu* asked the parties to clarify the potential relevance of article 3 ECHR concerning the prohibition of inhuman or degrading treatment.[77] The environmental jurisprudence of the ECtHR has, until now, not involved this provision so the court's decision to assess the relevance of article 3 constitutes an important development. These

[70] *Fadeyeva v Russia* (n 51) para 134.
[71] ibid para 133.
[72] *Dubetska and others v Ukraine* App no 30499/03 (ECtHR, 10 February 2011) para 105.
[73] ibid para 150.
[74] *Carême v France* App no 7189/21 (pending before the ECtHR).
[75] *Verein KlimaSeniorinnen Schweiz et al v Switzerland* App no 53600/20 (pending before the ECtHR).
[76] *Duarte Agostinho et al v Portugal et al* App no 39371/20 (pending before the ECtHR).
[77] *Duarte Agostinho et al v Portugal et al* App no 39371/20, request no 39371/20 (Communicated on 13 November 2020, published on 30 November 2020).

decisions are expected to be very impactful, partly because jurisdiction has been relinquished to the Grand Chamber. The hearings have taken place in all three cases. Several other climate cases are pending before the ECtHR but hearings have been postponed until after the Grand Chamber hands down its judgments in these three cases.

National courts have also contributed to the greening of ECHR provisions and have linked the underlying right to a healthy environment to climate change. For example, in the *Urgenda Foundation v Netherlands* judgment of 2018, the Hague Court of Appeal referenced reports of the Intergovernmental Panel on Climate Change, the Paris Agreement and decisions by the Conference of the Parties to the UN Framework Convention on Climate Change before arriving at the conclusion that the Netherlands had violated its obligations under articles 2 and 8 ECHR due to insufficient climate action.[78] More recently, in the *Neubauer et al v Germany* case of 2021, the Federal Constitutional Court of Germany found that Germany was obliged to reduce greenhouse gas emissions to achieve the objective of the Paris Agreement and to satisfy constitutional provisions concerning the right to human dignity, the right to life and physical integrity, and the State's obligation to protect the natural foundations of life for future generations. The relevant constitutional provisions were interpreted *inter alia* by reference to the ECHR and its jurisprudence.[79]

3.2 CUSTOMARY INTERNATIONAL LAW OBLIGING STATES TO ENSURE THE RIGHT TO A HEALTHY ENVIRONMENT?

The treaties discussed above do not establish a universal right to a healthy environment. The UN Special Rapporteur on Human Rights and the Environment asserted in 2019 that although the right to a healthy environment had been recognised by most States through constitutional law, domestic legislation and various treaties, it had 'not yet been recognized as such at the global level'.[80] This was true in 2019 but historic milestones have been reached since, most notably the resolutions of the UNHRC and the UNGA. The Special Rapporteur has referred to the former as a 'historic resolution recognizing, for the first time at the global level, the human right to a clean, healthy and sustainable environment', effecting 'a turning point in the evolution of human rights'.[81] The subsequent UNGA resolution further established this right and did so through a channel widely known for demonstrating state practice and *opinio juris*. Consequently, the universal right to a healthy environment may be entering the corpus of customary international law. This section will discuss the requirements for a right to achieve a customary international law status and the recent developments to determine whether the relevant requirements are satisfied in the case of the right to a healthy environment.

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[78] *Urgenda Foundation v Netherlands*, case no 200.178.245/01) (Hague Court of Appeal 9 October 2018) unofficial translation, paras 5-12, 15 and 73 <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2018/20181009_2015-HAZA-C0900456689_decision-4.pdf>accessed 1 October 2023.
[79] *Neubauer et al v Germany* (Federal Constitutional Court 29 April 2021) summary and case documents <http://climatecasechart.com/non-us-case/neubauer-et-al-v-germany/>accessed 1 October 2023.
[80] UN Doc A/HRC/40/55 (n 34) Summary.
[81] 'The Right to a Clean, Healthy and Sustainable Environment: Non-Toxic Environment, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment' (12 January 2022) UN Doc A/HRC/49/53 paras 1, 47–49, 54, 62, 64, 77, and 89(i).

3.2[a] Requirements for Customary International Law

The requirements for customary international law are state practice and *opinio juris*.[82] A rule will not become binding on States as customary international law without widespread and uniform state practice[83] and the belief that such practice is binding as law.[84] The International Court of Justice (ICJ) does not seem to place a heavy emphasis on evidencing *opinio juris* when evaluating whether a rule has entered the corpus of customary international law.[85] State practice is arguably the more important requirement of the two. After all, the distinction between state practice and *opinio juris* can be ambiguous and the latter can be derived from general practice, e.g. the conclusion of treaties,[86] or from positive evidence demonstrating the presence of *opinio juris*.[87]

Resolutions by international organisations often reflect *opinio juris*.[88] This is particularly true of UNGA resolutions.[89] In the *Nuclear Weapons Advisory Opinion*, the ICJ found that even if UNGA resolutions are not binding, they can 'sometimes have normative value [and] in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an opinio juris'.[90] These resolutions can actually play a twofold role in the creation of customary international law, serving as means to identify *opinio juris* and to synchronize state practice. *Opinio juris* can, according to Sir Hersch Lauterpacht, be derived from uniform actions of States, such as that expressed in joint resolutions, except when that is clearly not their intention.[91] This is why the support behind each resolution is relevant when determining its impact. According to the ILA's *London Statement of Principles Applicable to the Formation of General Customary International Law*, '[r]esolutions accepted [by States] unanimously or almost unanimously, and which evidence a clear intention on the part of their supporters to lay down a rule of international law, are capable, very exceptionally, of creating general customary law by the mere fact of their adoption'.[92]

The following factors are relevant when assessing whether state practice reflects custom: duration, repetition, consistency and generality. The practice of codifying a right to a healthy environment in international instruments or constitutions dates back approximately forty years whenPortugal adopted an environmental provision in its constitution in 1976[93] while the African Charter, with its reference to a healthy environment, dates back to 1981. The practice has been repeated in different declarations and instruments, by a growing

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[82] See David Pataraia, *International Law: Text, Cases and Materials* (Routledge 2021) 66-68.
[83] See, e.g., *Asylum (Colombia/Peru)* (Judgment) [1950] ICJ Rep 266, 277; *Right of Passage over Indian Territory (Portugal v India)* (Merits) [1960] ICJ Rep 6, 40.
[84] See *North Sea Continental Shelf (Federal Republic of Germany/Netherlands) (Federal Republic of Germany/Denmark)* (Judgment) [1969] ICJ Rep 3, 44.
[85] Philippe Sands and Jacqueline Peel with Adriana Fabra and Ruth MacKenzie, *Principles of International Environmental Law, Fourth Edition* (Cambridge University Press 2018) 122 referring to the *Advisory Opinion on the Legality of the Use of Nuclear Weapons* and the *Pulp Mills* case.
[86] Sands and Peel (n 85) 122.
[87] Ian Brownlie, *Principles of Public International Law* (Clarendon Press 1998) 7-11.
[88] Jan Klabbers, *International Law, Third Edition* (Cambridge University Press 2021) 32.
[89] See, e.g., *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Judgment) [1986] ICJ Rep 132, para 188.
[90] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 70.
[91] See Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (Stevens 1958) 380.
[92] ILA Committee on Formation of Customary (General) International Law, 'London Statement of Principles Applicable to the Formation of General Customary International Law' (2000) 61, para 32.
[93] UN Doc A/HRC/22/43 (n 3) para 12.

number of States, demonstrating repetition. The consistency and generality also seem to be increasing because the reference to a healthy environment has steadily grown over the past decades and a big majority of States now supports the notion of a human right to a healthy environment. Indeed, there may have been regional differences for some time due to the absence of an environmental provision in the ECHR but that is arguably diminishing as more European States adopt constitutional provisions codifying the right to a healthy environment.

3.2[b] Current Status

The practice of recognising the right to a healthy environment has become widespread in the past decade. The right has been reiterated in different fora, read into different treaties and States have taken note of each others' legislation and jurisprudence when implementing this right into domestic settings.[94] This has resulted in a cross-pollination and harmonisation of relevant state practice. For example, in 1976, Portugal made the first ever constitutional reference to a 'right to a healthy and ecologically balanced environment' and by 2012, this phrase had already been repeated in 21 other constitutions.[95] In 2019, the UN Special Rapporteur on Human Rights and the Environment reported that 110 States had implemented the right to a safe, clean, healthy and sustainable environment into their constitutions.[96] Furthermore, 156 States had legally recognised this right through domestic or international obligations.[97] That means that out of the 193 members to the UN, no more than 37 States have refrained from recognising the legal obligation to ensure a right to a healthy environment and this overwhelming state practice may indicate that the remaining States are bound by the same obligation through customary international law. Indeed, there have been no persistent objectors, and the number of States accepting the obligation implicitly through international instruments may be even higher than 156. After all, there are 194 States Parties to the Paris Agreement[98] which implicitly safeguards the human right to a healthy environment.

There is also some evidence of *opinio juris* for customary international law on the right to a healthy environment. Both resolutions were supported by overwhelming majorities but their evidentiary value is somewhat reduced by declarations of individual States. The resolution of the Human Rights Council was adopted with forty-three votes in favour and four abstentions (China, India, Japan, and Russia). The United States was not a member of the Human Rights Council at the time of adoption but issued a statement on 13 October 2021 to clarify its position. It stated 'that there [were] no universally recognized human rights specifically related to the environment' and no basis for the recognition of the "'right to a clean, healthy, and sustainable environment", either as an independent right or a right derived from existing rights'. Moreover, the United States did 'not see this resolution as altering the

[94] See Boyd, 'The Implicit Constitutional Right to Live in a Healthy Environment' (n 34) 178.
[95] ibid.
[96] UN Human Rights Council, 'Right to a healthy environment: good practices, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (30 December 2019) UN Doc A/HRC/43/53, para 10.
[97] ibid para 13.
[98] UN Climate Change, 'Paris Agreement - Status of Ratification' <https://unfccc.int/process/the-paris-agreement/status-of-ratification> accessed 23 November 2022.

content of international law or establishing a precedent in other fora'.[99] China and Russia took similar positions.[100] It was anticipated that the reaction of the international community to the UNHRC resolution would determine whether it turned out to be a 'game changer' in the development of the right to a healthy environment[101] and the following events were significant.

The UNGA resolution on the right to a healthy environment was adopted unanimously, by 161 votes in favour. There were no votes against but eight abstentions (Belarus, Cambodia, China, Ethiopia, Iran, Kyrgyzstan, Russian Federation, and Syria). This time, the United States voted in favour of the resolution and its altered position may be indicative of the swift developments in the field. However, while a vote in favour of a resolution can often be taken as support of a developing rule of customary international law, certain States (including the United Kingdom, New Zealand and the United States) specified that this was not their intention in regards to the right to a healthy environment.[102] According to the United States:

> a right to a clean, healthy, and sustainable environment has not yet been established as a matter of customary international law; treaty law does not yet provide for such a right; and there is no legal relationship between such a right and existing international law. And, in voting 'YES' on this resolution the United States does not recognize any change in the current state of conventional or customary international law.[103]

Perhaps such statements were made because the States in question wanted to prevent the crystallisation of the customary right to a healthy environment but found themselves unable to vote against it because of the overwhelming support from the international community. At any rate, the repeated use of the word 'yet' in the statement of the United States suggests that the right to a healthy environment is in the process of becoming customary international law.

4 CONSTITUTIONAL STATUS OF THE RIGHT TO A HEALTHY ENVIRONMENT

States are oblied to abide by the obligations binding on them under international law. These obligations will be directly applicable in monist States but have to be implemented to take effect in dualist States, such as Iceland. If not adequately implemented, States risk violating international law and incurring state responsibility. Thus, international obligations pertaining

[99] UN Human Rights Council – 48th Session End-of-Session General Statement of the United States of America, posted 13 October 2021 on the website of the US Mission to International Organizations in Geneva <https://geneva.usmission.gov/2021/10/13/un-human-rights-council-48th-end-of-session-general-statement/> accessed 1 October 2023.
[100] Tang and Spijkers (n 30) 101.
[101] ibid 89.
[102] See for example statements of the United Kingdom, New Zealand and the United States in UNGA, '97th plenary meeting' (28 July 2022) UN Doc A/76/PV.97 11, 14-15.
[103] United States Mission to the United Nations, 'Explanation of Position on the Right to a Clean, Healthy, and Sustainable Environment Resolution' (28 July 2022) <https://usun.usmission.gov/explanation-of-position-on-the-right-to-a-clean-healthy-and-sustainable-environment-resolution/> accessed 1 October 2023.

to the right to a healthy environment must be implemented into domestic law, as emphasised by e.g. UNGA resolution 76/300,[104] UNHRC resolution 48/13,[105] and the UNFCCC.[106] If customary international law imposes a self-standing human right to a healthy environment, then that should be transposed into domestic legal systems. If this right is not guaranteed under customary international law, all treaty obligations must still be implemented, and that extends to treaty obligations implicitly providing for a right to a healthy environment.

The right to a healthy environment is a human right and stands in opposition to various other rights that enjoy constitutional status. Therefore, in order to ensure sufficient implementation of the right to a healthy environment and fulfilment of international obligations, States may be required to give it constitutional status. Moreover, if States fail to properly implement the right to a healthy environment this may influence domestic law because of its supranational character. The following sections will explain the need for constitutional status of the right to a healthy environment, give an overview of different types of constitutional provisions protecting the environment, and discuss how constitutional protection of the right to a healthy environment can derive both from explicit and implicit provisions.

4.1 NEED FOR CONSTITUTIONAL STATUS

Some have suggested that environmental issues are best addressed at the international level due to their transboundary nature. However, international environmental law is notoriously soft, and the lack of enforcement mechanisms in the international legal system make it ineffective in securing necessary environmental rights.[107] As explained by UN High Commissioner for Human Rights, Michelle Bachelet, it is not enough to confirm and recognise the right to a healthy environment. It must also be adequately implemented into domestic law,[108] i.e., to national consitutions lest it be automatically subordinate to other constitutionally protected rights.

Environmental constitutionalism has emerged over the past decades and is based on the notion that environmental protection requires constitutional status.[109] The incorporation of core environmental rights or principles into constitutions has at least five advantages over implementation into general domestic legislation.[110] First, constitutional law takes precedence over regular statutes. Second, a constitutional provision can shape public opinion and behaviour. Third, States are more likely to ensure compliance with constitutions in comparison to other laws. Fourth, environmental provisions in constitutions tend to provide broad substantive protection as opposed to narrow provisions in specific legislation, serving as a basis for various rights. Fifth, this generality of constitutional environmental provisions

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[104] Paragraph 3 stipulates that 'the promotion of the human right to a clean, healthy and sustainable environment requires the full implementation of the multilateral environmental agreements under the principles of international environmental law'.
[105] See paragraph 3.
[106] Article 4(1)(b) requires States to '[f]ormulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change'.
[107] May and Daly (n 1) 19-20.
[108] UN News (n 17).
[109] Joana Setzer and Délton Winter de Carvalho, 'Climate litigation to protect the Brazilian Amazon: Establishing a constitutional right to a stable climate' (2021) 30(2) RECIEL 197, 201.
[110] ibid.

can be relied upon to fill gaps in domestic legislation.[111] It is particularly important that the right to a healthy environment enjoys constitutional status when conflicts arise with other constitutional rights. This is relevant *inter alia* for the implementation of international obligations under the UN climate regime. In fact, the main benefit of incorporating the right to a healthy environment into constitutions may be that it becomes less susceptible to revision and consequently, more difficult for governments to lower the standard of protection.[112] Furthermore, '[r]ecognition of the right to a healthy environment in national constitutions has raised the profile and importance of environmental protection and provided a basis for the enactment of stronger environmental laws, standards, regulations and policies'.[113]

Most regional human rights treaties have effective enforcement mechanisms and entail supranational rights. This makes it more feasible to pursue environmental protection under international human rights law than international environmental law.[114] The human rights category is immense and increasingly tied to environmental law with increased understanding of the importance of a healthy environment for the enjoyment of other human rights.[115] In *PSB et al v Brazil*, the Brazilian Supreme Court asserted that environmental treaties, such as the Paris Agreement, represent a certain type of human rights treaty and consequently enjoy 'supralegal character' and 'supranational status'.[116] National courts will have varying views on whether, and to what extent, environmental treaties can take precedence over, and influence, the interptation of national laws. Courts in dualist States such as Iceland may find it difficult to justify giving priority to such provisions without a clear anchor in national legislation, ideally constitutions.

4.2 DIFFERENT TYPES OF PROVISIONS

No less than 150 States currently include environmental provisions in their constitutions. [117] These take various shapes but are predominantly anthropocentric and rights-based, establishing for example the obligation on States to ensure a healthy environment, the duty for individuals to protect the environment, the right of access to environmental information and the human right to a sound environment.[118] Environmental rights have been criticised for being 'too uncertain a concept to be of normative value'[119] but that hurdle is overcome

[111] See Erin Daly and James R May, 'Comparative Environmental Constitutionalism' (2015) 6 Jindal Global Law Review 9, 21-22; César Rodríguez-Garavito, 'Human Rights: The Global South's Route to Climate Litigation' (2020) 114 AJIL Unbound 40.
[112] See David R Boyd, *The Environmental Rights Revolution: A Global Study or Constitutions, Human Rights, and the Environment* (UBC Press 2012) 30.
[113] Navraj Singh Ghaleigh, Joana Setzer, and Asanga Welikala, 'The Complexities of Comparative Climate Constitutionalism' (2022) University of Edinburgh Research Paper Series No 2022/06, 6.
[114] See Michael Anderson, 'Human Rights Approaches: An Overview' in Alan E Boyle and Michael R Anderson, *Human Rights Approaches to Environmental Protection* (Clarendon Press 1998) 1.
[115] See UN Doc A/HRC/22/43 (n 3) para 19, 'the full enjoyment of all human rights depends on a supportive environment'.
[116] *PSB et al v Brazil* (n 45) para 17.
[117] Setzer and de Carvalho (n 109) 201 referring to UNEP, 'Environmental Rule of Law: First Global Report'(2019) < https://www.unep.org/resources/assessment/environmental-rule-law-first-global-report> accessed 1 October 2023.
[118] See Setzer and de Carvalho (n 109) 201.
[119] Boyle, 'Human Rights or Environmental Rights? A Reassessment' (n 4) 471.

by tying them to fundamental and actionable human rights.[120] The universal move toward greater environmental protection has resulted in the emergence of a universal right to a healthy environment and the implementation of these growing environmental obligations into national constitutions has resulted in environmental constitutionalism.[121]

At least 110 States have constitutional provisions protecting the right to a healthy environment.[122] Additionally, some States have jurisprudence referring to the right to a healthy environment as a prerequisite to the right to life, giving it implicit constitutional protection.[123] There are some variations in the terminology used, for example, the Costa Rican constitution ensures 'the right to a healthy and ecologically balanced environment' and the constitution of Fiji provides for the 'the right to a clean and healthy environment, which includes the right to have the natural world protected for the benefit of present and future generations through legislative and other measures'.[124] David Boyd has explained that the right to a healthy environment incorporates a negative and a positive right: 'a negative right to be free from exposure to toxic substances produced by the state or by state-sanctioned activities' and 'a positive right to clean air, safe water, and healthy ecosystems, which may require an extensive system of regulation, implementation, and enforcement as well as remediation efforts in polluted areas'.[125]

Many States have adopted other types of environmental provisions relating to the protection of more specific environmental human rights or nature itself. For example, France has incorporated the right to participate in decisions affecting the environment into its constitution[126] and several States, including Albania, Argentina, Azerbaijan, Belarus, Bolivia, Brazil, Czechia, France, Norway, and Ukraine, have given the right of access to environmental information constitutional status.[127] Belgium, Bolivia, Chile, Democratic Republic of the Congo, Cuba, Dominican Republic, Ecuador, Ethiopia, Fiji, France, Kenya, Maldives, Mexico, the Netherlands, Nicaragua, Niger, Paraguay, Slovenia, Solomon Islands, South Africa, Tanzania, Tunisia, and Uruguay are among the States that have constitutional provisions referring to the rights to water and/or sanitation[128] and numerous States also ensure the constitutional right to food.[129] The right to clean air enjoys constitutional status in India and Pakistan due to its inherent link to the right to life.[130] At least eleven States now have specific constitutional provisions dealing with climate change.[131] These are Algeria, Bolivia, Côte d'Ivoire, Cuba, Dominican Republic, Ecuador, Thailand, Tunisia, Venezuela,

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[120] May and Daly (n 1) 26.
[121] Setzer and de Carvalho (n 109) 200 referring to Kotzé (n 1) 145.
[122] UN Doc A/HRC/43/53 (n 96) para 10.
[123] UN Doc A/HRC/40/55 (n 34) para 14, referring to Boyd, 'The Implicit Constitutional Right to Live in a Healthy Environment' (n 34) 171-179.
[124] ibid. See article 50 of the constitution of Costa Rica and article 40(1) of the constitution of Fiji.
[125] Boyd, *The Environmental Rights Revolution* (n 112) 24.
[126] UN Special Rapporteur on Human Rights and the Environment, 'Right to a healthy environment: good practices' (*UNEP*, 29 May 2020) 17, para 23 <https://wedocs.unep.org/bitstream/handle/20.500.11822/32450/RHE.pdf?sequence=1&isAllowed=y> accessed 1 October 2023.
[127] ibid 14, para 14.
[128] ibid 37, para 82.
[129] ibid 33, para 74.
[130] ibid 24, para 42.
[131] Singh Ghaleigh, Setzer and Welikala (n 113) 9; see also Setzer and de Carvalho (n 109) 201; and 'Right to a healthy environment: good practices' (n 126) 25, para 50.

Viet Nam, and Zambia.[132] Furthermore, the constitutions of Bolivia, Bhutan, Ecuador and Namibia oblige the States to protect wildlife and nature, with references to non-human species and Mother Earth.[133]

4.3 EXPLICIT OR IMPLICIT PROTECTION

A universal right to a healthy environment may result in implicit constitutional protection. The link between a healthy environment and the enjoyment of other human rights has been understood for quite some time[134] and is confirmed e.g. by UNGA resolution 76/300.[135] It has lead to the establishment of an implicit right to a healthy environment in relation to specific human rights, as demonstrated by the environmental jurisprudence of the ECtHR.[136] Recent developments have also given increased weight to a self-standing right to a healthy environment, as referred to in article 1 of the UNGA Resolution. Recognition of this international self-standing right can strengthen the right domestically and influence environmental constitutionalism. It can lead to the conclusion that an implicit right to a healthy environment exists even in jurisdictions carrying no explicit constitutional provisions concerning the environment.[137] That means that the right to a healthy environment is not only an implicit foundation of certain other human rights but also an implicit independent right, obligating States to protect the environment and the climate *per se*.[138]

The number of States opting for explicit constitutional protection has increased in recent years with the urgent need for environmental protection.[139] However, an explicit constitutional provision may be unnecessary if an implicit right already exists. This particularly applies to the implicit environmental protection that is related to other human rights. According to Alan Boyle,

> [t]here is little to be said in favour of simply codifying the application of the rights to life, private life and property in an environmental context. Making explicit in a declaration or protocol the greening of existing human rights that has already taken place would add nothing and clarify little.[140]

The greening of these and other human rights should result in implicit environmental constitutionalism, and the climate cases currently pending before the ECtHR Grand Chamber will clarify the extent to which obligations to protect the environment can be read

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[132] Singh Ghaleigh, Setzer and Welikala (n 113) 9.
[133] 'Right to a healthy environment: good practices' 44, para 105.
[134] ibid para 18.
[135] See article 2.
[136] See chapter 3.1[c].
[137] This right has been read into India's Constitution, see Lovleen Bhullar, 'The Judiciary and the Right to Environment in India: Past, Present and Future' in Shibani Ghosh (ed), *Indian Environmental Law: Key Concepts and Principles* (Orient BlackSwan 2019) 22; Singh Ghaleigh, Setzer and Welikala (n 113) 7; Annalisa Savaresi, 'The UN HRC recognizes the right to a healthy environment and appoints a new Special Rapporteur on Human Rights and Climate Change. What does it all mean?' (*EJIL:Talk*, 12 October 2021) <https://www.ejiltalk.org/the-un-hrc-recognizes-the-right-to-a-healthy-environment-and-appoints-a-new-special-rapporteur-on-human-rights-and-climate-change-what-does-it-all-mean/> accessed 1 October 2023.
[138] Singh Ghaleigh, Setzer and Welikala (n 113) 7. See also Elena Cima, 'The right to a healthy environment: Reconceptualizing human rights in the face of climate change' (2022) 31(1) RECIEL 38.
[139] UN Doc A/HRC/22/43 (n 3) para 12.
[140] Boyle, 'Human Rights and the Environment: Where Next?' (n 54) 616.

into provisions safeguarding the right to life, the prohibition of degrading treatment, non-discrimination and respect for private and family life, at least in the European context. On the other hand, explicit provisions might be needed to establish more recent trends.

An explicit provision might contribute to the progressive development of environmental constitutionalism. The self-standing human right to a healthy environment is not as firmly established as the right to an environment that is adequate for ensuring the enjoyment of other fundamental rights. It is difficult to derive a self-standing right to a healthy environment from constitutional provisions concerning non-environmental rights and therefore, it might be useful to explicitly implement the right to a healthy environment as an independent right. An explicit provision might also lay the foundation for further developments and more extensive rights. For example, a Brazilian court is currently being asked to recognise a new implicit intergenerational right to a stable climate and the basis for this alleged right is a constitutional provision that expressly establishes the right to an ecologically balanced environment.[141] Courts might be generally more prone to confirm the existence of a right to a stable climate, when they can base their decisions on explicit provisions codifying the right to a healthy environment. Yet, this depends on the unique traditions of each jurisdiction. A United States Court has also been asked to confirm a right to a stable climate in *Juliana v United States* and that claim was not based on an explicit environmental provision. The Oregon District Court Judge found that 'a climate system capable of sustaining human life is fundamental to a free and ordered society'[142] and consequently, governmental acts harming the climate system could infringe explicit and implicit constitutional rights.[143] Thus, the District Court derived this implicit right from other constitutional rights but only as a precondition for other rights and not as an autonomous human right.

5 RIGHT TO A HEALTHY ENVIRONMENT IN THE ICELANDIC CONSTITUTION

The Icelandic Constitution carries no explicit right to a healthy environment. This leaves Iceland in a rather small group of States that has yet to give the right to a healthy environment constitutional status. Yet, Iceland is among the States that have recognised the right to a healthy environment through international treaties, namely by ratifying the Aarhus Convention.[144] In order to ensure compliance with that treaty and with the emerging customary international law on the right to a healthy environment, Iceland should adopt an environmental provision in its constitution. The Icelandic Constitution is interpreted in a dynamic manner and Icelandic courts are bound to interpret laws in accordance with international obligations.[145] Therefore, the right to a healthy environment may be implicitly

[141] Setzer and de Carvalho (n 109) 200, referring to *Institute of Amazonian Studies v Brazil*, 11th Lower Federal Court of Curitiba (5048951-39.2020.4.04.7000), filed 8 October 2020 <https://climate-laws.org/geographies/brazil/litigation_cases/institute-of-amazonian-studies-v-brazil> accessed 1 October 2023.
[142] Juliana v United States, 947 F.3d 1159 (9th Cir. 2020), Judge Ann Aiken Order Opinion and Order, 10/11/2016 (Aiken Order) 32, referring to Juliana v United States, 217 F Supp 3d 1224 1250 (D Or 2016), rev'd, 947 F3d 1159 (9th Cir 2020).
[143] ibid. See also Setzer and de Carvalho (n 109) 202-203.
[144] 'Right to a healthy environment: good practices' (n 126) 11.
[145] Davíð Þór Björgvinsson, *Lögskýringar* (JPV útgáfa 2008) 150.

embedded in a constitution frame of protection but only to a limited extent. This chapter will explain the possibility of reading an implicit right to a healthy environment into the Icelandic Constitution and discuss recent parliamentary proposals to expressly implement the right.

5.1 IMPLICIT RIGHT TO A HEALTHY ENVIRONMENT

The Icelandic constitution is succinct.[146] However, international treaties dealing with the rights and obligations of individuals have an increasing influence on the interpretation and explanation of human rights provisions in Iceland, even those that have not been implemented into domestic law.[147] In particular, human rights treaties refer to the same rights that the Icelandic constitution is meant to safeguard and these can be used for gap-filling and interpretation.[148] The ECHR was used as a basis for the human rights provisions of the constitution, and various provisions of the convention were incorporated into the constitution by adaptation. Additionally, the ECHR has the status of general law in Iceland. The strong legal impact of the ECHR is also demonstrated by the fact that the human rights provisions of the constitution were interpreted in accordance with the convention before it was enacted in its entirety and before the constitutional provisions were changed to better reflect it.[149]

The purpose of transposing the ECHR into national law has been described as giving the courts authority to protect human rights as much as possible within the framework of established laws. This gives courts a lot of leeway in interpreting the human rights treaty.[150] In practice, Icelandic courts have often been reluctant to apply progressive interpretations of the constitution, but the Supreme Court based one recent decision on an implicit right to be free from association on ECtHR jurisprudence.[151] This precedent may potentially allow Icelandic courts to read the right to a healthy environment into the Icelandic constitution.

An implicit right to a healthy environment could be derived from certain provisions and customary norms of the Icelandic Constitution. It would have to be linked to other constitutional rights, i.e. the right to life, prohibition of degrading treatment and the right to private and family life.

Article 71 implements article 8 ECHR and reads as follows:

> 1. Everyone shall enjoy the right to respect for their privacy, home and family life.
> 2. A body search or search of a person, a search of his house or belongings may not be carried out, except according to a court order or a special legal authorization. The same applies to the examination of documents and mailings, telephone calls and other electronic communications, as well as any similar interference with one's private life.

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146 Gunnar G Schram, *Stjórnskipunarréttur* (Háskólaútgáfan 1999) 461.
147 Björgvinsson (n 145) 249.
148 Schram (n 146) 462.
149 Björgvinsson (n 145) 310-311; Supreme Court of Iceland, case no 120/1989 (9 January 1990) and case no 274/1991 (5 March 1992).
150 Niclas Berggren, Nils Karlson, and Joakim Nergelius (eds), *Why Constitutions Matter* (Transaction Publishers 2002) 122-123.
151 Supreme Court of Iceland, Case no. 20/2022, paras 47-50.

> 3. Notwithstanding the provisions of paragraph 1, respect for privacy, home or family life may be restricted with a special legal authorization if it is absolutely necessary due to the rights of others.[152]

This article does not employ the same terminology as article 8 ECHR but shall be interpreted in accordance with it. Provisions establishing individual human rights are to be interpreted broadly in the Icelandic legal system[153] but Icelandic courts have been criticised for unduly narrowing down the human rights provisions of the constitution.[154] There have not been any judgments confirming the relevance of this provision for environmental protection. However, as previously discussed, the ECtHR has indicated that the obligation to take measures to respect the parties' rights under article 8 ECHR extends to the protection of a healthy environment.[155] While no provision of the ECHR ensures environmental protection as such, article 8 can be activated when environmental harm exceeds generally acceptable levels and causes considerable impairment of the enjoyment of the rights to home, private or family life. The relevant criteria in this assessment include 'the intensity and duration of the nuisance and its physical or mental effects on the individual's health or quality of life'.[156] An example of such a nuisance would be traffic noise that causes sleep disturbances.[157] The climate cases currently pending before the Grand Chamber of the ECtHR will further demonstrate how article 8, and consequently article 71 of the Icelandic Constitution, could impact States' duties to respond to the adverse effects of climate change.

Article 68 of the Icelandic Constitution is also potentially relevant in this context. It implements article 3 ECHR and provides that no one shall be subjected to torture or other inhuman or degrading treatment or punishment. The fact that the Grand Chamber of the ECtHR has requested parties in *Duarte Agostinho et al v Portugal et al* to consider the applicability of article 3 ECHR to this climate case, indicates that it may relate to the right to healthy environment.[158] Moreover, the recent decision of the Federal Constitutional Court in *Neubauer et al v Germany* also suggests that a constitutional provision on the right to human dignity can be interpreted in accordance with article 3 ECHR and entail an obligation to take climate action.[159] Finally, the Icelandic Constitution holds no provision concerning the right to life but this right is enshrined in the constitution as a customary norm. The right to a healthy environment might be implicit in that right, as indicated by the ECtHR decision in *Budayeva and Others v Russia* where Russian authorities violated article 2 ECHR by failing to protect the lives of people killed in mudslides.[160] According to this, the right to a healthy environment may already be implicitly protected under the Icelandic Constitution insofar as it relates to other fundamental rights. However, the self-standing right to a healthy environment needs to be articulated to acquire constitutional status in Iceland.

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[152] Article 71 of the Icelandic Constitution, law no 1944/33.
[153] Björgvinsson (n 145) 169.
[154] Jón Steinar Gunnlaugsson, *Deilt á dómarana* (Almenna bókafélagið 1987) 134.
[155] *Tatar and Tatar v Romania* (n 66) para 107.
[156] *Dubetska and others v Ukraine* (n 72) para 105.
[157] *Deés v Hungary* App no 2345/06 (ECtHR, 9 November 2010).
[158] See *Duarte Agostinho et al v Portugal et al*, request no 39371/20 (n 77).
[159] *Neubauer et al v Germany* (n 79).
[160] *Budayeva and Others v Russia* (n 62).

5.2 PROPOSALS FOR AN EXPLICIT ENVIRONMENTAL PROVISION

On 4 November 2009, Jóhanna Sigurðardóttir, then Prime Minister of Iceland, submitted a bill proposing that the President of Iceland convenes a consultative constitutional assembly to review the Icelandic Constitution. The appointment of the Constitutional Council was approved by the national parliament on 24 March 2010, and the council was tasked with considering the report of the Constitutional Committee and making proposals for changes to the Icelandic Constitution.[161] The Constitutional Council handed over a proposal for a new constitution on 29 July 2010,[162] and on 20 October 2012, the people agreed in a referendum to adopt a new constitution on the basis of that proposal. The proposal for a new constitution was circulated in parliament on 16 November 2012, but Alþingi rejected the proposal and made no amendments to the existing constitution. This led to the appointment of a constitutional committee which submitted a progress report in June 2014 noting its decision to prioritize four issues, namely the delegation of powers in the interest of international cooperation, national referendums, environmental protection, and national ownership of natural resources.[163] Thus, the constitutional debate continued but now concentrating specifically on these four issues. On 25 August 2016, then Prime Minister Sigurður Ingi Jóhannsson proposed the addition of an environmental provision in the Constitution on the basis of the work of the Constitutional Committee, .[164] This prosposal was not passed by the majority but Iceland's current Prime Minister, Katrín Jakobsdóttir, continued her efforts and proposed a very similar provision concerning the right to a healthy environment in January 2021.[165]

The draft article from 2021 reads as follows:

1. Iceland's nature is the basis of life in the country. Responsibility for the protection of nature and the environment rests jointly on everyone, and the protection must be based on precautionary and long-term considerations with sustainable development as a guiding principle. There must be efforts to ensure biological diversity and the growth and development of the biosphere.
2. Everyone has the right to a healthy environment. The general public is allowed to move around the country and stay there for legitimate purposes. Nature must be treated well and the interests of landowners and other rights holders must be respected. This shall be prescribed in more detail in public law.
3. The law shall prescribe the public's right to information about the environment and the effect of construction on it, as well as to participate in the preparation of decisions that affect the environment.

The Prime Minister presented her proposal for constitutional reform as a member of parliament and not as the head of government because of lack of support from within her

[161] Constitutional Council, 'Ítarlegar upplýsingar' (2011) < http://stjornlagarad.is/upplysingar/um-stjornlagarad/> accessed 1 October 2023.
[162] Constitutional Council, 'Um starfið' (2011) <http://stjornlagarad.is/starfid/> accessed 1 October 2023.
[163] Alþingi, 'Frumvarp til stjórnarskipunarlaga', legislative parliament 145 2015-2016, document 1577, case no 841.
[164] ibid article 1.
[165] Alþingi, 'Frumvarp til stjórnarskipunarlaga', legislative parliament 151 2020-2021, document 787, case no 466.

government. It did not pass through Parliament[166] but the Prime Minister subsequently formed a committee of experts to assess the need for constitutional reform concerning, *inter alia*, human rights. The experts delivered a report on 30 August 2023, which advocated for the adoption of an environmental provision but presented a simplified version of the draft article. Most notably, paragraph 2 concerning the right to a healthy environment was condensed to 'Everyone shall be guaranteed by law the right to a healthy environment and nature'.[167] This provision is partly based on article 112 of the Norwegian Constitution. Therefore, valuable lessons can be learnt from judicial treatment of that provision. Article 112 of the Norwegian Constitution reads as follows:

> 1. Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be used on the basis of holistic long-term considerations which will safeguard this right for future generations as well.
> 2. In order to secure their rights according to the previous paragraph, citizens have the right to information about the state of the natural environment and the effects of planned or ongoing interventions in nature.
> 3. The government must take measures to implement these principles.

This provision is currently being used to build a climate case before the ECtHR. The *People v Arctic Oil* case involves the government's decision to issue a new drilling license to Arctic Oil in the Barents Sea and the applicant's efforts to invalidate the license due to an infringement of the right to a healthy environment as protected by article 112 of the Norwegian Constitution.[168] The case has already been heard in Norway and the Norwegian Court of Appeal suggested that the provision might be operational in the context of climate change. It found that it could extend to harm outside Norwegian jurisdiction and that international agreements, such as the Paris Agreements, could contribute to the clarification of acceptable tolerance limits and adequate measures. Therefore, the alignment of governmental actions with such international obligations could be relevant in an assessment of potential violation of article 112 of the Norwegian Constitution.[169] This decision clearly indicated that the provision could affect the climate-related obligations of governments. However, the Supreme Court of Norway took a narrower view, suggesting that Article 112 is merely a safety valve and that courts should generally defer judgment concerning

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[166] Rúv, 'Frumvarp ráðherra endastöð stjórnarskrárbreytinga' (14 June 2021) <https://www.ruv.is/frett/2021/06/14/frumvarp-radherra-endastod-stjornarskrarbreytinga> accessed 1 October 2023.

[167] Róbert R Spanó and Valgerður Sólnes, 'Greinargerð um hvort þörf sé á breytingum á mannréttindakafla stjórnarskrárinnar' (30 August 2023), 61 <https://www.stjornarradid.is/library/03-Verkefni/Stjornskipan-og-Thjodartakn/Stjornarskrarvinna/Greinarger%c3%b0%20um%20mannr%c3%a9ttindakafla%20stj%c3%b3rnarskr%c3%a1rinnar.pdf> accessed 1 October 2023.

[168] Greenpeace Nordic and Others v *Norway (People v Arctic Oil)* <http://climatecasechart.com/non-us-case/greenpeace-nordic-assn-v-ministry-of-petroleum-and-energy-ecthr/> accessed 1 October 2023.

[169] *Greenpeace Nordic Ass'n v Ministry of Petroleum and Energy (People v Arctic Oil)* Borgarting Court of Appeal (judgment, 23 January 2020), case no 18-060499ASD-BORG/03, unofficial translation, 22 <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2020/20200123_HR-2020-846-J_judgment.pdf> accessed 1 October 2023.

appropriate climate action to parliament.[170] If the draft article for the Icelandic Constitution were applied in a manner consistent with the decision of the Norwegian Court of Appeal, that could mean that international agreements, such as the Paris Agreement, could help clarify the acceptable tolerance limits and appropriate measures for compliance with the draft article. However, the Norwegian Supreme Court judgment suggests that the article should be used restrictively and not for judicial review of legislative acts, unless States grossly neglect their obligations to take adequate measures to ensure a healthy environment.

6 CONCLUSION

At least 156 States have recognised the right to a healthy environment through the adoption of international treaties and 161 States have recognised it through their endorsement of UNGA resolution 76/300 affirming the right to a healthy environment. Moreover, 194 States are bound by the Paris Agreement which implicitly safeguards the human right to a healthy environment. Clearly an overwhelming majority of States recognise this right and the adoption of these instruments demonstrates widespread and longstanding state practice. The UNHRC and UNGA resolutions show signs of *opinio juris* and the right to a healthy environment seems to be well on its way to becoming binding for all States. If it is indeed a universal right protected under international law, then it should belong in constitutions to enjoy adequate protection against other human rights.

At least 110 States have adopted explicit provisions into their constitutions concerning the right to a healthy environment. Iceland is among those States that have recognised the right internationally but has not implemented it into its constitution despite repeated efforts by members of Parliament and the Constitutional Committee. This does not necessarily mean that the right to a healthy environment enjoys no protection under the Icelandic Constitution because the right is both a fundamental autonomous human right and a precondition inherently linked to the enjoyment of certain other rights.

Iceland provides implicit constitutional protection of the right to a healthy environment because it is interpreted in accordance with the ECHR. Article 71 of the Icelandic Constitution implements article 8 ECHR and the jurisprudence of the ECtHR demonstrates that the right to a healthy environment can be activated when environmental harm significantly impairs the rights of individuals to respect for privacy and family life, home and correspondence under article 8 ECHR. This harm can be in the form of noise or odour impacting an individual's mental or physical health. The right to a healthy environment is also implicit in the right to life, under the jurisprudence of the ECtHR concerning article 2, and consequently also under the customary right to life under the Icelandic Constitution. Three climate cases currently await the decision of the Grand Chamber of the ECtHR and these will shed further light on the extent of the environmental rights embedded in articles 2 and 8 ECHR and address the relevance of article 3 ECHRand article 68 of the Icelandic Constitution concerning the prohibition of torture or other inhuman or degrading treatment or punishment. The Federal Constitutional Court in Germany has already indicated that the

[170] *Greenpeace Nordic Ass'n v Ministry of Petroleum and Energy (People v Arctic Oil)* Supreme Court of Norway (Judgment, 22 December 2020) HR-2020-2472-P, case no 20-051052SIV-HRET, unofficial translation, see summary and conclusion <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2020/20201222_HR-2020-846-J_judgment.pdf> accessed 1 October 2023.

right to human dignity can oblige States to take climate action by reference to an implicit obligation under article 3 ECHR.

The climate cases pending before the Grand Chamber of the ECtHR may significantly increase the implicit protection derived from the ECHR, both directly and through national constitutions interpreted in accordance with the ECHR. However, the implicit protection always relates to other human rights and that will not in itself suffice to guarantee the independent right to a healthy environment. This right can only form part of constitutional law through express incorporation or by the development of a new constitutional norm. Constitutional reform has been high on the agenda of Icelandic politics for the past decade but to no avail. A draft article implementing the right to a healthy environment was last presented before the Parliament in January 2021 but rejected, partly due to the controversial nature of other articles included in the same proposal. The draft article on the right to a healthy environment closely resembled article 112 of the Norwegian Constitution, which currently awaits assessment by the ECtHR. That decision will hopefully inform the continued debate in Iceland concerning the right to a healthy environment and lead to the adoption of an explicit constitutional provision. Until then, Icelandic courts should read an implicit right to a healthy environment into articles 68 and 71 of the constitution and regard it as an inherent precondition of the constitutional right to life.

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REVISITING THE STANDING DEBATE BEFORE THE EFTA COURT THROUGH THE LENS OF POST-LISBON EU DEVELOPMENTS REGARDING *LOCUS STANDI*

JARNE DE GEYTER*

The Lisbon Treaty broadened and relaxed the standing requirements before the EU Court of Justice by adding a third class of acts amenable to judicial review. In the meantime, the EU has moreover been found in breach of the Aarhus Convention twice for shortcomings in access to justice for environmental organisations. Hence, the Aarhus Regulation, which implements the Aarhus Convention at Union level, was revised in 2021, and possible further amendments with regard to state aid decisions are being examined at the moment. The current standing requirements before the EFTA Court by contrast still reflect the situation prevailing in the European Union before those EU pillar evolutions. This article revisits four judgments of the EFTA Court in light of these developments and analyses how the EFTA Court has dealt with the existing discrepancies before, and might or might not be able to deal with them in the future.

1 INTRODUCTION

The EFTA States Norway, Iceland and Liechtenstein established the EFTA Court in order to ensure a uniform interpretation and application of EEA law throughout the whole EEA,[1] alongside the EU Court of Justice (CJEU) and the national courts. This was considered essential to attain the EEA Agreement's objective of extending the EU's internal market to the EEA EFTA States, and to create a dynamic and homogeneous European Economic Area.[2] Thereto, the EFTA Court was attributed powers similar to those of the CJEU.[3] The Surveillance and Court Agreement (SCA) concluded by the EEA EFTA States attributes the EFTA Court in this regard, amongst others, the power to annul decisions taken by the EFTA Surveillance Authority (ESA),[4] the European Commission's counterpart in the EFTA pillar. In order to ensure equivalent access for natural and legal persons to the EFTA Court compared to the EU pillar, the EEA EFTA States copied the standing requirements before the CJEU into the EFTA pillar judicial framework back in 1992.[5] Despite the fact that these standing requirements have been broadened in the EU in the meantime, the EFTA pillar provisions with regard to *locus standi* have not been updated accordingly.

With the 2009 Treaty of Lisbon, the standing requirements before the CJEU were amended for reasons of effective judicial protection. Pre-Lisbon, natural or legal persons

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1 Agreement on the European Economic Area [1994] OJ L1/3 (hereinafter EEA Agreement), recital 15; Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice [1994] OJ L344/1 (hereinafter SCA), recital 4.

2 EEA Agreement (n 1) recitals 4-5.

3 In this regard, article 108 of the EEA Agreement (n 1) requires the EEA EFTA States to establish 'procedures similar to those existing in the Community'.

4 SCA (n 1) Art 36.

5 ibid Art 36(2).

could only institute an action for annulment before the CJEU when they were either the addressee of the contested act, or when they were directly and individually concerned by that act. The Lisbon Treaty introduced a third category of acts in order to relax the standing requirements for natural or legal persons,[6] i.e., regulatory acts which are of direct concern to them and do not entail implementing measures.[7] Article 36 SCA, which lays down the rules on legal standing for natural and legal persons in actions for annulment before the EFTA Court, has not been amended accordingly, and still reflects the more restrictive pre-Lisbon situation.

Even after the relaxation of the standing requirements post-Lisbon, the EU was condemned by the Compliance Committee of the Aarhus Convention twice with regard to access of environmental organisations to the CJEU. The 1998 Aarhus Convention was adopted under the auspices of the United Nations Economic Commission for Europe and has been ratified by 47 Parties (including the EU, its Member States, Norway and Iceland) in order to enhance public access to information, participation in decision-making, and access to justice in environmental matters.[8] To ensure compliance with the provisions of the Aarhus Convention, the Parties established the Compliance Committee which is tasked with reviewing the Parties' compliance with the Convention, upon which the Meeting of the Parties may take a set of actions to bring about full compliance.[9] For the purpose of implementing its obligations under the Convention, the EU adopted in 2006 the so-called Aarhus Regulation in order to translate its international obligations into the EU context.[10]

In 2017 the Compliance Committee nonetheless concluded that the CJEU's interpretation of its standing requirements failed to facilitate access of environmental organisations to the Court. In its findings, the Compliance Committee pointed out, amongst others, that the 'direct and individual concern' test was too severe to comply with the Aarhus Convention, and that the Aarhus Regulation did not compensate for the CJEU's strict interpretation.[11] The Compliance Committee's findings were subsequently endorsed by the Convention's Meeting of the Parties.[12] In a separate procedure, the Compliance Committee furthermore found that access to justice at EU level for environmental organisations also failed with regard to state aid decisions specifically,[13] partly because state aid decisions were

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[6] See Joined Cases C-622/16 P to C-624/16 P Scuola Elementare Maria Montessori v Commission, Commission v Scuola Elementare Maria Montessori and Commission v Ferracci EU:C:2018:873 paras 22, 26 and 27; Case C-583/11 P Inuit Tapiriit Kanatami and Others v Parliament and Council EU:C:2013:625 para 60.

[7] Art 263(4) *in fine* TFEU.

[8] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447 (Aarhus Convention).

[9] See Aarhus Convention (n 8) Art 15, in combination with Decision I/7 concerning review of compliance, adopted by the Meeting of Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters at its first session (21-23 October 2002).

[10] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] OJ L264/13 (hereinafter Aarhus Regulation).

[11] Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2008/32 (part II) concerning compliance by the European Union (17 March 2017), para 64.

[12] Decision VII/8f concerning compliance by the European Union with its obligations under the Convention, adopted by the Meeting of Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters at its seventh session (18-20 October 2021).

[13] Findings and recommendations with regard to communication ACCC/C/2015/128 concerning compliance by the European Union (17 March 2021).

(and, for the moment,[14] still are) excluded from the scope of the Aarhus Regulation.[15] The latter has never been incorporated into the EEA Agreement. Nonetheless, it may be expected that environmental and climate change litigation will increase in the future, in general, but also with regard to climate-related state aid decisions specifically.[16]

Consequently, the conditions under which natural and legal persons may institute proceedings before the CJEU and the EFTA Court increasingly diverge. In environmental matters specifically, findings of non-compliance with the Aarhus Convention have urged the EU to broaden its rules on access of environmental NGOs to the CJEU laid down in the Aarhus Regulation, whereas that Regulation has not (yet) been incorporated in EEA law in the first place. Moreover, more generally, the broadened standing requirements in the EU post-Lisbon have not been followed-up by a similar update in the EFTA pillar. According to the preamble of the EEA Agreement, natural and legal persons play an essential role through the judicial defence of their EEA rights.[17] As a consequence, the EFTA Court has ruled repeatedly that access to justice and effective judicial protection are essential elements of the EEA legal framework,[18] and that therefore EEA EFTA citizens and EU citizens should enjoy equal access to the courts in both EEA pillars.[19] Instead, the current differences between the EU and the EFTA pillar show that access to justice is increasingly *unequal* between those seeking access to the CJEU and those seeking access to the EFTA Court. This article demonstrates how these differences create uneven access to justice between both EEA pillars, and analyses how the EFTA Court has dealt with these discrepancies before, and might or might not be able to deal with them in the future.

The impact of the discrepancies in access to justice between the two EEA pillars, and the EFTA Court's response thereto, will be illustrated by revisiting four EFTA Court judgments. Firstly, the EFTA Court's 2008 *Private Barnehagers* judgment is analysed since it is put forward here that the contested decision constituted a regulatory act in the sense of the third limb of article 263(4) TFEU. This, in combination with recent case law of the CJEU, illustrates the possible impact of the Lisbon Treaty changes on individuals and economic operators in the EFTA pillar, and on the achievement of the EEA Agreement's objective of creating equal conditions of competition (section 2). Secondly, the 2015 and 2017 judgments in *Konkurrenten III* and *Konkurrenten IV* will be addressed since the applicant in these cases put forward several arguments to convince the EFTA Court to reconsider its interpretation of the standing requirements in light of the changes brough about by the Lisbon Treaty (section 3). Lastly, the EFTA Court's 2003 environmental protection related state aid

[14] The European Commission started a public consultation assessing the options available to provide environmental NGOs adequate access to justice with regard to state aid decisions, one of the options being to allow review under the Aarhus Regulation.

[15] Aarhus Regulation (n 10) Art 2(2)(a).

[16] The (increasing) importance of state aid in the field of climate change, environmental protection and energy policy is evidenced by the European Commission's 2022 'Guidelines on State aid for climate, environmental protection and energy'. Similar guidelines have been issued by the EFTA Surveillance Authority. See: Communication from the Commission – Guidelines on State aid for climate, environmental protection and energy 2022 [2022] OJ C80/1; EFTA Surveillance Authority Decision No 029/22/COL of 9 February 2022 amending the substantive rules in the field of State aid by introducing new Guidelines on State aid for climate, environmental protection and energy 2022 [2022] OJ L277/218.

[17] EEA Agreement (n 1) recital 8.

[18] Case E-3/11 *Pálmi Sigmarsson v Seðlabanki Íslands* [2011] para 29; Case E-5/10 *Dr. Joachim Kottke v Präsidial Anstalt and Sweetyle Stiftung* [2010] para 26.

[19] Case E-11/12 *Beatrix Koch, Dipl. Kfm. Lothar Hummel and Stefan Müller v Swiss Life (Liechtenstein) AG [*2013] para 117; Case E-14/11 *DB Schenker v EFTA Surveillance Authority* [2012] para 77.

judgment in *Bellona* will be revisited to analyse the possible impact for the EFTA pillar of the (revision of the) Aarhus regulation and the findings of the Aarhus Convention's Compliance Committee. Even before the adoption of the Aarhus Regulation in the EU and the findings of the Compliance Committee, the applicant already argued in *Bellona* that a more flexible interpretation of the standing requirements would have been consistent with the Aarhus Convention (section 4).

2 *PRIVATE BARNEHAGERS*

In 2007 ESA adopted a decision declaring Norway's system of financing municipal kindergartens not to constitute state aid. In the EFTA Court's 2008 judgment of *Private Barnehagers Landsforbund v EFTA Surveillance Authority,* the applicant, a Norwegian organisation representing private kindergartens, put forward three arguments contesting the merits of the ESA's decision. In addition, the applicant claimed that ESA failed to initiate the formal investigation procedure. Since the applicant was not the addressee of ESA's decision, it first had to prove that it was directly and individually concerned by that decision pursuant to article 36(2) SCA. With regard to the plea relating to the alleged failure to initiate the formal investigation procedure, the EFTA Court found that the applicant had standing since the applicant sought to safeguard its procedural rights as a 'party concerned' within the meaning of Article 1(2) in Part I of Protocol 3 SCA.[20] Although ultimately the EFTA Court found the applicant's plea to be unfounded,[21] a decision to the contrary could not unimportantly have resulted in a decision from the EFTA Court requiring ESA to nonetheless start a formal investigation into the alleged state aid. As regards the pleas relating to the merits of ESA's decision, the EFTA Court held the action to be inadmissible, since the applicant could not prove that either its members' or its own market position was substantially affected by the aid, and therefore failed to prove that it was individually concerned within the meaning of article 36(2) SCA.[22]

Turning to the CJEU's post-Lisbon case law, the CJEU has acknowledged on multiple occasions that decisions of the Commission authorising or prohibiting a national aid scheme are of general application.[23] Consequently, certain Commission decisions in the field of state aid law may be considered to constitute regulatory acts which do not entail implementing measures in the sense of the third limb of article 263(4) TFEU.[24] In such circumstances, applicants only have to prove that they are directly concerned by the Commission's decision, and will not have to pass the burdensome test of being individually concerned.

In *Verband Deutscher Alten- und Behindertenhilfe and CarePool Hannover v Commission* the CJEU found a Commission decision qualifying a state aid scheme as 'existing aid' in the sense of article 108 TFEU, and thereby rejecting the complaints made by the applicants, to be a regulatory act not entailing implementing measures in the sense of article 263(4) *in fine*

[20] Case E-5/07 *Private Barnehagers Landsforbund v EFTA Surveillance Authority* [2008] paras 61-64.
[21] ibid paras 74-84.
[22] ibid paras 45-53.
[23] Case T-522/20 *Carpatair v Commission* EU:T:2023:51 paras 48-49; Case C-99/21 P *Danske Slagtermestre v Commission* EU:C:2022:510 para 66.
[24] Case T-69/18 *Verband Deutscher Alten- und Behindertenhilfe and CarePool Hannover v Commission* EU:T:2021:189 paras 133-169; Joined Cases C-622/16 P to C-624/16 P *Scuola Elementare Maria Montessori* (n 6) paras 22-33 and paras 63-67.

TFEU.[25] The applicants were consequently able to contest that Commission decision on the merits provided they could prove that they were directly concerned by that decision – which they *in casu* could.[26]

In *Scuola Elementare Maria Montessori and Ferracci v Commission* the CJEU furthermore found that a Commission decision declaring a national aid scheme not to constitute state aid was a decision of general application which did not entail implementing measures since the Commission's approval did not require the Member State to take any further action.[27] The contested Commission decision moreover declared another part of the national aid scheme to be illegal but did not require the Member State concerned to recover the state aid from the beneficiaries. According to the CJEU, that part of the decision also constituted a regulatory act not requiring implementing measures as the state aid scheme applied to an indeterminate number of persons envisaged in a general and abstract manner, and the national authorities were not required to adopt any measure since they were not obliged to recover the unlawful state aid.[28]

The latter may be the case if recovery would be contrary to general principles of EU law,[29] if the Commission is of the opinion that recovery would be 'absolutely impossible' for the State,[30] or if the aid has been granted to the beneficiary more than ten years before the European Commission takes action.[31] These grounds for non-recovery of unlawful state aid have also been recognised in EEA law and in the case law of the EFTA Court. Firstly, Article 14 of Protocol 3 to the SCA stipulates in a general fashion that the ESA 'shall not require recovery of the aid if this would be contrary to a general principle of EEA law'. In this regard, the EFTA Court has specified that particularly the existence of legitimate expectations may prevent the recovery of state aid.[32] Secondly, although so far the EFTA Court has only ruled on the invocation of the 'absolute impossibility' plea with regard to EEA EFTA States' failure to recover state aid,[33] nothing suggests that the ESA would not also be allowed to find in an earlier stage that recovery of unlawful aid is not necessary if it is 'absolutely impossible' for the EEA EFTA State concerned. Lastly, Art. 15 of Protocol 3 to the SCA stipulates that ESA cannot recover state aid more than ten years after it has been awarded.

It follows from the above that quite some situations may arise in which ESA decisions in the field of state aid would meet the loosened requirements following from the third limb of article 263(4) TFEU. As mentioned before, so far, the standing requirements laid down in article 36(2) SCA have not been adapted to the situation prevailing in the EU pillar since the Lisbon Treaty. Natural or legal persons will consequently not be able to rely

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[25] Case T-69/18 *Verband Deutscher Alten- und Behindertenhilfe* (n 24) paras 142-152 and paras 162-169.

[26] ibid paras 153-161.

[27] Joined Cases C-622/16 P to C-624/16 P *Scuola Elementare Maria Montessori* (n 6) paras 22-33 and paras 63-67.

[28] ibid paras 34-38 and 62.

[29] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification) [2015] OJ L248/9 (hereinafter Regulation on rules of application of Art 108 TFEU), Art 16.

[30] Joined Cases C-622/16 P to C-624/16 P *Scuola Elementare Maria Montessori* (n 6) para 32.

[31] Regulation on rules of application of Art 108 TFEU (n 29) Art 17.

[32] Joined Cases E-17/10 and E-6/11 *The Principality of Liechtenstein and VTM Fundmanagement v EFTA Surveillance Authority* [2012] para 94; Joined Cases E-4/10, E-6/10 and E-7/10 *The Principality of Liechtenstein, REASSUR Aktiengesellschaft and Swisscom RE Aktiengesellschaft v EFTA Surveillance Authority* [2011] para 118.

[33] Case E-25/15 *EFTA Surveillance Authority v Iceland* [2016] para 49; Case E-2/05 *EFTA Surveillance Authority v The Republic of Iceland* [2005] para 38.

before the EFTA Court on the less restrictive test for legal standing introduced by the Lisbon Treaty, and will have to argue that they meet the more burdensome test of being directly and individually concerned in case ESA adopts similar state aid decisions.

In *Private Barnehagers,* the decision adopted by ESA arguably met the requirements of being a regulatory act not entailing implementing measures which was of direct concern to the applicant. As mentioned above, in *Scuola Elementare Maria Montessori and Ferracci v Commission,* the CJEU found that the applicants had legal standing on the basis of article 263(4) *in fine* TFEU. According to the CJEU, the Commission decision declaring that the national aid scheme at hand did not constitute state aid was of general application.[34] The CJEU furthermore found that the aid scheme only entailed implementing measures with regard to the beneficiaries of the aid, but not with regard to competitors of the beneficiaries, such as the applicants, since they were not eligible for the aid.[35] Similarly, the beneficiaries of the national measure in *Private Barnehagers* were also defined in a general and abstract manner, namely all Norwegian municipal kindergartens, and ESA's decision approving Norway's system of financing municipal kindergartens did not require implementing measures *vis-à-vis* the applicant or its members. Since the private kindergartens were direct competitors of the beneficiaries of the aid, i.e., the municipal kindergartens, and the national measure was therefore liable to place them in an unfavourable competitive position, they were furthermore directly concerned by the ESA decision.[36]

The question consequently arises how the EFTA Court will deal with future cases post-Lisbon regarding decisions similar to the one in *Private Barnehagers*, and, by extension, with regard to ESA decisions in the field of state aid similar to the ones found to be regulatory acts in the sense of article 263(4) *in fine* TFEU by the CJEU. If the EFTA Court refuses to change its interpretation of the current (more restrictive) standing requirements, EEA undertakings might find it in certain circumstances harder – if not impossible – to challenge ESA decisions on state aid in the EFTA pillar, compared to (competing) EEA undertakings seeking the annulment of a similar Commission decision in the EU pillar. The question consequently arises how this finding is reconcilable with the EEA's main objective of establishing a homogeneous European Economic Area, based on common rules and equal conditions of competition.[37] Especially since the EFTA Court has held before that '[t]his can only be achieved if EEA/EFTA and EU nationals and economic operators enjoy equal access to the courts in both the EU and EFTA pillars'.[38] Since almost 15 years have passed since the entry into force of the Lisbon Treaty, and the EEA (EFTA) States do not seem inclined to adapt the standing requirements in the EFTA pillar, it is interesting to examine the EFTA Court's post-Lisbon response to a clear call for reinterpretation of its standing requirements by the applicant in *Konkurrenten III* and *Konkurrenten IV*.

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[34] Joined Cases C-622/16 P to C-624/16 P *Scuola Elementare Maria Montessori* (n 6) paras 22-33.
[35] ibid paras 63-67.
[36] See Case T-522/20 *Carpatair* (n 23) paras 87-89; Case T-238/21 *Ryanair v Commission (SAS II; COVID-19)* EU:T:2023:247 para 23.
[37] EEA Agreement (n 1) recital 4.
[38] Case E-11/12 *Beatrix Koch* (n 19) paras 116-117. See similarly Case E-14/11 *DB Schenker* (n 19) para 77.

3 *KONKURRENTEN III* AND *IV*

3.1 INTRODUCTION

The issue of admissibility of actions for annulment was at the forefront of the discussions in the two latest EFTA Court cases involving the Norwegian transport company Konkurrenten.no AS (Konkurrenten). In 2006, Konkurrenten filed a complaint with ESA regarding alleged state aid its competitor Sporveien Oslo AS (Sporveien) received from the Norwegian government. ESA concluded in 2010, without starting a formal investigation, that no further measures had to be taken since the alleged state aid had been terminated as of 30 March 2008.[39] Konkurrenten brought an action for annulment before the EFTA Court, upon which the EFTA Court annulled ESA's decision (*Konkurrenten I*).[40] Following the EFTA Court's judgment, Konkurrenten filed a new complaint with ESA in 2011, both regarding the aid Sporveien received before 30 March 2008, and the aid it received afterwards. In the context of that procedure, Konkurrenten requested access to certain documents. In 2012, a second case was brought before the EFTA Court regarding ESA's refusal to disclose these documents (*Konkurrenten II*), but was found inadmissible.[41] At the end of 2012, ESA issued a new decision regarding the complaint made by Konkurrenten in 2006.[42] In May 2013 a second decision was issued in response to Konkurrenten's complaint of 2011.[43] In both decisions ESA concluded that part of the challenged measures did not constitute state aid, and part of the measures constituted lawful 'existing aid'. Subsequent to both decisions, Konkurrenten started another action for annulment before the EFTA Court (*Konkurrenten III*). The EFTA Court concluded that the application was inadmissible since Konkurrenten lacked *locus standi*.[44] In the meantime, Konkurrenten had also filed a state aid complaint with ESA in 2011 regarding another competitor, Nettbuss AS. ESA concluded in 2015 that part of the aid Nettbuss AS benefitted from was granted on the basis of an aid scheme existing before the entry into force of the EEA Agreement and was therefore compatible with EEA law, and found that the part of the aid that fell outside the aid scheme was unlawful and should be recovered.[45] At the beginning of 2017, Konkurrenten lodged yet another action for annulment against ESA's decision, which was also held inadmissible by the EFTA Court due to a lack of legal standing (*Konkurrenten IV*).[46]

In *Konkurrenten III*, Konkurrenten put forward that the contested decisions constituted regulatory acts not entailing implementing measures which were of direct concern to Konkurrenten.[47] Therefore, Konkurrenten interestingly requested the EFTA Court to reinterpret the admissibility requirements of article 36 SCA and to reconsider its

[39] Decision of the EFTA Surveillance Authority No 254/10/COL of 21 June 2010 regarding AS Oslo Sporveier and AS Sporveisbussene.

[40] Case E-14/10 *Konkurrenten.no AS v EFTA Surveillance Authority* (Konkurrenten I).

[41] Joined Cases E-4/12 and E-5/12 *Risdal Touring AS, Konkurrenten.no AS v EFTA Surveillance Authority (Konkurrenten II).*

[42] Decision of the EFTA Surveillance Authority No 519/12/COL of 19 December 2012 closing the formal investigation procedure into potential aid to AS Oslo Sporveier and AS Sporveisbussene (Norway).

[43] Decision of the EFTA Surveillance Authority No 181/13/COL of 8 May 2013 on alleged aid to Kollektivtransportproduksjon AS ('KTP'), Oslo Vognselskap AS and Unibuss AS.

[44] Case E-19/13 *Konkurrenten.no AS v EFTA Surveillance Authority (Konkurrenten III).*

[45] Decision of the EFTA Surveillance Authority No 179/15/COL of 7 May 2015 on aid to public bus transport in the County of Aust-Agder (Norway) [2016/1890].

[46] Case E-1/17 *Konkurrenten.no AS v EFTA Surveillance Authority (Konkurrenten IV).*

[47] Case E-19/13 *Konkurrenten III* (n 44) para 65.

traditional test for legal standing in light of the broadened standing rules of article 263(4) TFEU post-Lisbon.[48] The EFTA Court was able to easily circumvent the question posed by Konkurrenten and observed that, contrary to what Konkurrenten claimed, the contested decisions did not constitute regulatory acts in the sense of article 263(4) *in fine* TFEU.[49] Hence, the EFTA Court proceeded by asserting whether Konkurrenten met the requirements of direct and individual concern laid down in article 36(2) SCA. In doing so, the EFTA Court stuck with its previous case law and followed the CJEU's *Plaumann* case law on the interpretation of the requirements of direct and individual concern.[50] Although the EFTA Court rightfully found that the contested decisions did not constitute regulatory acts, and held the case to be inadmissible, it is nonetheless interesting to scrutinise the arguments put forward by the different parties to the dispute. Konkurrenten's arguments in both *Konkurrenten III* and *IV* may generally be bundled as being based on the principle of homogeneity, on the one hand (section 3.2), and the right to effective judicial protection, on the other hand (section 3.3).

3.2 THE PRINCIPLE OF HOMOGENEITY

A first strand of arguments put forward by Konkurrenten relates to the principle of homogeneity. In this regard, Konkurrenten contended in *Konkurrenten III* that 'a gap has been opened that must be closed by means of dynamic interpretation'.[51] In *Konkurrenten IV*, Konkurrenten similarly put forward that not recognising that it had standing would 'run counter to the interests of genuine reciprocity and homogeneity'.[52]

The EFTA Court's reliance on the CJEU's *Plaumann* test for determining whether an individual meets the requirements of direct and individual concern is, according to the EFTA Court, based on reasons of homogeneity.[53] Even though the EFTA Court is formally not bound to follow the CJEU's case law with regard to the procedural provisions laid down in the SCA,[54] the EFTA Court considers such procedural homogeneity to be important to ensure equal access to justice in both EEA pillars.[55] After all, according to the EFTA Court, the objectives of the EEA Agreement can only be achieved if EEA EFTA citizens and EU citizens enjoy the same rights in both the EU and the EFTA pillar, including equal access to the courts in both pillars.[56]

But what if the EFTA Court's reliance on the CJEU's case law for the interpretation of its procedural provisions *de facto* leads to unequal judicial protection between the two EEA pillars? Although the CJEU until today insists on its strict interpretation of the requirements of direct and individual concern,[57] it cannot be disregarded that in the EU pillar the Lisbon

[48] ibid para 64.
[49] ibid para 91.
[50] ibid paras 92-122.
[51] ibid para 64.
[52] Case E-1/17 *Konkurrenten IV* (n 46) para 48.
[53] Case E-2/13 *Bentzen Transport AS v EFTA Surveillance Authority* [2013] paras 37-38; Joined Cases E-5/04, E-6/04, and E-7/04 *Fesil ASA and Finnfjord Smelteverk AS, Prosessindustriens Landsforening and others, The Kingdom of Norway v EFTA Surveillance Authority* [2005] paras 53-54.
[54] Case E-5/16 *Norwegian Board of Appeal for Industrial Property Rights – appeal from the municipality of Oslo* [2017] para 37; Case E-13/10 *Aleris Ungplan AS v EFTA Surveillance Authority* [2011] para 24.
[55] Case E-11/12 *Beatrix Koch* (n 19) para 117; Case E-2/13 *Bentzen Transport AS* (n 53) para 37.
[56] Case E-11/12 *Beatrix Koch* (n 19) paras 116-117; Case E-14/11 *DB Schenker* (n 19) para 118.
[57] Case T-522/20 *Carpatair* (n 23) para 54; Case C-284/21 P *Commission v Braesch and Others* EU:C:2023:58.

Treaty broadened the rules on legal standing by adding a third limb to article 263(4) TFEU. The third limb was specifically added to article 263(4) TFEU to provide an answer to situations in which individuals first had to break the law in order to gain access to a(n EU) court.[58] When EU law requires the Member States to take further implementing measures, individuals may challenge the national measure before the national courts, who may in turn refer a question on the validity of the underlying EU act to the CJEU. On the other hand, when EU law does not require implementing measures at the national level, individuals would be obliged to first breach EU law, in order to be able to raise its invalidity in the national proceedings started against that person for breaching that law.[59] Similar considerations play a role in the field of state aid law, where the CJEU has held before that, when a competitor wants to challenge the validity of a Commission decision approving an aid scheme, it would be artificial to first require that competitor to request the national authorities to grant him the aid (so to obtain an implementing measure), and then to contest the refusal before a national court, upon which the national court could make a reference to the CJEU on the validity of the Commission decision.[60] Therefore, the third limb of article 263(4) TFEU now allows natural and legal persons to challenge such acts of EU law directly before the CJEU.

In the EFTA pillar, on the other hand, the SCA has not been adapted in this regard and still reflects the (more restrictive) pre-Lisbon situation. By lack of an EEA equivalent to the third limb of article 263(4) TFEU, certain measures which may be challenged before the CJEU under that limb, are necessarily excluded from review by the EFTA Court, or would require natural or legal persons to wriggle themselves in artificial situations in order to obtain judicial redress (see section 2 for examples in this regard). As long as the EEA EFTA States refuse to update article 36(2) SCA, the EFTA Court facilitates the current situation of procedural heterogeneity (rather than homogeneity) between the two EEA pillars by holding on to the CJEU's strict interpretation of the requirements of direct and individual concern.[61]

In this regard, Konkurrenten argued in *Konkurrenten III* and *IV* that there is nothing to assume that there is less need for legal scrutiny of state aid decisions of ESA, compared to Commission decisions in this field, especially in light of the EEA Agreement's objective to establish a homogeneous economic area based on equal conditions of competition.[62] Accordingly, Konkurrenten argued that nothing suggests that the parties to the EEA Agreement did not intend for the EFTA Court's jurisdiction to evolve dynamically with that of the CJEU.[63] Indeed, although the Contracting Parties did not provide for an explicit obligation for the EFTA Court to take into account the CJEU's case law with regard to the interpretation of its procedural rules,[64] the EFTA Court nonetheless takes into account the

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[58] As may be derived from the *travaux préparatoires* relating to the draft Treaty establishing a Constitution for Europe, the content of which has been copied in the Lisbon Treaty. See for example: Cover Note from the Praesidium to the European Convention (CONV 734/03) of 12 May 2003, 20; Case T-18/10 *Inuit Tapiriit Kanatami and Others v Parliament and Council* EU:T:2011:419 para 50.

[59] As already put forward in 2002 by AG Jacobs in his opinion to Case C-50/00 P *Unión de Pequeños Agricultores v Council* EU:C:2002:197 (see para 43 of the opinion).

[60] Joined Cases C-622/16 P to C-624/16 P *Scuola Elementare Maria Montessori* (n 6) para 66.

[61] See in a similar vein: Patricia Wiater, Internationale Individualkläger: ein Vergleich des Zugangs zu Gericht im Wirtschaftsvölkerrecht (Mohr Siebeck 2020) 206–208.

[62] Case E-19/13 *Konkurrenten III* (n 44) para 66; Case E-1/17 *Konkurrenten IV* (n 46) para 48.

[63] Case E-19/13 *Konkurrenten III* (n 44) para 66.

[64] EEA Agreement (n 1) Art 6 and SCA (n 1) Art 3 only provide in such an obligation with regard to the substantive rules of EEA law.

CJEU's case law in this regard,[65] with the approval of the Contracting Parties.[66] However, in *Konkurrenten III,* the Norwegian government countered Konkurrenten's argument that the EFTA Court's jurisdiction should evolve dynamically with the CJEU's jurisdiction by putting forward that EEA law is a *sui generis* legal system.[67] Norway's claim in this regard seems to be based on and resonates the EFTA Court's seminal statement in *Sveinbjörnsdóttir* that 'the EEA Agreement is an international treaty *sui generis* which contains a distinct legal order of its own'.[68] Since the EFTA Court considered it essential for the proper functioning of the EEA Agreement that individuals and economic operators can rely on the rights conferred upon them by EEA law, it took that statement as a starting point to read into the EEA Agreement a right which was not explicitly provided for in the Agreement, namely the right to compensation for loss and damage by incorrect implementation of a directive. It is remarkable to see how the Norwegian government in *Konkurrenten III* likewise relies on the *sui generis* nature of EEA law, but this time in order to *restrict* the (procedural) rights of individuals and economic operators in the EFTA pillar.

In this respect it seems important to differentiate between EU pillar changes in the standing requirements due to evolutions in the CJEU's case law or following treaty changes. Whereas the Contracting Parties seem to accept the idea that the EFTA Court follows the CJEU's case law on *locus standi*, it appears a step too far if the EFTA Court were to pursue its endeavour of preserving homogeneity by also taking into account EU pillar treaty changes. This reluctance may be explained by reference to the delicate balance between international cooperation and sovereignty the EEA Agreement aims to accommodate.[69] Whereas the EEA EFTA States have accepted that the EFTA Court's case law dynamically evolves in line with the case law of the CJEU in article 6 EEA Agreement and article 3 SCA,[70] they have not consented to the changes to the standing requirements introduced by the Lisbon Treaty. A similar reluctance for sovereignty reasons may be seen in cases such as *Criminal proceedings against A* and *Enes Deveci*. In *Criminal proceedings against A,* Iceland argued that the principles of direct effect and primacy of EU law were not made part of the EEA Agreement and that the EFTA Court could not derive these principles from the EEA Agreement 'without putting the fundamental principles of the EEA Agreement at risk and changing its foundation of respect for State sovereignty'.[71] Similarly, Norway argued in *Enes Deveci* that 'an automatic application of the Charter, which is not incorporated in the EEA Agreement, would challenge State sovereignty and the principle of consent as the source of international legal obligations'.[72]

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[65] See Case E-8/19 *Scanteam AS v The Norwegian Government* [2020] para 45; Case E-2/12 INT *HOB-vín ehf.* [2012] para 9.

[66] See for example Norway's submission in *Bellona*: 'It is submitted that Articles 3(1) and (2) of the Surveillance and Court Agreement and Article 6 of the EEA are directly applicable in the case at hand, mainly because the assessment of *locus standi* is so closely linked to substantial rules that it in reality is a matter of an interpretation of these substantial rules'. See: report of the hearing in Case E-2/02 *Technologien Bau- und Wirtschaftsberatung GmbH and Bellona Foundation v ESA*, para 38.

[67] Case E-19/13 *Konkurrenten III* (n 44) para 87.

[68] Case E-9/97 *Erla María Sveinbjörnsdóttir v Iceland* [1998] para 59.

[69] For more on the concept of sovereignty in the EEA: Mads Andenas, 'Sovereignty' in Carl Baudenbacher (ed), *The Fundamental Principles of EEA Law: EEA-ities* (Springer International Publishing 2017).

[70] Although the homogeneity principle in article 6 EEA Agreement (n 1) and SCA (n 1) Art 3 does not cover the procedural provisions of the SCA, the EEA EFTA States have accepted the EFTA Court's application of that principle to these provisions too. See for example: report of the hearing in *Technologien Bau- und Wirtschaftsberatung GmbH and Bellona Foundation v ESA*, E-2/02, para 38.

[71] Report for the hearing in Case E-1/07 *Criminal proceedings against A*, paras 26 and 29.

[72] Case E-10/14 *Enes Deveci and Others v Scandinavian Airlines System Denmark-Norway-Sweden* [2014] para 44.

Notwithstanding, taking into account the changes brought about by the Lisbon Treaty would rather be in line with the EFTA Court's consistent statements that access to justice and effective judicial protection are essential elements of the EEA legal framework,[73] and that therefore EEA EFTA citizens and EU citizens should enjoy equal access to the courts in both EEA pillars.[74] Such an approach would furthermore fit within the EFTA Court's effects-based conception of the principle of homogeneity. As acknowledged by the EFTA Court itself, due to certain discrepancies between the EEA Agreement and the (post-Lisbon) EU Treaties, the EFTA Court is sometimes simply unable to apply the same reasoning as applied by the CJEU:

> The Court notes that a gap between the two EEA pillars has emerged since the signing of the EEA Agreement in 1992. This gap has widened over the years. The EU treaties have been amended four times since then, while the EEA Main Agreement has remained substantially unchanged. This development has created certain discrepancies at the level of primary law. Depending on the circumstances, this fact may have an impact on the interpretation of the EEA Agreement.[75]

Through an effects-based conception of the homogeneity principle the EFTA Court nevertheless aims to obtain the same outcome/effects in the EFTA pillar as compared to the EU pillar, albeit inevitably based on a different reasoning and/or different provisions than the CJEU.[76] In *Jabbi* and *Campbell* for example the question was raised by the referring national court whether a third country national who is a family member of an EEA EFTA citizen, enjoys a derived right of residence in the home state of that EEA EFTA citizen if the latter returns to his home state from another EEA State.[77] The same question had already been raised before the CJEU in *O. and B.*[78] In *O. and B.* the CJEU had come to the conclusion that such derived right of residence for third country nationals in the home state of an EU citizen was based on that citizen's free movement rights as an EU citizen *ex* article 21(1) TFEU.[79] Since the EEA Agreement does not provide an EEA equivalent of EU citizenship,[80] the EFTA Court could not apply the same reasoning.[81] Eventually, the EFTA Court nonetheless managed to come to the same conclusion as the CJEU, albeit based

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[73] Case E-3/11 *Pálmi Sigmarsson* (n 18) para 29; Case E-5/10 *Dr. Joachim Kottke* (n 18) para 26.

[74] Case E-11/12 *Beatrix Koch* (n 19) para 117.

[75] Case E-28/15 *Yankuba Jabbi v The Norwegian Government, represented by the Immigration Appeals Board* [2016] para 62.

[76] For more on the different aspects of the principle of homogeneity (substantive, procedural and effects-based), see: Christa Tobler, 'Free Movement of Persons in the EU v. in the EEA: Of Effect-Related Homogeneity and a Reversed Polydor Principle' in Nathan Cambien, Dimitry Kochenov and Elise Muir (eds), *European Citizenship under Stress* (Brill Nijhoff 2020); Philipp Speitler, 'Judicial Homogeneity as a Fundamental Principle of the EEA' in Carl Baudenbacher (ed), *The Fundamental Principles of EEA Law: EEA-ities* (Springer International Publishing 2017); Carl Baudenbacher, 'The EFTA Court and Court of Justice of the European Union: Coming in Parts But Winning Together' in Court of Justice of the European Union (ed), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law - La Cour de Justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence* (TMC Asser Press 2013).

[77] Case E-4/19 *Campbell v The Norwegian Government* [2020]; Case E-28/15 *Yankuba Jabbi* (n 75).

[78] Case C-456/12 *O. and B.* EU:C:2014:135.

[79] ibid para 61.

[80] See Joint Declaration by the Contracting Parties to Decision No 158/2007 of 7 December 2007 amending Annex V (Free movement of workers) and Annex VIII (Right of establishment) to the EEA Agreement [2008] OJ L124/20: 'The concept of Union Citizenship as introduced by the Treaty of Maastricht […] has no equivalent in the EEA Agreement'.

[81] Case E-28/15 *Yankuba Jabbi* (n 75) para 68: 'The case at hand must be distinguished from *O. and B.* to the extent that that judgment is based on Union citizenship. Therefore, it must be examined if homogeneity in the EEA can be achieved based on an authority included in the EEA Agreement. Such an examination must be based on the EEA Agreement, legal acts incorporated into it and case law'. See also Case E-4/19 *Campbell* (n 77) para 57.

on the Citizenship Directive and the right to free movement,[82] which is remarkable since the CJEU explicitly ruled out the applicability of the Citizenship Directive in this context in *O. and B.*[83]

This effects-based conception of the homogeneity principle has also been applied by the EFTA Court to the procedural provisions of the EEA Agreement. Article 267(3) TFEU imposes an obligation on the highest courts of the EU States to refer a request for a preliminary ruling to the CJEU when a question arises in the domestic proceedings with regard to the interpretation or validity of EU law. Unlike article 267 TFEU, article 34 SCA does not require apex courts to refer a request for an advisory opinion to the EFTA Court where a question is raised regarding the interpretation of EEA law. Although the EFTA Court acknowledged this clear difference between both procedures, in *Irish Bank* it nonetheless argued that apex courts should duly take into account the fact that they are bound by the duty of loyal cooperation *ex* article 3 EEA Agreement, adding that EEA EFTA citizens and economic operators do benefit from the obligation to refer imposed on apex courts in the EU pillar.[84] In *Jonsson,* the EFTA Court further clarified the latter by stating that it is important that use is made of article 34 SCA when a legal situation lacks clarity in order to ensure coherence and reciprocity between the rights enjoyed in the EFTA and the EU pillar.[85] Moreover, the EFTA Court added in *Irish Bank* that the procedural provisions of the SCA should be interpreted in line with fundamental rights, and therefore it could not be excluded that a refusal to refer would be in breach of article 6 of the European Convention on Human Rights (ECHR).[86] Despite the clear difference in wording between article 267 TFEU and article 34 SCA, the EFTA Court hereby tried to bridge the gap, to a certain extent, between the EU pillar preliminary ruling procedure and the EFTA pillar advisory opinion procedure, driven by considerations of homogeneity and equal access to justice.

Since, so far, the EEA EFTA States have not broadened the standing requirements by adding the class of acts included in the third limb of article 263(4) TFEU, it appears hard to claim that the EFTA Court should interpret article 36(2) SCA so as to include a provision similar to that limb. The EFTA Court has held before that it cannot apply non-incorporated primary and secondary EU law by analogy.[87] The EFTA Court, however, is not bound by the CJEU's interpretation of its procedural provisions,[88] and is therefore free to provide its own interpretation of article 36(2) SCA in order to ensure equivalent access to justice across both EEA pillars. This holds especially true since the EFTA Court's introduction of the principle of procedural homogeneity was precisely intended to ensure *equal* access to justice for individuals and economic operators throughout the EEA.[89] The main objective of the

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[82] Case E-4/19 *Campbell* (n 77) paras 57-59; Case E-28/15 *Yankuba Jabbi* (n 75) paras 77-79.

[83] Case C-456/12 *O. and B.* (n 78) paras 35-43.

[84] Case E-18/11 *Irish Bank Resolution Corporation Ltd v Kaupping hf* [2012] paras 57-58.

[85] Case E-3/12 *Staten v/Arbeidsdepartementet v Stig Arne Jonsson*[2013] para 60.

[86] Case E-18/11 *Irish Bank* (n 84) paras 63-64.

[87] See for instance: Case E-1/02 *EFTA Surveillance Authority v The Kingdom of Norway* [2003] para 55; Case E-1/01 *Hörður Einarsson v The Icelandic State* [2002] para 43.

[88] Case E-5/16 *Norwegian Board of Appeal for Industrial Property Rights* (n 54) para 37; Case E-13/10 *Aleris Ungplan AS* (n 54) para 24.

[89] Case E-14/11 *DB Schenker* (n 19) paras 77-78: 'The Court has recognised the procedural branch of the principle of homogeneity and referred in particular to considerations of equal access to justice […] the need to apply that principle, namely in order to ensure equal access to justice for individuals and economic operators throughout the EEA […]'.

EEA Agreement is not to obtain a homogeneous interpretation of EEA law in and of itself,[90] but rather to create a homogeneous European Economic Area in which common rules and equal conditions of competition apply.[91] Homogeneous interpretation of EEA law is in this regard only a means to an end, from which under certain conditions may be deviated in order to ensure a homogeneous outcome for individuals.[92]

Several elements advocate in favour of such an approach and could (jointly) serve as a basis and justification for reinterpreting the current standing requirements. Article 108 EEA Agreement first of all stipulates that the (judicial) procedures established by the EEA EFTA States should be 'similar to those existing in the Community'.[93] In addition, recital 8 of the EEA Agreement attributes individuals an important role in the development of the EEA through the judicial defence of their EEA rights. Therefrom it follows, according to the EFTA Court, that access to justice and effective judicial protection are essential elements of the EEA legal framework,[94] and that the principle of effective judicial protection constitutes a general principle of EEA law.[95] As a consequence, the EFTA Court held that its procedural rules should be interpreted in light of the principle of effective judicial protection.[96] In order to ensure a homogeneous EEA based on common rules and equal conditions of competition, the EFTA Court considers it furthermore important that EEA EFTA citizens and EU citizens enjoy equal access to the courts in both EEA pillars.[97]

In light of all these elements, it is argued that the EFTA Court is able to reinterpret its standing requirements as they stand now, in order to ensure that individuals enjoy effective and equivalent access to justice compared to their EU counterparts, not by applying the third limb of article 263(4) TFEU by analogy, but rather by reinterpreting its current standing requirements on the basis of the (above described considerations underlying the) EEA Agreement.[98] Just as the EFTA Court invoked the right to free movement as a right lying at the heart of the EEA Agreement to broaden the scope of the Citizenship Directive, the principle of effective judicial protection could, as a general principle of EEA law, justify a broader understanding of the current standing requirements, in order to guarantee the full effectiveness and homogeneity of EEA law.[99] After all, unequal access to justice between

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[90] EEA Agreement (n 1) recital 15 and Art 105(1) indicate that (one of) the objective(s) of the Contracting Parties is not only to arrive at, and maintain, a uniform interpretation of EEA law, but also to arrive at, and maintain, a uniform *application* of EEA law. The aim of a uniform application of EEA law corresponds with the idea of creating a homogeneous European Economic Area, and appears to support the idea of an effects-based conception of the principle of homogeneity. See similarly: Finn Arnesen and Halvard Haukeland Fredriksen, 'Preamble' in Finn Arnesen and others (eds), *Agreement on the European Economic Area - A Commentary* (Nomos Verlagsgesellschaft 2018) 167–168.

[91] EEA Agreement (n 1) recital 4 and Art 1(1).

[92] As evidenced by amongst others: Case E-4/19 *Campbell* (n 77); Case E-28/15 *Yankuba Jabbi* (n 75).

[93] EEA Agreement (n 1) Art 108(1).

[94] E-3/11 *Pálmi Sigmarsson* (n 18) para 29; Case E-5/10 *Dr. Joachim Kottke* (n 18) para 26.

[95] Case E-12/20 *Telenor ASA and Telenor Norge AS v EFTA Surveillance Authority* [2022] para 75; Joined Cases E-11/19 and E-12/19 *Adpublisher AG v J & K* [2020] para 50.

[96] Case E-18/11 *Irish Bank* (n 84) paras 63-64; Case E-2/03 *Ákæruvaldið (The Public Prosecutor) v Ásgeir Logi Ásgeirsson, Axel Pétur Ásgeirsson and Helgi Már Reynisson* [2003] para 23.

[97] Case E-11/12 *Beatrix Koch* (n 19) para 117; Case E-14/11 *DB Schenker* (n 19) para 77.

[98] In *Jabbi* for instance, the EFTA Court found that it could not give the same interpretation to EEA law as the CJEU did to EU law by lack of an EEA equivalent of EU citizenship. Because of the different legal context, the EFTA Court therefore held that 'it must be examined if homogeneity in the EEA can be achieved based on an authority included in the EEA Agreement'. Consequently, by relying on sources included in the EEA Agreement (a general right to free movement) the EFTA Court was able to obtain the same outcome as in the EU, albeit necessarily based on a different argumentation. See Case E-28/15 *Yankuba Jabbi* (n 75).

[99] Case E-4/19 *Campbell* (n 77) para 55: '*To ensure effectiveness and to achieve homogeneity* in the area of the free movement of persons, the Court similarly ruled in *Jabbi* that when an EEA national, not considered a worker, has created or strengthened

both EEA pillars would hamper the achievement of the EEA Agreement's aim of the fullest possible realisation of the internal market in the whole European Economic Area, based on common rules and equal conditions of competition.[100]

Rather than judicially copy-pasting the third limb of article 263(4) TFEU into article 36(2) SCA in a general manner, the EFTA Court should instead, by applying a contextual and teleological interpretation, determine to what extent the principles of homogeneity, effective judicial protection and effectiveness of EEA law justify, in the specific case before it, a broader or more flexible reading of its standing requirements. Although admittedly this may initially raise questions of legal certainty, nothing prevents that a general line of reasoning emerges after a couple of judgments will have been decided. In light of the current state of EEA law and the developments in the EU pillar, this seems to be a necessary evil in order to ensure a well-functioning EEA, based on common rules and (equal) access to justice. This would especially be the case if in the EU pillar the applicant(s) would be granted standing before the CJEU on the basis of the third limb of article 263(4) TFEU, whereas they would not be granted standing before the EFTA Court if the current standing test were to be applied. It is particularly important in this regard to be mindful of the *raison d'être* of the third limb of article 263(4) TFEU, namely to prevent individuals from having to break the law or put themselves in artificial situations first in order to gain access to justice (see *supra*).

It remains to be seen whether the EFTA Court will be willing to extend its effects-based conception of homogeneity to the standing requirements of article 36 SCA. It should be noted, however, that the EFTA Court held in *Konkurrenten III* that it found no reason to address the applicant's submission regarding the changes to article 263(4) TFEU, but not for the reason one would suspect. One would expect the EFTA Court to refuse considering the post-Lisbon changes to article 263(4) TFEU simply because the corresponding article 36 SCA has not been updated accordingly by the EEA EFTA States. Instead, the EFTA Court considered the rationale behind the third limb of article 263(4) TFEU and found that the considerations underlying that provision did not apply 'in this case' (next to the fact that the decisions at hand did not constitute regulatory acts).[101] Although drawing grand conclusions from this may be premature, the EFTA Court appeared to leave the door open for a contextual and teleological reinterpretation of its standing rules, as suggested above, if the considerations at the basis of the changes to article 263(4) TFEU would apply to the case before it.

3.3 THE RIGHT TO EFFECTIVE JUDICIAL PROTECTION

A second line of argumentation put forward by Konkurrenten to persuade the EFTA Court to reconsider its interpretation of article 36 SCA was based on the fundamental right to effective judicial protection.[102] More specifically, Konkurrenten contended that EEA law does not provide for a complete system of legal remedies and procedures as provided for in

family life with a third-country national during genuine residence in another EEA State, the provisions of the Directive apply when that EEA national returns to their EEA State of origin' (emphasis added).

[100] EEA Agreement (n 1) recitals 4, 5 and 15.

[101] Case E-19/13 *Konkurrenten III* (n 44) para 91.

[102] ibid para 64; Case E-1/17 *Konkurrenten IV* (n 46) para 46.

the EU.[103] Although Konkurrenten did not further elaborate on this claim in *Konkurrenten III*, this statement should be read in light of the CJEU's case law on legal standing for individuals in the context of an action for annulment. The CJEU's refusal of a broader understanding of the requirements of direct and individual concern is primarily based on the premise that the EU Treaties already provide for a complete system of legal remedies and procedures,[104] through the combination of the action for annulment, the preliminary rulings procedure and the possibility to raise a plea of illegality before the EU judiciary in proceedings for acts of general application.[105] According to this proposition, these three avenues of judicial redress are complementary to each other and each avenue compensates for the others:

> [I]t should be borne in mind that in the complete system of legal remedies and procedures established by the FEU Treaty with a view to ensuring judicial review of the legality of acts of the institutions, where natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of Article 263 TFEU, directly challenge acts of the European Union of general application, they are able, depending on the case, either indirectly to plead the invalidity of such acts before the EU judicature under Article 277 TFEU or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid, to make a reference to the Court of Justice for a preliminary ruling on validity.[106]

The argument of lacking a complete system of legal remedies and procedures in EEA law was further elaborated upon by Konkurrenten in *Konkurrenten IV*. In *Konkurrenten IV*, Konkurrenten put forward that it should be granted standing pursuant to the right to effective judicial protection under EEA law and article 6 ECHR, because it had no other venue to challenge the validity of ESA's decision.[107] Konkurrenten argued that there is no obligation on the national courts of the EEA EFTA States to refer a question to the EFTA Court and, even if they do so, the opinions of the EFTA Court are not binding on them.[108] In addition, Konkurrenten put forward that, in any event, the EFTA Court is not empowered to rule on the validity of an ESA decision in the context of an advisory opinion procedure.[109]

Nonetheless, ESA's former version of its guidelines on the enforcement of state aid law by national courts repeatedly stipulated that national courts should rely on the advisory opinion procedure *ex* article 34 SCA where the issues raised at national level concern the validity of a state aid decision by ESA.[110] However, as put forward by Konkurrenten,

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[103] Case E-19/13 *Konkurrenten III* (n 44) para 65.

[104] The idea that the EU legal order provides for a 'complete system of legal remedies and procedures' was first introduced by the CJEU in *Les Verts*. See Case C-294/83 *Les Verts v Parliament* EU:C:1986:166 para 23.

[105] See especially Case C-50/00 P *Unión de Pequeños Agricultores v Council* EU:C:2002:462 paras 39-41. More recently: Case T-721/21 *Sunrise Medical and Sunrise Medical Logistics v Commission* EU:T:2022:791 paras 31-32.

[106] Case C-59/11 *Association Kokopelli* EU:C:2012:447, para 34. This proposition has been criticised. See Opinion of AG Bobek in Case C-352/19 P *Région de Bruxelles-Capitale v Commission* EU:C:2020:588 paras 139-140; Opinion of AG Jacobs in Case C-50/00 P *Unión de Pequeños Agricultores* (n 59) paras 36-48.

[107] Case E-1/17 *Konkurrenten IV* (n 46) para 46.

[108] ibid para 47.

[109] ibid.

[110] EFTA Surveillance Authority Decision No 254/09/COL of 10 June 2009 amending, for the 71st time, the procedural and substantive rules in the field of state aid by introducing a new chapter on enforcement of state aid law by national courts [2011] OJ L115/13, points 14, 64 and 78.

article 34 SCA only explicitly allows the EFTA Court to interpret EEA law, and not to rule on the validity of EEA law in general or ESA decisions in particular. Arguably, in *CIBA,* the EFTA Court framed questions of competence as a matter of interpretation of the EEA Agreement, and not as a matter of validity of the contested decision.[111] But what if the contested state aid decision is contested on the merits instead of on procedural/competence grounds? Since the EFTA Court is similarly competent to interpret the substantive provisions of EEA law in the context of an advisory opinion procedure,[112] it seems likely that the EFTA Court would adopt a similar approach. Implicitly, this may perhaps be deduced from the EFTA Court's statement in *Posten Norge* that an action for annulment is the '*primary* form of judicial protection against decisions of ESA',[113] suggesting that other avenues of judicial redress (such as the advisory opinion procedure) exist. In the absence of a clear precedent, the foregoing remains second-guessing, however.

In spite of this uncertainty, ESA nonetheless perceived this to be a valid alternative to make up for the gap created by the addition of a third limb to 263(4) TFEU, by insisting that national EFTA courts should in particular refer a question to the EFTA Court in case 'the measure was an aid scheme with a wide coverage for which the claimant may not be able to demonstrate an individual concern'.[114] Remarkably, ESA revised its guidelines on 31 May 2023 and omitted all references to the role of the advisory opinion procedure where the validity of its state aid decisions is concerned. Instead, the updated guidelines now explicitly state that the EFTA Court has jurisdiction to give advisory opinions on the interpretation of the state aid rules, '[h]owever, in order to seek the annulment of a State aid decision adopted by the ESA, an application for anulment (*sic*) must be brought under Article 36 SCA'.[115] Either this confirms that, as pointed out above, the EFTA Court can indeed not directly rule on the validity of ESA decisions in an advisory opinion and can merely provide an interpretation of the relevant provisions, leaving it up to the national court to draw the necessary conclusions. Alternatively, it means that ESA does not consider the advisory opinion as a valid option to assess the validity of state aid decisions, complementary to the annulment procedure.

Considering the above, it remains uncertain whether the EFTA pillar truly provides for a complete and complementary system of legal remedies with regard to (state aid) decisions of ESA, as compared to the EU, in light of the uncertainty surrounding the powers of the EFTA Court in the advisory opinion procedure. It should be noted, however, that in the EU state aid decisions are only very rarely (successfully) contested via a preliminary ruling procedure.[116] This observation is a consequence of the CJEU's *TWD* doctrine. In *TWD,* the CJEU ruled that recipients of state aid forming the subject-matter of a Commission decision

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[111] Case E-6/01 *CIBA Speciality Chemicals Water Treatment Ltd and Others v The Norwegian State, represented by the Ministry of Labour and Government Administration* [2002] paras 20-23.

[112] ibid para 22.

[113] Case E-15/10 *Posten Norge AS v EFTA Surveillance Authority* [2012] para 87 (emphasis added).

[114] EFTA Surveillance Authority Decision No 254/09/COL of 10 June 2009 amending, for the 71st time, the procedural and substantive rules in the field of state aid by introducing a new chapter on enforcement of state aid law by national courts [2011] OJ L115/13, point 64.

[115] EFTA Surveillance Authority Decision No 081/23/COL of 31 May 2023 amending the procedural and substantive rules in the field of State aid by introducing revised Guidelines on the enforcement of State aid rules by national courts [2023], point 27.

[116] Although rare, a state aid decision by the Commission was successfully challenged via the preliminary ruling procedure in Case C-212/19 *Compagnie des pêches de Saint-Malo* EU:C:2020:726.

cannot challenge the validity of such a decision via the preliminary reference procedure if the recipient could undoubtedly have challenged that decision via a direct action for annulment *ex* article 263(4) TFEU.[117] So far, the EFTA Court has only confirmed the applicability of the *TWD* doctrine in EEA law once, in an infringement action in which Iceland claimed the invalidity of an ESA decision requiring Iceland to terminate and recover unlawful state aid. Since Iceland failed to institute an action for annulment within the time limits laid down in article 36 SCA, it could not claim the invalidity of the decision during the infringement action anymore.[118] If the EFTA Court would confirm its applicability to the advisory opinion procedure too, the application of the *TWD* doctrine could mean that, in light of the more restrictive standing rules for actions for annulment, in theory, less applicants are barred from challenging the validity of ESA decisions via the advisory opinion procedure, in comparison to their EU counterparts before the CJEU. Whether this is a good thing and would compensate for the more restrictive standing rules, of course depends on the EFTA Court's (for now unclear) powers as regards the validity of ESA decisions in the context of such a procedure.

In *Konkurrenten IV,* Konkurrenten contended that it should have been granted standing because it had no other venue to challenge the validity of ESA's decision than via an action for annulment.[119] Claims concerning the unavailability of an effective remedy have not been able to persuade the CJEU to reconsider the interpretation of its standing requirements. According to the CJEU, the right to effective judicial protection cannot lead to a change of the legal framework or the setting aside of the conditions for legal standing laid down in the Treaties, such a reform being up to the Member States.[120] The EFTA Court's stance on this seems to be a bit more nuanced and less firm. Similar to the CJEU, in *Konkurrenten IV,* the EFTA Court firstly responded to Konkurrenten's claim for standing based on the right to effective judicial protection that 'the requirements of standing are a recognised part of a judicial procedure'.[121] This might have been a sign that the EFTA Court would follow the hard line followed by the CJEU in this regard, were it not that the EFTA Court added that 'Konkurrenten has not presented any argument that could persuade the Court to conclude that the application of the requirements of article 36 SCA is *in the present case* in breach of the fundamental right to effective judicial protection under EEA law, as interpreted in light of the ECHR'.[122] Unlike the CJEU, the EFTA Court hereby seemed to leave the door open for a reinterpretation of its standing requirements in light of the right to effective judicial protection, if persuasive arguments thereto would be presented. Here too, at first sight the EFTA Court appears to leave open the possibility of a contextual and teleological reinterpretation of its standing rules, as suggested above (see section 3.2).

The EFTA Court considered it furthermore necessary to reiterate that the right to effective judicial protection should be interpreted in light of the ECHR. Consequently, it could be assumed that the EFTA Court would at least have to agree with a more liberal interpretation of its standing requirements if the ECtHR would come to the conclusion that

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[117] Case C-188/92 *TWD* EU:C:1994:90 para 17.
[118] Case E-2/05 *EFTA Surveillance Authority v The Republic of Iceland* (n 33) paras 17 and 20.
[119] Case E-1/17 *Konkurrenten IV* (n 46) para 46.
[120] Case C-263/02 P *Commission v Jégo-Quéré* EU:C:2004:210 paras 29-36; Case C-50/00 P *Unión de Pequeños Agricultores* (n 105) paras 33-41.
[121] Case E-1/17 *Konkurrenten IV* (n 46) para 64.
[122] ibid (emphasis added).

the current interpretation of the requirements of direct and individual concern constitutes a breach of the ECHR. After all, the EFTA Court recurrently held that its procedural rules should be interpreted in light of fundamental rights,[123] which in turn should be interpreted in light of the ECHR and the case law of the ECtHR.[124] Particularly interesting in this regard is the fact that, in the wake of the EFTA Court's judgment in *Konkurrenten III*, Konkurrenten lodged a complaint with the ECtHR in September 2015, specifically with regard to the requirements on legal standing.[125] Although the ECtHR did not find a breach of article 6 ECHR on the right to a fair trial,[126] caution is warranted and neither general nor definitive conclusions can be drawn from the ECtHR's judgment. The ECtHR did not address whether the EFTA Court's interpretation of the *locus standi* requirements is or is not in line with article 6 ECHR, but only addressed the questions whether the EFTA Court sufficiently examined Konkurrenten's arguments and whether its decision was adequately reasoned.[127] It thus remains to be seen how the ECtHR would rule when confronted with the explicit question whether the EFTA Court's interpretation of its standing requirements in and of itself is in line with article 6 ECHR, and what impact this may have on the EFTA Court's case law in this regard. After all, the ECtHR has repeatedly found strict interpretations of procedural rules by courts, preventing an applicant's action from being examined on the merits, to be in breach of article 6 ECHR.[128] In addition, the ECtHR has held before that no one can be required to breach the law first in order to obtain protection of his or her civil rights in line with article 6 ECHR.[129] Interestingly, article 263(4) TFEU was amended and a third limb was added precisely in order to prevent individuals from having to infringe the law in order to have access to the court[130] - an amendment which has not been followed in the EFTA pillar. It is therefore interesting to see how the EFTA Court, despite the lack of an EEA equivalent, recognised the *ratio legis* behind the introduction of the third limb in *Konkurrenten III*, but found that these considerations did not apply 'in this case'.[131] The EFTA Court thus seemed to leave open the possibility of accepting such considerations, and to reinterpret its standing rules in the light thereof, if the specific case before it would require so. In any event, this issue is not merely hypothetical and will most likely arise sooner or later, as demonstrated above in section 2.

In light of the increased importance of state aid in the field of climate, the environment and energy,[132] similar questions will most likely arise in these fields too. Added to this,

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123 Case E-18/11 *Irish Bank* (n 84) para 63; Case E-15/10 *Posten Norge AS* (n 113) para 110.

124 Case E-12/20 *Telenor ASA* (n 95) para 75; Joined cases E-3/13 and E-20/13 *Fred. Olsen and Others v the Norwegian State* [2014] para 224.

125 *Konkurrenten.no v Norway* App no 47341/15 (ECtHR, 5 November 2019).

126 ibid para 48.

127 ibid paras 46-47.

128 *Gil Sanjuan v Spain* App no 48297/15 (ECtHR, 26 May 2020) para 31; *Zubac v Croatia* App no 40160/12 (ECtHR, 5 April 2018) para 97.

129 *Posti and Rahko v Finland* App no 27824/95 (ECtHR, 24 September 2002) para 64; *Stark and Others v Finland* App no 39559/02 (ECtHR, 9 October 2007).

130 As may be derived from the *travaux préparatoires* relating to the draft Treaty establishing a Constitution for Europe, the content of which has been copied in the Lisbon Treaty. See for example: Cover Note from the Praesidium to the European Convention (CONV 734/03) of 12 May 2003, 20; Case T-18/10 *Inuit Tapiriit Kanatami* (n 58) para 50.

131 Case E-19/13 *Konkurrenten III* (n 44) para 91. In addition, the EFTA Court found that the contested decisions did not constitute regulatory acts in the sense of the third limb of article 263(4) TFEU.

132 The (increasing) importance of state aid in the field of climate change, environmental protection and energy policy is evidenced by the European Commission's 2022 'Guidelines on State aid for climate, environmental protection and energy'. Similar guidelines have been issued by the EFTA Surveillance Authority. See: Communication from the Commission –

environmental NGOs have faced considerable – and perhaps even greater – obstacles in meeting the standing requirements before the CJEU and the EFTA Court. In the meantime, the EU pillar has undergone (and is still undergoing) certain developments in order to facilitate access of environmental NGOs to the CJEU. It is therefore important to analyse how the EFTA Court will deal with these EU pillar developments with regard to *locus standi* for environmental NGOs, especially since no similar developments have taken place in the EFTA pillar. The EFTA Court's judgment in *Bellona* serves as a starting point for this analysis.

4 *BELLONA*

In *Bellona,* the applicants, a German consultancy firm within the field of renewable energy and a non-profit environmental foundation, lodged an appeal before the EFTA Court against a by ESA approved Norwegian tax measure which allowed all new large-scale LNG facilities within a certain geographical area to benefit from increased depreciation rates. ESA had been of the opinion that the aid constituted "regional aid" within the meaning of article 61(3)(c) EEA Agreement. Hence, the Norwegian aid was not considered to be in violation of the EEA Agreement.[133] The application for annulment against ESA's decision was declared inadmissible by the EFTA Court since the applicants did not have the necessary *locus standi.*

According to article 36(2) SCA, natural and legal persons may institute an action for annulment against ESA decisions provided they are either the addressee of that decision, or if they are directly and individually concerned by the decision. As mentioned before, the EFTA Court in principle adheres to the CJEU's *Plaumann* case law for the interpretation of the notions 'direct concern' and 'individual concern'. In *Bellona,* the applicants asked the EFTA Court nonetheless to adopt a flexible interpretation of the rules on legal standing laid down in article 36(2) SCA, since application of the CJEU's *Plaumann* test did not allow them to obtain appropriate judicial redress *in casu.*[134] To reinforce their claim, the applicants referred to articles 6 and 13 ECHR, article 47 of the EU Charter of Fundamental Rights, and the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.[135] In hindsight, the latter reference is especially interesting in light of the decision taken by the Meeting of the Parties to the Aarhus Convention in October 2021, endorsing the findings of the Convention's Compliance Committee.[136] In its Decision VII/8f, the Meeting of the Parties concluded that the CJEU's interpretation of the notions of direct and individual concern is not in compliance with the obligation of article 9(3) and (4) of the Aarhus Convention to provide for effective access to

Guidelines on State aid for climate, environmental protection and energy 2022 [2022] OJ C80/1; EFTA Surveillance Authority Decision No 029/22/COL of 9 February 2022 amending the substantive rules in the field of State aid by introducing new Guidelines on State aid for climate, environmental protection and energy 2022 [2022/2072] OJ L277/218.

133 For the facts of the case, see Case E-2/02 *Technologien Bau- und Wirtschaftsberatung GmbH and Bellona Foundation v ESA* [2003] paras 1-7.

134 ibid paras 24 and 28.

135 ibid para 28.

136 For an appraisal of the legal value of decisions by the Meeting of the Parties to the Aarhus Convention and the reports of the Compliance Committee, see: Gor Samvel, 'Non-Judicial, Advisory, Yet Impactful? The Aarhus Convention Compliance Committee as a Gateway to Environmental Justice' (2020) 9(2) Transnational Environmental Law 211, 17–25; Elena Fasoli and Alistair McGlone, 'The Non-Compliance Mechanism Under the Aarhus Convention as "Soft" Enforcement of International Environmental Law: Not So Soft After All!' (2018) 65 Netherlands International Law Review 27.

justice for the protection of the environment.[137] In a separate procedure, the Compliance Committee further found that access to justice at EU level for environmental organisations also failed with regard to state aid decisions specifically.[138] Although endorsement of the latter was postponed by the Meeting of the Parties, it is noteworthy that Norway unmistakably declared that it expects the EU to follow up on its commitments under the Aarhus Convention.[139]

Despite the applicants' attempt to obtain a more liberal interpretation of the rules on legal standing, the EFTA Court nonetheless stuck with the case law of the (then) European Court of Justice (ECJ). The EFTA Court's reluctance to deviate from the ECJ's case law should be seen in its pre-Lisbon context. In 2002 Advocate General (AG) Jacobs advocated in *UPA* that the ECJ should reconsider its case law on the requirement of individual concern, in order to relax the conditions for individuals to institute an action for annulment since, otherwise, the applicant would have been deprived of any remedy.[140] Only two months later, in *Jégo-Quéré*, the (then) Court of First Instance (CFI) followed AG Jacobs in his reasoning that the strict interpretation of the requirement of individual concern should be reconsidered and abandoned.[141] Another two months later, the ECJ refused to follow AG Jacobs's plea for a broader interpretation of the rules on legal standing in *UPA* by stating that, if necessary, it is for the Member States, and not for the Court, to reform the system of judicial protection and, accordingly, the rules on legal standing.[142] Following its clear stance on the issue in *UPA*, the ECJ ruled on appeal in *Jégo-Quéré* that the CFI erred in law where it deviated from the ECJ's *Plaumann* test.[143] The EFTA Court acknowledged that it was aware of the ongoing debate between the AG, the CFI and the ECJ, but nonetheless it found it opportune to stick with the ECJ's *Plaumann* test in light of the uncertainty surrounding the discussion.[144]

Whilst the EFTA Court's reluctance in *Bellona* may be understandable in light of the ambivalent situation in the Community back then, it remains to be seen whether the EFTA Court is able to maintain this position if confronted with a similar issue today. Not only have the rules on legal standing been broadened by the Lisbon Treaty (see *supra*),[145] in the EU the

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[137] Decision VII/8f concerning compliance by the European Union with its obligations under the Convention, adopted by the Meeting of Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters at its seventh session (18-20 October 2021) para 3. Decision VII/8f was based on a report by the Aarhus Convention's Compliance Committee, see: Findings and Recommendations of the Compliance Committee with regard to Communication ACCC/C/2008/32 (Part II) concerning Compliance by the European Union (17 March 2017) para 66: '[…] the restrictions to access to justice imposed by the direct and individual concern test are too severe to comply with the Convention'.

[138] Findings and recommendations with regard to communication ACCC/C/2015/128 concerning compliance by the European Union (17 March 2021).

[139] Report ECE/MP.PP/2021/2 of the seventh session of the Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (18-20 October 2021), 11.

[140] Opinion of AG Jacobs in Case C-50/00 P *Unión de Pequeños Agricultores* (n 59).

[141] Case T-177/01 *Jégo-Quéré v Commission* EU:T:2002:112 paras 49-50.

[142] Case C-50/00 P *Unión de Pequeños Agricultores* (n 105) paras 44-45.

[143] Case C-263/02 P *Commission v Jégo-Quéré* (n 120) paras 29-39.

[144] Case E-2/02 *Bellona* (n 133) para 37.

[145] For the reasons set out in section 2, the approval by ESA of the aid scheme in *Bellona* may be considered a regulatory act not entailing implementing measures in the sense of article 263(4) TFEU. However, as the Aarhus Convention's Compliance Committee found, in light of the CJEU's current interpretation, it is practically impossible for an environmental NGO to prove that it is directly concerned by that measure when it purely acts for the purpose of promoting environmental protection. Therefore, a similar broadening of the standing requirements in the EFTA pillar would not suffice, unless the EFTA Court adopts a different interpretation than the CJEU. See: Findings and Recommendations of the Compliance Committee with regard to Communication ACCC/C/2008/32 (Part II) concerning Compliance by the European Union (17 March 2017) para 73.

Aarhus Regulation has been adopted to implement the Aarhus Convention at Union level and facilitate access to the CJEU for environmental organisations. The Aarhus Regulation provides for the possibility for NGOs and other members of the public to make a request for internal review to EU institutions and bodies of administrative acts allegedly adopted in breach of environmental law.[146] Subsequently, a decision by the EU institution or body rejecting the request for review may be brought before the CJEU via an action for annulment.[147] In this regard, the parties concerned will not have to prove anymore that they are directly and individually concerned since they will be the addressee of the review decision and can therefore rely on the first limb of article 263(4) TFEU.[148] The purpose of this measure is to compensate for the insurmountable obstacles environmental organisations face to prove that they are directly and individually concerned by EU acts impacting the environment.[149]

The Aarhus Regulation has, by contrast, not been incorporated in EEA law. In the first place, this may be explained by the fact that, although Liechtenstein has signed the Aarhus Convention, it has not ratified the Convention. In addition, the EEA Agreement is and remains primarily focused on economic and commercial cooperation, and has not known a similar broadening in scope as the EU. Nonetheless, it cannot be neglected that the EEA Agreement stipulates in its preamble that the Contracting Parties are determined 'to preserve, protect and improve the quality of the environment', and to take, in the development of EEA law, a high level of protection regarding the environment as a basis.[150] Not only does the EEA Agreement provide for a provision setting out the objectives and principles to be taken into account when the Parties adopt action relevant to the four freedoms in the field of the environment,[151] it further lists the environment as an area in which the Contracting Parties shall strengthen and broaden their cooperation outside these freedoms.[152] In addition, EU acts which essentially aim at implementing the Aarhus Convention, such as Directives 2003/4/EC and 2008/1/EC,[153] have been incorporated in EEA law without any reservations, and this despite Liechtenstein's non-ratification of the Convention.[154] Lastly, Liechtenstein did not ratify the Aarhus Convention *inter alia* due to limited human resources,[155] though it could be argued that incorporation of the Aarhus Regulation would only create rights and obligations at EEA level and would not burden Liechtenstein's

[146] Aarhus Regulation (n 10) Arts 10-11.

[147] ibid Art 12.

[148] Case T-569/20 *Stichting Comité N 65 Ondergronds Helvoirt v Commission* EU:T:2021:892 para 59; Case T-177/13 TestBioTech and Others v Commission EU:T:2016:736 para 53.

[149] Opinion of AG Kokott in Case C-212/21 P *EIB v ClientEarth* EU:C:2022:1003 paras 48-52; Case T-569/20 *Stichting Comité N 65* (n 148) para 59.

[150] EEA Agreement (n 1) recitals 9-10. See also EEA Agreement (n 1) Art. 1(2)(f), which stipulates that the objectives of the EEA Agreement shall be obtained through closer cooperation as regards, amongst others, the environment.

[151] EEA Agreement Art. 1(2)(f), Art 73.

[152] ibid Art 78.

[153] Art 1 of Directive 2008/1/EC even explicitly stipulates that the objective of the Directive is 'to contribute to the implementation of the obligations arising under the Århus Convention'. This has remained unchanged in the version incorporated in EEA law. Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (Codified version) [2008] OJ L24/8.

[154] Decision of the EEA Joint Committee No 123/2003 of 26 September 2003 amending Annex XX (Environment) to the EEA Agreement [2003] OJ L331/50; Decision of the EEA Joint Committee No 28/2012 of 10 February 2012 amending Annex XX (Environment) to the EEA Agreement [2012] OJ L161/34.

[155] See UNECE, 'International environmental agreements ratified and signed by Liechtenstein' <https://aarhusclearinghouse.unece.org/resources/international-environmental-agreements-ratified-and-signed-liechtenstein> accessed 7 September 2023.

administration. A case could therefore be made for incorporation of the Aarhus Regulation in EEA law by the EEA States.

Admittedly, in cases concerning state aid decisions of ESA, such as in *Bellona*, the Aarhus Regulation would not offer a solution since the Regulation explicitly excludes decisions taken in the field of competition law from its scope.[156] It should be noted, however, that the European Commission has conducted a public consultation to analyse the implications of the findings of the Aarhus Convention's Compliance Committee on state aid and to assess the options to resolve the issue. The solution the Commission proposes is to either amend the scope of application of the Aarhus Regulation to include state aid decisions or to amend other instruments to provide for an internal review process similar to the one under the Aarhus Regulation.[157] In any event, regardless of what measure will be adopted, its aim will be to facilitate access to the CJEU with regard to state aid decisions possibly having a negative impact on the environment and climate. This evolution will once again broaden the gap in judicial protection between the two EEA pillars if the EFTA pillar does not catch up.

As a consequence, ESA approved state aid schemes, which are possibly harmful for the environment and climate, will be practically shielded from judicial review in the EFTA pillar, contrary to similar state aid measures in the EU. Norway's unequivocal statement that it expects the EU to follow up on its commitments under the Aarhus Convention with regard to access to justice of environmental NGOs against state aid decisions,[158] sounds rather hollow in the context thereof. Not only may this broadening gap be considered alarming from the perspective of environmental and climate protection, it is clear that such an evolution also runs counter to the EEA Agreement's objective of creating equal conditions of competition throughout the whole EEA.[159] It remains to be seen how the EFTA Court will react to the evolutions that have taken place in the EU on a primary and secondary law level when confronted with the issue more than 20 years after *Bellona*. Uncontestably, the legal landscape has changed drastically within the EU pillar. Norway, as the biggest EEA EFTA country, plays a crucial and central role in the EU's and EEA's climate transition and energy policy, which increases the chance of cases being brought before the EFTA Court.

On the one hand, one could argue that the EFTA Court cannot deny the clear findings of the Aarhus Convention's Compliance Committee, endorsed by the Meeting of the Parties to that Convention, that 'the restrictions to access to justice imposed by the direct and individual concern test are too severe to comply with the Convention'.[160] The same holds true for the Compliance Committee's findings with regard to state aid decisions in particular, and Norway's unambiguous statement that it expects the EU to comply with the Aarhus Convention in this regard. On the other hand, it should be noted that the Aarhus Convention

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156 Aarhus Regulation (n 10) Art 2(2)(a).

157 Commission Communication COM(2023) 307 final of 17 May 2023 on the findings adopted by the Aarhus Convention Compliance Committee in case ACCC/C/2015/128 as regards state aid: Analysing the implications of the findings and assessing the options available.

158 Report ECE/MP.PP/2021/2 of the seventh session of the Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (18-20 October 2021), 11.

159 EEA Agreement (n 1) recital 4.

160 Findings and Recommendations of the Compliance Committee with regard to Communication ACCC/C/2008/32 (Part II) concerning Compliance by the European Union (17 March 2017), para 66.

has only been ratified by Norway and Iceland, but not by Liechtenstein,[161] and can thus not be relied on by the EFTA Court as a common standard to all the EEA EFTA States for the interpretation of EEA law, as it does with regard to the ECHR. The fact that all three EEA EFTA States are a party to the ECHR namely serves as a justification for the EFTA Court's interpretation of EEA law in light of the ECHR, and this despite the fact that the Convention is not incorporated in EEA law.[162]

Interestingly, in this regard is ESA's argument in *Liechtensteinische Gesellschaft für Umweltschutz v Gemeinde Vaduz* that Directive 2011/92/EU should have been interpreted in light of the Aarhus Convention for reasons of homogeneity between both EEA pillars, and this notwithstanding the fact that Liechtenstein is not a party to the Aarhus Convention and is thus not bound by that Convention under public international law.[163] Although the EFTA Court did not explicitly dwell on this issue, it nevertheless referred to the case of *Gemeinde Altrip and Others*, in which the CJEU interpreted the Directive in light of the objectives of the Aarhus Convention.[164] From this, it cannot be inferred with certainty, however, that the EFTA Court would now also be inclined to re-interpret its standing requirements in light of the Aarhus Convention. In *Liechtensteinische Gesellschaft für Umweltschutz v Gemeinde Vaduz,* the EFTA Court's interpretation was probably rather driven by homogeneity reasons, to ensure a homogeneous interpretation of Directive 2011/92/EU throughout the whole EEA, especially since the EFTA Court did not explicitly mention the Aarhus Convention itself in its reasoning.

The CJEU from its side persistently refuses to change its interpretation of the requirements of direct and individual concern in light of the Aarhus Convention and sticks with its *Plaumann* test.[165] Although the CJEU's case law in this regard predates Decision VII/8f of the Meeting of the Parties to the Aarhus Convention, it remains to be seen whether the CJEU will be inclined to reconsider its *Plaumann* test in environmental matters in light of that decision. In *Région de Bruxelles-Capitale v Commission,* the CJEU namely stipulated that, although international agreements concluded by the EU are binding upon the Union institutions, the Aarhus Convention cannot change the conditions of admissibility laid down in article 263(4) TFEU since that Convention cannot prevail over primary EU law.[166] Reiterating its statement in *UPA*, the CJEU held in *Sabo and Others* that it would therefore be up to the Member States to reform the current judicial framework laid down in the Treaties in order to facilitate access of environmental organisations to the Court, in line with the Aarhus Convention.[167] Arguably, the Treaties should not necessarily be changed in order to comply with the Aarhus Convention; it would suffice if the CJEU re-interpreted the rules on legal standing in a more liberal fashion. In the end, the current restrictive approach does not *per se* follow from the wording of article 263(4) TFEU itself, but rather from the way in which

[161] See Case E-3/15 *Liechtensteinische Gesellschaft für Umweltschutz v Gemeinde Vaduz* [2015] para 19.
[162] Case E-4/11 *Arnulf Clauder* [2011] para 49.
[163] See report for the hearing in Case E-3/15 *Liechtensteinische Gesellschaft für Umweltschutz v Gemeinde Vaduz* paras 48-49.
[164] In para 62 the EFTA Court referred to Case C-72/12 *Gemeinde Altrip and Others* EU:C:2013:712 para 28.
[165] Case C-297/20 P *Sabo and Others v Parliament and Council* EU:C:2021:24 paras 31-32; Case C-352/19 P *Région de Bruxelles-Capitale v Commission* EU:C:2020:978, paras 25-26.
[166] Case C-352/19 P *Région de Bruxelles-Capitale* (n 165) paras 25-26. See also: Case T-600/15 *PAN Europe and Others v Commission* EU:T:2016:601 paras 53-56.
[167] Case C-297/20 P *Sabo* (n 165) para 33.

the CJEU interprets that provision.[168] In this regard, it is worthwhile quoting AG Bobek's stance on this matter in *Région de Bruxelles-Capitale v Commission*:

> 115. The Court has held that *national courts* must 'interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of the Aarhus Convention and the objective of effective judicial protection of the rights conferred by EU law, so as to enable [environmental protection organisations] to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law […]
> 116. Although the Court has not yet had an opportunity to make similar statements with regard to the EU judicial procedures, I see no reason why those principles should not be equally valid. The Commission is right that international treaties cannot derogate or prevail over primary EU law. However, primary law can and should be interpreted, where appropriate and as far as possible, in conformity with international law.[169]

Since international agreements concluded by the Union are binding upon its institutions,[170] including the CJEU,[171] it could therefore be argued that the CJEU is under an obligation to re-interpret the requirements of direct and individual concern in light of the Aarhus Convention, especially since the adoption of Decision VII/8f by the Meeting of the Parties to that Convention. In doing so, the CJEU would not change the relevant provisions of primary EU law, but rather change the mere interpretation of these provisions in compliance with the Union's international obligations. A more liberal reading of the requirements of direct and individual concern would furthermore be in line with the CJEU's case law that EU law should be interpreted in a manner consistent with international law.[172] Moreover, it would be consistent with previous statements of the CJEU that the Union legislator aims for a wide access to justice in the field of environmental protection, since the public should play an active role in the preservation, protection and improvement of the quality of the environment.[173] Notwithstanding, as mentioned above already, AG Bobek's call for a broader interpretation of the rules on legal standing in light of the Aarhus Convention, was met with an outright rejection by the CJEU in *Région de Bruxelles-Capitale v Commission*.[174]

Although in *Konkurrenten III* and *IV* the EFTA Court seemed to leave open the door for a reinterpretation of its standing requirements if circumstances require so (see section 3),

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168 Opinion of AG Jacobs in Case C-50/00 P *Unión de Pequeños Agricultores* (n 59) para 75. See also: Ami Barav, *Judicial Enforcement and Implementation of European Union Law* (Bruylant 2017) 63–64; Laurence Gormley, 'Access to Justice: Rays of Sunshine on Judicial Review or Morning Clouds on the Horizon?' (2013) 5 Fordham International Law Journal 1169, 1174–1175.

169 Opinion of AG Bobek in Case C-352/19 P *Région de Bruxelles-Capitale* (n 106) paras 115-116.

170 Article 216(2) TFEU. See also: Case T-194/20 *JF v EUCAP Somalia* EU:T:2022:454 para 129; Case C-352/19 P *Région de Bruxelles-Capitale* (n 165) para 25.

171 On the basis of Art 13(1) TEU the CJEU is considered to be an institution of the EU and therefore the CJEU is also bound by the international agreements concluded by the Union.

172 Case C-515/19 *Eutelsat* EU:C:2021:273 para 62; Case T-381/15 RENV *IMG v Commission* EU:T:2020:406 para 77.

173 Case T-9/19 *ClientEarth v EIB* EU:T:2021:42 para 107; Case C-167/17 *Klohn* EU:C:2018:833 para 35.

174 Case C-352/19 P *Région de Bruxelles-Capitale* (n 165) paras 25-26.

as the EFTA Court is not bound by the CJEU's interpretation of its procedural rules,[175] it cannot be ruled out right away that the EFTA Court would come to a similar conclusion. Even more so since not all EEA EFTA States are a party to the Aarhus Convention (i.e., Liechtenstein). On the other hand, the considerations of (equal) access to justice set out in section 3.2 likewise apply as regards access of environmental NGOs to the EFTA Court. In combination with the EEA Agreement's objective to preserve, protect and improve the quality of the environment, an argument could nonetheless be made for a broader understanding of the rules on *locus standi* by the EFTA Court.

In the EU, the issue of access to justice for environmental NGOs may also be resolved through the 2021 revised version of the Aarhus Regulation and the future amendments currently being assessed by the Commission. If the scope of the Aarhus Regulation were to be extended to state aid decisions, as one of the solutions proposed by the Commission, the CJEU would not even be required anymore to reconsider its interpretation of the standing requirements at all. Environmental NGOs would then be able to request the Commission for an internal review of a state aid decision *ex* article 10 of the Aarhus Regulation. Consequently, a negative decision may easily be challenged before the CJEU since the environmental NGO(s) concerned are then the addressee(s) of that decision in the sense of the first limb of article 263(4) TFEU.[176] The same approach would be followed in the other proposals for similar amendments to other EU law instruments.[177]

Arguably, the EFTA Court's approach will most likely depend on what steps will be taken next in the EU pillar. For now, it can be expected that the EFTA Court will only accept a more liberal approach to the standing rules in environmental matters if the CJEU goes first, which it can then justify under the pretext of (procedural) homogeneity or considerations of (equal) access to justice,[178] without having to rely on the Aarhus Convention. If the European Commission instead proceeds with the proposals made in light of the public consultation, and the Aarhus Regulation or other instruments are amended in order to facilitate access for environmental organisations to the CJEU in the field of state aid, more resistance may be expected from the EEA EFTA States if the EFTA Court were to follow-up on this evolution by reinterpreting its standing requirements. As shown above already, although the Contracting Parties seem to accept the idea that the EFTA Court follows the CJEU's case law on *locus standi*, it might go a step too far if the EFTA Court were to pursue its endeavour of preserving homogeneity by also taking into account legislative EU pillar changes impacting the standing requirements. Inevitably, if it does so, a broadening of the standing rules would necessarily have to be based on sources intrinsic to EEA law and the specific legal context of the EEA Agreement.[179] Instead, it would perhaps be better if the Contracting Parties

[175] Case E-8/19 *Scanteam AS* (n 65) para 45; Case E-2/12 *INT HOB-vín ehf.* (n 65) para 9.

[176] Aarhus Regulation (n 10) Arts 10-12.

[177] See: Commission Communication COM(2023) 307 final of 17 May 2023 on the findings adopted by the Aarhus Convention Compliance Committee in case ACCC/C/2015/128 as regards state aid: Analysing the implications of the findings and assessing the options available.

[178] In case it concerns a reinterpretation of the part of article 263(4) TFEU that is identical to article 36(2) SCA, the EFTA Court can rely on the principle of procedural homogeneity. If it instead concerns a reinterpretation of the third limb of article 263(4) TFEU, the EFTA Court will – by lack of an EEA equivalent – necessarily have to base itself on a source found in EEA law, such as considerations of (equal) access to justice and effective judicial protection underlying the EEA Agreement (see section 3.2).

[179] Because of a lack of Union citizenship in EEA law, the EFTA Court therefore also found in *Jabbi* that 'it must be examined if homogeneity in the EEA can be achieved based on an authority included in the EEA Agreement'. See Case E-28/15 *Yankuba Jabbi* (n 75) para 68.

relieved the EFTA Court of this thorny issue (to reinterpret or not to reinterpret) by incorporating the (revised) Aarhus Regulation in EEA law themselves.

5 CONCLUSION

Over the past 15 years, the EU has been subject to a number of legal developments regarding access of individuals and economic operators to the CJEU. On the one hand, the 2009 Lisbon Treaty has broadened the requirements of standing enshrined in article 263(4) TFEU, extending the class of acts amenable to review by the CJEU to regulatory acts not entailing implementing measures which are of direct concern to the applicant(s). On the other hand, with regard to access to the CJEU for environmental organisations specifically, the EU has been found in breach of the Aarhus Convention by the Convention's Compliance Committee twice. These findings have prompted the EU to revise its Aarhus Regulation in 2021, another revision with regard to state aid decisions being examined at the moment. At the same time, similar legislative and treaty-making developments have not taken place in the EFTA pillar of the EEA.

When it comes to the standing requirements before the EFTA Court, both for individuals and economic operators in general, and for environmental organisations in particular, the EFTA pillar situation still reflects the more restrictive pre-Lisbon situation. In light of the earlier and ongoing EU pillar advancements, this stalemate in the EFTA pillar is liable to broaden the gap in judicial protection between both EEA pillars. Such divergence in judicial protection is detrimental to the EEA Agreement's main objective of establishing a homogeneous European Economic Area, based on common rules and equal conditions of competition.[180] Such equal conditions of competition may only be achieved if individuals and economic operators cannot only *effectively* defend their EEA rights at the judicial level, but also if everyone is *equally* entitled to do so throughout the whole EEA. The EEA States and the EU subscribed to this idea at the time the EEA Agreement was signed where its preamble states that individuals will play an important role in the EEA through the judicial defence of their EEA rights.[181] Thereto, the EEA EFTA States established judicial procedures 'similar to those existing in the Community'.[182] However, as a consequence of EU law developments analysed in this article, this supposed similarity is more and more under threat as regards the standing requirements.

Since the EEA EFTA States have so far not adapted the EFTA pillar judicial framework to bridge the gaps created by these EU pillar advancements, the EFTA Court will increasingly be confronted with issues of unequal access to justice between both EEA pillars. The question arises whether and how the EFTA Court will be able to reconcile this issue with its recurrent statements that equal access to justice is a prerequisite to the good functioning of the EEA, on the one hand, and the limits of its judicial powers, on the other hand. Although, so far, the EFTA Court has been able to avoid having to re-interpret its standing requirements in light of the abovementioned EU legal developments, this article has shown that situations will arise most likely sooner than later in which the EFTA Court will have to tackle the issue. In *Konkurrenten III* and *IV,* the EFTA Court seems to have left

[180] EEA Agreement (n 1) recitals 4 and 15.
[181] ibid recital 8.
[182] ibid Art 108(1).

the door open for a reinterpretation of its standing requirements if confronted with a regulatory act in the sense of article 263(4) *in fine* TFEU,[183] or if the strict interpretation and application of its standing requirements would lead to a breach of fundamental rights.[184] Caution is nonetheless warranted until the EFTA Court pronounces itself on the matter again. The EFTA Court's possible response regarding access to justice for environmental organisations, especially with regard to state aid decisions by ESA, is surrounded by even more uncertainty, and will most likely depend on whether a judicial or legislative solution will be pursued in the EU. Regardless of how the EFTA Court will proceed and how its case law on *locus standi* will evolve, it will without a doubt be accompanied by the necessary (academic and political) debate, opposition and contestation.

[183] Case E-19/13 *Konkurrenten III* (n 44) para 91.
[184] Case E-1/17 *Konkurrenten IV* (n 46) para 64.

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BOOK REVIEW

The respect of the rule of law by the European Union in times of economic emergency – Apropos of Anna Zemskova's brilliant Ph.D.

Pablo Martín Rodríguez*

1 INTRODUCTION

On April 26th Anna Zemskova obtained her PhD in Law from Lund University. She brilliantly defended a doctoral thesis titled *The Rule of Law in Economic Emergency in the European Union*. Her opponent was professor Takis Tridimas (King's College London). I had the opportunity and the privilege of both attending such defense and being part of the assessment panel together with Prof. Helle Krunke (University of Copenhagen) and Assoc. Prof. Julian Nowag (Lund University). The thesis was supervised by Prof. Xavier Groussot and Prof. Jeffery Atik.

As its title indicates, the dissertation has tackled an extremely intricate legal topic. The concept of the rule of law has been one of the few ideas shaping Western legal thought and legal systems over the past two centuries. Most likely a second one is solving the conundrum of emergency law. However, far from being outdated, rule of law and emergency law remain crucial and pervasive issues in contemporary legal discourse, extending well beyond their traditional domains of legal theory and philosophy, constitutional law, and comparative law, and asserting themselves unapologetically in international law and European Union (EU) law.

It is precisely the twofold focus on the EU itself and economic emergencies, i.e., a nontraditional polity and a nontraditional type of emergency, which makes Anna Zemskova's theoretical endeavour particularly remarkable.[1] This is especially opportune given that, as the author notes, recent attention has been almost entirely focused on the rule of law backsliding in some Member States, leaving the issue of how the EU itself abides by the rule of law somewhat overlooked.[2]

I fully agree with Zemskova that paying attention to this issue is crucial if we are to honour the foundational nature of the rule of law within the EU. This is particularly evident when observing the consequences of the response to the 2008 financial crisis that led to the sovereign debt crisis affecting several EU countries and caused the redesign of the Economic and Monetary Union (EMU), including the creation of a financial rescue mechanism for Member States.[3]

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1 Anna Zemskova, *The Rule of Law in Economic Emergency in the European Union* (Lund: Lund University 2023).

2 Pablo Martín Rodríguez, *El Estado de Derecho en la Unión Europea* (Madrid: Marcial Pons 2021) 22.

3 Pablo Martín Rodríguez, '*Dialogical rule of law* y respuesta europea a la crisis' in Luis Miguel Hinojosa Martínez and Pablo Martín Rodríguez, *La regulación internacional de los mercados y la erosión del modelo político y social europeo* (Cizur Menor: Thomson Reuters Aranzadi 2019).

The dissertation approaches its topic with remarkable intellectual honesty. The language used is accurate, beautiful but unpretentious, and the reasoning is transparent and open. The author explicitly states her legal philosophical assumptions and premises and sticks to them throughout the book. The results and conclusions are gradually delivered, introducing the reader smoothly to complicated legal issues and EU policies involving a vast amount of legislation. The challenge of handling an enormous volume of scientific literature, even if only in English sources, is accomplished successfully.

2 OUTLINE OF THE DISSERTATION AND MAIN CONCLUSIONS

After the introductory chapter discussing hypotheses, research questions, methodology, and the state of the art, Chapters 2 and 3 present the theoretical framework of the dissertation. They adopt a concept of the rule of law applicable to the EU and identify EU economic emergency law and its gaps. The author then applies these categories to the EU's response to the financial and economic crises in three different areas: economic and fiscal governance, monetary policy, and financial assistance. Chapter 7 provides a comparison with the EU's response to the COVID-19 pandemic. The dissertation closes with a Concluding Chapter.

Regarding the notion of the rule of law, Zemskova reviews its origin and evolution in EU law, with a particular focus on the Court of Justice and recent legal instruments addressing Member States' compliance. Adopting a common approach found in scientific literature, she identifies the essence of the rule of law in countering arbitrariness (with a distinct Krygier resonance)[4] while also emphasizing its sometimes-forgotten function of legitimizing the exercise of power. Based on these premises, the dissertation takes an *anatomical approach* which focuses less on finding a definition than on identifying rule of law components that are operational as general principles of EU law. Three facets emerge: a formal facet embracing principles of legality, legal certainty, and transparency; a substantive facet formed by fundamental rights; and a procedural facet ensuring individuals' access to justice, which enables the actualization of both formal and substantive aspects.

Chapter 3 aims to address the difficulties in finding an autonomous concept of economic emergency. The author argues that financial instability can be considered as a trigger for economic emergencies. Zemskova reviews the various provisions in EU primary and secondary law related to emergencies, highlighting that the principle of conferral leaves open the question of how to respond outside of specific provisions, especially considering that a state of economic emergency is rarely declared and the EU has no provision for it. Then, EU's approach oscillates between an extralegal model and a business-as-usual model. Following a neo-functionalistic rationale of the EU constitutional architecture, Zemskova claims that, in order to preserve the European project, extraordinary measures have been adopted, often involving centralization and technocratization of Member State competences, which implies a certain politicization of EU technocratic institutions. Those by no means business-as-usual measures have been imaginatively internalized into the system, changing it

[4] See Martin Krygier and Adam Winchester, 'Arbitrary power and the ideal of the rule of law' in Christopher May and Adam Winchester (eds), *Handbook on the Rule of Law* (Cheltenham: Elgar 2018).

but giving the impression that no resort to extralegal measures did exist. In her opinion, this approach cannot be easily reconciled with the rule of law *tout court*.

The following three chapters focus on the measures enacted in response to the 2007-2008 financial crisis, highlighting their controversial aspects in terms of the rule of law. Chapter 4 examines fiscal and economic policy which, as is well known, has undergone a formidable revision and legal reinforcement, in particular for Eurozone states. The author leads the reader beautifully through this true legal maze. She identifies weaknesses in terms of the principle of conferral, especially regarding specific country recommendations even if infringements thereof have not been pursued or sanctioned. She raises concerns about intertwining soft and hard law, as well as EU law and international law – which is a very common feature. Since the possibilities of individuals for challenging any of these measures before the Court of Justice are largely curtailed, the book gives a somber image of the procedural facet and its potential for actualization of the substantive facet, i.e., assuring respect for fundamental rights.

Considering the monetary policy *volet*, Zemskova discusses the controversial measures put in place by the European Central Bank (ECB). She convincingly outlines the insufficiencies in terms of the rule of law, such as the chiaroscuros related to conferral, compliance with Article 123 TFEU, and the wide discretion and secrecy endorsed by the Court of Justice. The conclusions drawn from this analysis are highly relevant for the rule of law, extending the mere role of the ECB in swiftly responding to economic emergencies.

Chapter 6 focuses on the most prominent manifestation of exceptionality in the European reaction to the crisis: granting financial assistance to Member States. This assistance has taken the form of bilateral loans or EU funds (Article 122 TFEU), but also instruments remaining formally outside EU law, such as the European Financial Stability Facility and the European Stability Mechanism. The book highlights the questionable legality of this financial assistance and its often intergovernmental or hybrid legal nature, but it rightly assigns utmost importance to the meager respect of the procedural facet of access to justice. Thus, despite certain improvements in *Ledra Advertising* or *Florescu*, other cases such as *Mallis*, *Associação Sindical dos Juízes Portugueses*, *Chrysostomides* or *Brinkmann* prove that the Court of Justice is still is far away from providing individuals an adequate level of effective judicial protection.

Chapter 7 provides a brief comparison with the EU's response to the COVID-19 pandemic and its economic dimension. According to Zemskova, although there are similarities in terms of swiftness and creative legal mechanisms, the response to the pandemic is more rule of law-oriented, following a 'business-as-usual' model. This is facilitated by the higher sophistication of the EU's economic emergency constitutional architecture that has already been achieved, as well as the symmetric impact of a non-economic-originated emergency across the Union. This contrast reveals, in her opinion, a novel rebalancing of the Economic and Monetary Union (EMU) with a new understanding of conditionality and solidarity between Member States.

Through her profound analysis, Zemskova reaches a central conclusion. She argues that due to the specific features of economic emergencies, they tend to lead to constitutional mutations or transformations. Even without formal declarations or primary law amendments, the requirements of the rule of law are not only softened but also extended well beyond the actual economic emergency, gradually becoming part of the legal normalcy.

As a result, these changes become 'embedded in the principle, which is, henceforth, perceived and applied in its modified version'.[5]

This succinct description of the thesis highlights the interest and relevance of Anna Zemskova's analysis. In my view, her approach combines a canonical constitutional perspective with a strong autonomous legal conception of the EU. Nonetheless, as someone with a background in international law, I hold a different and more nuanced concept of the EU's autonomy as both a legal system and a political entity. This likely extends to my perspective on emergency law as well. Additionally, my 20th century academic upbringing in a linguistically diverse environment leads me to resist the notion that everything interesting is written in English or its associated implications.

Despite these differences, I agree with the majority of the book's conclusions. This convergence of viewpoints is noteworthy, and it could be valuable to engage in a brief dialogue from an alternative perspective on two key topics: the legal articulation of the rule of law and the mixed nature of EU emergency law.

3 ON THE LEGAL ARTICULATION OF THE RULE OF LAW WITHIN THE EU

3.1 ON SOME THEORETICAL ASSUMPTIONS AND DILEMMAS

Addressing the concept of the rule of law in the EU entails considering four theoretical positions that are often left unspoken. These issues pertain to the uniqueness and binding nature of the rule of law within the EU's legal system, as well as the components it encompasses and how they are legally articulated and operationalized.

Often rooted in orthodox constitutional approaches, the notion of the rule of law has been understood as the practical outcome of other constitutional rules and principles. Consequently, the rule of law is viewed as an aspirational ideal embedded in the constitution but lacking the inherent ability to produce concrete legal consequences. This aligns with the legal theory common assertion that 'the rule of law is not *a* rule of law'.

This ethereal understanding of the rule of law conveniently accommodates the theoretical debate on its formal or substantive interpretation (referred to as thin or thick versions). It also appears to be consistent with its historical development in EU law, primarily shaped by the case law of the Court of Justice, which has predominantly focused on access to justice or judicial scrutiny since the seminal *Les Verts* case.[6] Additionally, it aligns with the recognition of the rule of law as a foundational European *value* common to its Member States.

However, this framework has been challenged as instances of rule of law backsliding in certain Member States necessitated the operationalization of the rule of law as a legal concept beyond its theoretical or speculative dimension. These challenges compelled the EU to define the legal parameters of the rule of law, i.e., how it has been effectively translated into the EU legal system, giving rise to enforceable legal standards. This has sparked familiar debates in EU law literature, such as the legal effects of Article 2 of the Treaty on European Union (TEU), the autonomous binding nature of the rule of law, the specific obligations it

[5] Zemskova (n 1) 330.
[6] Case 294/83 *Parti écologiste 'Les Verts' v European Parliament* EU:C:1986:166 para 23.

encompasses, the mechanisms for enforcement, and the scope and content of these obligations concerning the EU and the Member States.

There have been, indeed, some advancements in EU legislation and case law that shed light on some of these questions. For example, when examining the value enshrined in Article 2 TEU in relation to other Treaty provisions such as Articles 19 or 49 TEU, it becomes apparent that the concept of the rule of law may entail legal obligations that go beyond the traditional scope of EU law.[7] Precisely the Court of Justice is currently being called upon to clarify the autonomous binding effects of Article 2 TEU.[8] An important development in this regard is the inclusion of a definition of the rule of law in a legally binding act, namely Article 2 of Regulation 2020/2092 on financial conditionality.[9]

However, it seems that these developments towards a stronger binding nature and specificity of the rule of law have primarily affected Member States. This has led many authors to interpret (not always openly) that the rule of law may have a different content when applied to the EU as an entity compared to its application to the Member States.[10]

It is submitted here that the *effet utile* and consistency of Article 2 TEU are against those conclusions. In my view, Article 2 TEU ought to be understood as the posited translation of the rule of law in the EU legal order. Nothing different would imply the foundational nature of these values, former principles.[11] Conceiving the rule of law as the mere result of other principles and rules only intellectually connected by the speculative notion of the rule of law would deprive Article 2 TEU of any legal effect, degrading it to less than a programmatic provision.

The dissociation of the rule of law in its application to Member States and to the EU is not persuasive enough either. The wording of Article 2 TEU makes no difference among the values mentioned, and no such idea has been raised regarding other EU foundational values, such as fundamental rights or human dignity. In addition, given the decentralized nature of the implementation of EU law, the essentiality of Member State compliance with the rule of law should be taken into account. The only path for EU law to ensure the respect for the rule of law is by demanding Member States to comply with it when applying EU law. Therefore, it is not merely a situation of interconnected elements ('communicating vessels'), but rather an inherent link that necessitates a consistent and uniform understanding of the rule of law.[12] Differentiating between both levels, namely, demanding Member States to

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[7] In the *judicial independence in Poland* saga, the Court of Justice has acknowledged that subparagraph (2) of paragraph (1) of Article 19 TEU *gives concrete expression to the value of the rule of law* as outlined in Article 2 TEU, according to which Member States are obligated to ensure effective legal protection including independence of the judiciary in those areas covered by EU law (e.g. Case C-192/18 *Commission v Poland (Independence of ordinary courts)* EU:C:2019:924 para 98). In *Repubblika*, the Court made a connection between Articles 2 and 49 TEU to deduce a non-regression principle. This principle requires Member States not to lower the level of protection of the rule of law, including the independence of the judiciary, that was in place at the time of accession (Case C-896/19 *Repubblika v Il-Prim Ministru* EU:C:2021:311).

[8] See Case C-769/22 Action brought on 19 December 2022 — *European Commission v Hungary* (pending).

[9] 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 L433I/1.

[10] See e.g., *Zemskova* (n 1) 57-58.

[11] I agree with those who contend that the Lisbon Treaty cannot be interpreted as demoting the legal nature of these principles (See Armin von Bogdandy, 'Principles of a Systemic Deficiencies Doctrine: How to Protect Checks and Balances in the Member States' (2020) 57(3) Common Market Law Review 705, 716-717).

[12] Advocate General Campos Sánchez-Bordona accurately contends that '[t]he concept of the rule of law has an autonomous meaning within the EU legal system. It cannot be left to the national law of the Member

comply with certain principles that the EU does not, would necessitate a specific normative foundation that is lacking. The inherent challenge lies in elucidating why the content of the rule of law may vary in its application. My contention is that this divergence can be attributed to the nuances and sophistication of its legal articulation in the EU. A previous thorny issue on the definition of the rule of law is briefly tackled.

3.2 RULE OF LAW DEFINITION V RULE OF LAW COMPONENTS

It is a common place to note that the Treaties do not contain a definition of the rule of law. Most constitutions do not either, but states have historical legal traditions where the notion has emerged and evolved. Unlike states, the Union not only lacks this tradition but presents itself as a different political-legal entity of an international nature, where the translation of the rule of law concept is not straightforward.[13]

As Burgess points out, the rule of law is a historical category[14] and I think that a dual European consensus on the rule of law can be found in contemporary Europe which pleas for a *thickened version*.[15] This consensus concurs on a core set of formal requirements or contents, but also on the recognition of the necessary complementarity of the rule of law with a democratic system and the respect for fundamental rights.[16]

This approach has been codified in Article 2(a) of Regulation 2020/2092 on financial conditionality which reads as follows:

> 'the rule of law' refers to the Union value enshrined in Article 2 TEU. It includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU.

States to determine its parameters, because of the risk this would pose to its uniform application' (Opinion of AG Campos Sánchez-Bordona in Case C-156/21 *Hungary v European Parliament and Council of the European Union* EU:2021:974 para 273).

[13] Diego J Liñán Nogueras, 'La internacionalización del Estado del derecho y la Unión Europea: una traslación categorial imperfecta' in Diego J Liñán Nogueras and Pablo Martín Rodríguez (eds), *Estado de Derecho y Unión Europea* (Madrid: Tecnos 2018).

[14] Paul Burgess, 'Neglecting the History of the Rule of Law: (Unintended) Conceptual Eugenics' (2017) 9(2) Hague Journal on the Rule of Law 195.

[15] Martín Rodríguez, *El Estado de Derecho* (n 2) 27.

[16] This approach is followed by the Council of Europe and the EU (see Commission européenne pour la démocratie par le droit (Commission of Venice), Report on the Rule of Law, Venice, 25-26 March 2011, CDL-AD (2011) 003 rev and Rule of Law Checklist, Venice, 11-12 March 2016, CDL-AD (2016) 007; and European Commission, 'Communication A New EU Framework to Strengthen the Rule of Law' COM (2014) 158 final; Commission, 'Report on the Rule of Law in 2020 - The Rule of Law Situation in the European Union' COM (2020) 580 final). But it can also be linked to the evolution of national manifestations within European states (Laurent Pech and Joelle Grogan (dirs), 'Unity and Diversity in National Understandings of the Rule of Law in the EU', EU Project RECONNECT, Deliverable 7.1, 30.04.2020 and 'Meaning and Scope of the EU Rule of Law', EU Project RECONNECT, Deliverable 7.2, 30.04.2020, <https://reconnect-europe.eu/publications/deliverables/> accessed 1 October 2023).

Without endorsing it conceptually, the Court of Justice has functionally embraced this definition in the conditionality regulation cases.[17] It is worth noting that this definition affirms the two central features of the European consensus mentioned above. The first feature is the *interconnectedness of the rule of law with other values* inherent to the thickened version. This interpretative interdependence has an unquestionable legal foundation at the European level. Article 2 TEU explicitly declares democracy, respect for fundamental rights, and human dignity also as EU foundational values common to the Member States,[18] but they still retain their autonomy.[19]

The second feature is the *subtle shift from the definition towards the components* of the rule of law. Although the definition issue is not irrelevant, I agree with those authors, such as Zemskova who opts for an anatomical approach. As long as there is consensus that the rule of law encompasses certain principial contents and there exist legal mechanisms to make them operational, the repercussion of the absence of a definition does not disappear, but it is substantially diminished.

This occurs in Union law, where the components of legality, legal certainty and prohibition of arbitrariness, effective judicial protection (including the right to a judicial remedy), separation of powers, and equality before the law have been judicially recognized as general principles.[20] The Court of Justice has unequivocally recognized and developed them in its case law, often intertwined with each other.[21]

Thus, general principles of EU law appear as the first channel through which the value rule of law treads the path from axiological to deontic.[22] It is indeed an appropriate channel, since general principles are, according to Alexy,[23] legal norms imposing an optimization command that mirrors the axiological nature of values.

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[17] Case C-156/21 *Hungary v European Parliament and Council of the European Union* EU:C:2022:97 para 227.

[18] It can be argued that this is also an inherent consequence of the instrumental nature of the rule of law. Once embedded in a democratic constitutional system, the rule of law becomes instrumental, serving as a guarantee for preserving the democratic system itself. Therefore, it is inevitable to recognize a certain 'cross-fertilization', which is not an ideological use – as certain States have sometimes denounced – but rather the consequence of being such a *vehicular principle* (Diego J. Liñán Nogueras, 'Valores y Derecho: la tiranía del método' in Pablo Martín Rodríguez, *Nuevo mundo, nueva Europa. La redefinición de la Unión Europea en la era del Brexit* (Valencia: Tirant lo Blanch 2020) 28).

[19] See the interpretation of the expression 'also as regards fundamental rights' as not being part of the rule of law but only 'an illustration' (Case C-156/21 *Hungary v Parliament and Council* (n 17) para 229).

[20] It is rather quite significant that the rule of law materializes through general principles, the sort of legal norm whose control is retained by judicial organs. In fact, over time general principles have received different types of legal recognition, demonstrating the interesting dynamic between case law and legislation, between *jurisdictio* and *gubernaculum* (Gianluigi Palombella, 'The Rule of Law at Home and Abroad' (2016) 8(1) Hague Journal on the Rule of Law 1).

[21] Case C-157/21 *Poland v European Parliament and Council of the European Union* EU:C:2022:98 paras 290-292.

[22] A second channel is the use of the rule of law as a mere *parameter of control* for Member States. I cannot expand on this issue linked to Article 2 TEU and its enforceability towards Member States, the failure of Article 7 TEU procedure and the subsequent jurisdictional response. Let us just say that there is a crucial difference between both channels in terms of the principle of conferral (Martín Rodríguez, *El Estado de Derecho* (n 2) 33-44).

[23] Robert Alexy, *Teoría de los derechos fundamentales* (2nd edn, Madrid: Centro de Estudios Políticos y Constitucionales 2012).

3.3 RULE OF LAW COMPONENTS AS GENERAL PRINCIPLES OF EU LAW: CONCEPTUAL STRETCHING

By recognizing its components as general principles, EU law has substantially incorporated the value of the rule of law. However, this mere legal qualification does not suffice to illustrate the characteristics of this incorporation. When applied in an international setting, it is impossible not to notice a *conceptual stretching*, as explained by Konstadinides.[24] This sort of essentialism seems the only means of acquiring a necessary autonomous content. Nevertheless, this conceptual stretching that occurs in non-state political entities is connected or determined by the establishment of legal equivalences and/or presumptions, impacting on each component or general principle in a specific way.

The EU supranational framework requires the search for similarities for the components of the rule of law that, being halfway between their functional and substantive character, remain *unfinished* to a variable extent.[25] The principle of legality may illustrate this. If one looks at the formal core of legality (public authorities may only act through law and only to the extent authorized by the law), its incorporation into the EU legal system is evident, even unchanged, within the principle of conferral (Article 5 TEU).

However, as the principle of legality moves away from the formal aspect and delves into a substantive approach linked to the separation of powers and democratic legitimacy (which focuses, among other aspects, on parliamentary act supremacy, its making-process, or the connection to a representative institution), the introduction of this component requires establishing some equivalences, such as taking separation of powers and institutional balance as equivalent.[26] The category of legislative acts introduced by the Lisbon Treaty clearly proves this unfinished equivalence and suggests that the 'stretched legality' in EU law seeks to preserve the agreed procedure as a manifestation of the institutional balance (i.e., that original separation of powers) rather than shaping a qualified superior legal act, due to their complicated democratic pedigree as they emanate from an already atypical 'legislator'.[27]

The incorporation of rule of law components also resorts to legal fictions or presumptions, as illustrated by access to justice. This is a key component historically developed in the case law, and now understood in light of the fundamental right to effective judicial protection enshrined in Article 47 of the Charter. However, it should be borne in mind that this general principle works on the presumption that the EU legal system provides

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[24] Theodore Konstadinides, *The Rule of Law in the European Union. The Internal Dimension* (Oxford: Hart Publishing 2016) 38.

[25] These unfinished equivalences constitute, in my opinion, *non-univocal normative foundations*, and their immediate effect is to foster or project an open spectrum of legal evolution, thereby incorporating the rule of law to the Union legal system with the capacity for renewal and adaptation. They possess the ability to generate new responses within the system itself, whose evolution is also open due to the functional model of conferral and its articulation through general principles of law (Martín Rodríguez, *El Estado de Derecho* (n 2) 48).

[26] An equivalence less perfect than it may look (See Paz Andrés Sáenz De Santa María, 'El estado de derecho en el sistema institucional de la Unión Europea: realidades y desafíos' in Diego J Liñán Nogueras and Pablo Martín Rodríguez (eds), *Estado de Derecho y Unión Europea* (Madrid: Tecnos 2018)).

[27] Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council of the European Union* EU:C:2017:631.

a complete system of remedies that fully guarantees effective judicial protection.[28] This is a complex legal fiction, as there is no European judicial system as such. With only a system of judicial cooperation in place, this presumption entails, as we know, interpretative and even law-creating effects,[29] but mostly it heavily relies on the requirement for national legal systems to ensure full compliance with the principle, as set forth in Article 19 (1) and (2) TEU.[30] Thus, examining the procedural facet of the rule of law needs including both EU courts and national courts.

3.4 RULE OF LAW COMPONENTS AS GENERAL PRINCIPLES OF EU LAW: OPERATIONAL CONTEXTUALITY

Although this incorporation through general principles of Union law may produce some grey areas,[31] it should be underlined that it ensures its maximum protection as primary law requirements binding on EU institutions and Member States when they apply Union law, thus becoming inviolable benchmarks for the validity of rules and legal acts.[32] This is reinforced because individuals can invoke them in courts.[33]

However, applying a general principle is inseparably linked to another operation that could be termed as *normative refinement* which 'essentially consists in ascertaining a concrete legal context where the general principle gets normatively enriched to the point of being actionable (i.e., to acquire judicially manageable standards)'.[34] The refinement is of course influenced by the 'normative contours' namely the positive rules surrounding the general principle. These may entail its partial codification in primary law (including the Charter) or a specification of the optimization criterion in secondary law that the Court tends to valorise; it is somehow a *shift to legislation* that is partly justified because general principles' direct effect

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[28] Among others, Case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* EU:C:2007:163 paras. 37-44.

[29] This frequent assertion since Case 294/83 *Les Verts* (n 6) has sometimes resulted in wide interpretations broadening the jurisdiction of the Court of Justice (Case C-354/04 P *Gestoras Pro Amnistía, Juan Mari Olano Olano and Julen Zelarain Errasti v Council of the European Union* EU:C:2007:115; Case C-72/15 *PAO Rosneft Oil Company and Others v Council of the European Union* EU:C:2017:236; Case C-134/19 P *Bank Refah Kargaran v Council of the European Union* EU:C:2020:793; and more recently, Case C-872/19 P *République bolivarienne du Venezuela v Council of the European Union* EU:C:2021:507).

[30] Joined Cases C-924/19 PPU and C-925/19 PPU *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság* EU:C:2020:367. From the point of view of the rule of law, this is a compulsory complement acknowledged long time ago to the existence of subjective rights conferred by EU law (Case C-222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* EU:C:1986:206 paras 16-17).

[31] I cannot expand on these issues such as double standards and indirect legislation, which are referred to the intermediation of Member States in guaranteeing the respect of the rule of law (Martín Rodríguez, *El Estado de Derecho* (n 2) 60-68).

[32] Opinion of AG Bobek in Joined cases C-83/19, C-127/19, and C-195/19 *Asociația 'Forumul Judecătorilor Din România'* EU:C:2020:746 para. 200

[33] Laurent Pech, 'The Rule of Law as a Constitutional Principle of the European Union' (2009) 04/09 Jean Monnet Working Paper NYU School of Law, 20-21 < https://jeanmonnetprogram.org/wp-content/uploads/2014/12/090401.pdf> accessed 1 October 2023.

[34] Pablo Martín Rodríguez, 'The principle of legal certainty and the limits to the applicability of EU law' (2016) 50 Cahiers de droit européen 115, 121. This refinement impacts in umbrella principles lowering its applicability vis-`s-vis its sub-principles, which are actionable and become artificially enlarged. A good example is the relationship between legal certainty and legitimate expectations in Union law, where the latter has already largely devoured acquired rights, revocation of administrative decisions, retroactivity, normative changes, or the obligation to act within a reasonable time frame.

is closely connected with the vertical and horizontal allocation of competences (i.e., due respect to the competences of the EU legislature and Member States).[35]

This operational contextuality (and sensibility to legal rules surrounding their application) become key in explaining why general principles may accommodate different intensities of legal standards in their application to Member States and EU institutions. The publicity of norms is a good example.[36] So is also judicial independence, whose normative contours are necessarily different in international and national jurisdictions.[37] The Court of Justice has confirmed, in my view, this contextuality when it dismissed the claim made by Hungary and Poland based on Article 4(2) TEU against the conditionality regulation. Both states argued that the obligation to respect the national identity inherent in their constitutional structures, as provided in that provision, prevented a uniform interpretation of the concept of the rule of law. Although, as it could not be otherwise, the Court has upheld the autonomous nature of the value (and the general principles that compose it), it has not failed to acknowledge that it is necessary 'taking due account of the specific circumstances and contexts of each procedure conducted under the contested regulation and, in particular, taking into account the particular features of the legal system of the Member State in question and the discretion which that Member State enjoys in implementing the principles of the rule of law'.[38]

This operational contextuality lies, in my opinion, behind the limited effectiveness of these general principles as components of the rule of law during the emergency, exactly as it has happened with fundamental rights. But maybe a more determining factor comes from the hybrid nature of EU emergency law and the unfinished court reaction.

4 ON THE RULE OF LAW IMPACT OF EU RESPONSE TO THE EMERGENCY

4.1 ON THE HYBRID NATURE OF EU EMERGENCY LAW

I have contended that EU emergency law possesses a hybrid nature between international and constitutional law. Some provisions in the Treaties

> envisage, so to speak 'restricted emergencies' and, in a very modest way, they follow a constitutional approach by providing the institutions with exceptional powers to face an exceptional situation. Contrarily and rather naturally, the common EU law approach to emergencies is international in spirit, allowing a Member State to

[35] Koen Lenaerts and José A Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' (2010) 47(6) Common Market Law Review 1629; Sacha Prechal, 'Competence Creep and General Principles of Law' (2010) 3(1) Review of European Administrative Law 5.
[36] Martín Rodríguez, 'The principle of legal certainty' (n 34) 131-132.
[37] See by analogy the right to a tribunal established by law in Case C-542/18 RX *Erik Simpson v Council of the European Union* EU:C:2020:232 para 73.
[38] Case C-156/21 *Hungary v Parliament and Council* (n 17) para 235.

> escape from its EU obligations under certain extraordinary circumstances under close control by EU institutions, including the Court of Justice.[39]

There is a vast and enlightening tradition in the literature on European economic integration concerning these *clauses de sauvegarde*, which are unfortunately neglected by contemporary doctrine.[40] While many of these provisions were removed by the Treaty of Amsterdam, they still permeate now secondary legislation and remain relevant as they demonstrate that the seriousness of the situation is less significant (there is little sense in differentiating between crises and emergencies in international law) compared to the legal basis governing state behaviour, which allows for emergency measures.[41] Counterintuitively, these clauses are not intended to protect the state itself, but rather the treaty.[42] An example of this is seen in the European banks' rescue: 'the EU could neither have prevented a Member State from going Icelandic (or compelled it not to do so) nor could it have articulated a proper bank aid-saving scheme using European funds. Instead, the EU had to facilitate concerted action by Member States through the 'emergency clauses' that permit state aids that are deemed compatible with the internal market, allowing Member States to deviate from their obligations following the specific procedure outlined in the Treaties.[43]

In constitutional approaches the legal basis for responding to an emergency is considered inherent (aimed at preserving the polity). Hence the issues are 'whether the legislative, the executive or a certain combination of both should rule this reaction *ex ante*; whether there are any uncrossable constitutional limits thereto and what is the appropriate role for the judiciary before, during and after emergency law obtains'.[44] Naturally, in the EU response to the crisis, 'restricted emergencies' clauses that grant exceptional powers to the EU have been utilized, sometimes in imaginative ways. It is worth reminding that this entire response has been carried out *à droit primaire constant*.

Nevertheless, the financial and sovereign debt crisis painfully revealed the limitations of EU emergency law and its mixed nature. The crisis went beyond a national emergency and posed a threat to the entire Eurozone. A single Member State recovering its powers to

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[39] Pablo Martín Rodríguez, 'Legal Certainty after the Crisis. The Limits of European Legal Imagination' in Jessica Schmidt, Carlos Esplugues Mota, and Rafael Arenas Garcia, *EU Law after the Financial Crisis* (Cambridge: Intersentia 2016) 287.

[40] See Klaus Gentzcke, *Ausweich- und Katastrophenklauseln im internationalen Wirtschaftsrecht* (Göttingen: Institut für Völkerrecht der Universität Göttingen 1959); Paolo Gori, *Les clauses de sauvegarde dans les traités C.E.C.A. et C.E.E.* (Heule: UGA 1967); Till Müller-Heidelberg, *Schutzklauseln im Europäischen Gemeinschaftsrecht* (Hamburg: Stiftung Europa-Kolleg 1970); Marc A. Lejeune, *Un droit des temps de crises: les clauses de sauvegarde de la CEE* (Brussels: Bruylant 1975); Achille Accolti-Gil, 'Il sistema normativo del Trattato CEE per la tutela degli interessi nazionali dopo la fine del periodo transitorio' (1977) 17 Rivista di Diritto Europeo 111; Martin Seidel, 'Escape Clauses in European Community Law with special reference to capital movements' (1978) 15(3) Common Market Law Review 283; Christian Talgorn, 'Les mesures de sauvegarde dans le cadre des accords externes de la C.E.E.' (1978) 14(3) Revue trimestrielle de droit européen 694; Albrecht Weber, *Schutznormen und Wirtschaftsintegration* (Baden-Baden: Nomos Verlagsgesellschaft 1982); Sebastian Bohr, *Schutznormen im Recht der Europäischen Gemeinschaften* (Munich: Verlag von Florenzt 1994).

[41] Martín Rodríguez, 'Legal Certainty after the Crisis' (n 39) 286-287.

[42] A Ph D casts a long shadow: on all sorts of escape clauses, see Pablo Martín Rodríguez, *Flexibilidad y tratados internacionales* (Madrid: Tecnos 2003) 187-208.

[43] Pablo Martín Rodríguez, 'A Missing Piece of European Emergency Law: Legal Certainty and Individuals' Expectations in the EU Response to the Crisis' (2016) 12 European Constitutional Law Review 292.

[44] ibid 270. Zemskova's distinction between the extralegal and the business-as-usual models succeeds, in my view, in grasping the constitutional conundrum but not the international one. The extralegal model would be just a violation of the Treaty.

act freed from EU commitments could not possibly preserve the EMU. The EU, based on the principle of conferral, was unable to expand its powers to the extent required by the global threat. Therefore, international law became the only genuine means of resolving the legal basis and competence issues for the necessary coordinated action among Member States. International law proved to be incredibly useful and flexible in this regard, although it is important to acknowledge that it was not immaterial in terms of the rule of law.[45]

However, it is important to differentiate these serious concerns regarding the rule of law from interpreting the solution as a mere disguise of EU factual conferral in international law. Such an interpretation would require an inverted piercing of the corporate veil, which I suspect in some EU law literature. Unless *Pringle* is disregarded,[46] the EU could not at that time, nor can it now (Article 48 TEU would prevent European Council Decision 2011/199/EU from having such effect) establish a permanent stability mechanism, unless Article 352 TFEU results usable and viable. The persistent reluctance of Member States to change the conferral *status quo* (as evident by the recent amendment of the EMS Treaty and the unfulfilled promise of Article 16 of the Fiscal Compact) should be taken into consideration when evaluating the EU's hybrid emergency law and its compliance with the rule of law. This also means that the rule of law equation needs to include Member States as well.

4.2 ON THE EU RESPONSE DEFICIENCIES IN TERMS OF THE RULE OF LAW

There is no need to review all the measures undertaken by the EU in response to the Great Crisis and discuss their weaknesses in terms of the rule of law. Anna Zemskova's book has already thoroughly addressed these issues, particularly in the areas of fiscal and economic governance, monetary policy and financial assistance. While there are other areas of EU law, such as the banking union or state aids, that could be explored in greater depth, including them would not significantly strengthen the main argument but only provide additional examples.

Instead, we can identify three types of rule of law problems in the European response that are linked to the exhaustion of the legal bases and the utilization of international law by Member States.

(1) The response has demonstrated the possibilities that EU secondary law provides for dealing with emergencies, either by granting Member States derogations from EU commitments or endowing EU institutions with extensive powers. The latter may raise concerns regarding the principle of conferral unless a specific legal basis can be found and broadly interpreted in the Treaty. The expansion of powers of EU institutions and agencies is not only connected to the principle of institutional balance (ranging from reversed qualified majority to the modification of the *Meroni-Romano* doctrine by the *ESMA* case)[47] but also with the need to recalibrate the position of individuals in relation to these expanded powers, ensuring guarantees of legal certainty and prohibition of arbitrariness. For instance, this can be seen in the Commission's managerial power in the state aids regime or the substantial

[45] Martín Rodríguez, 'Legal Certainty after the Crisis' (n 39) 286-293.
[46] Case C-370/12 *Thomas Pringle v Government of Ireland and Others* EU:C:2012:756 para 168.
[47] Case C-270/12 *United Kingdom v European Parliament and Council of the European Union* EU:C:2014:18. See also Opinion of AG Jääskinen in Case C-270/12 EU:C:2013:562.

increase in power by the ECB within the banking union.[48] Let us remember that the Court has even approved the attribution of *tasks* to certain EU institutions outside EU law realm.

(2) Another significant issue arises from the distortion of EU competence in both branches of the EMU, which affects the institutional balance as well.[49] This distortion was endorsed by the Court of Justice in *Pringle* and *Gauweiler*,[50] but it has been further exacerbated by EU institutions legislative activity (e.g., the two-pack or the PSPP program). The interpretation of the Treaty's fiscal rules on sound public finances as mere mandates with no competence dimension at all has contributed to this disfigurement. Consequently, the EU's competence in coordinating Member States' economic policies, with new procedures and fines, raises concerns regarding the principles of conferral, subsidiarity and proportionality. Moreover, when overlapped with financial assistance conditionality formally decided outside the Union, the EU's competence becomes practically unrecognizable.

The issue of EU monetary policy, exemplified in the *Weiss* bitter confrontation with the *Bundesverfassungsgericht*, cannot be defined solely in instrumental and teleological terms. It necessitates a recalibration of the ECBs' democratic accountability credentials, especially concerning judicial scrutiny of the duty to state reasons and its subordinate role in supplementing the general economic policies in the Union.[51] This matter is highly complex and has been extensively discussed in the literature, with Anna Zemskova's incisive criticisms providing a comprehensive account.

(3) Given the highly complex nature of the legal framework governing the emergency response within the EU, involving various formal and informal organs, cooperation with international institutions, and the utilization of both hard and soft law instruments, both international and European, the principle of legal certainty emerges as a crucial criterion for assessing the compatibility of these measures with the rule of law.[52]

4.3 THE INCOMPLETENESS OF THE JUDICIAL SCRUTINY BY THE COURT OF JUSTICE

The different approaches of international and constitutional law regarding emergencies highlight a shared concern: the risk of normalizing emergency measures to the extent that they bring about a constitutional transformation. Both perspectives recognize the importance of safeguarding against this risk. In this regard, the judiciary plays a crucial role, particularly

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[48] Including the issue of composite administrative procedure (See Manuel López Escudero, 'Le contrôle juridictionnel de la Cour de justice de l'Union européenne dans le domaine de l'union bancaire' (2020) 56(2/3) Cahiers de droit européen 549.

[49] See Andreu Olesti Rayo, 'El control democrático y la rendición de cuentas en el Pacto de Estabilidad y Crecimiento' (2018) 110-II Revista Vasca de Administración Pública 77; José M Porras Ramírez, 'Intergubernamentalismo y tecnocracia en la gobernanza económica de la Unión Europea' in Francisco Jesús Carrera Hernández, *¿Hacia una nueva gobernanza económica europea?* (Cizur Menor: Thomson Reuters Aranzadi 2018).

[50] Case C-62/14 *Peter Gauweiler and Others v Deutscher Bundestag* EU:C:2015:400.

[51] Pablo Martín Rodríguez, 'Y sonaron las trompetas a las puertas de Jericó… en forma de sentencia del *Bundesverfassungsgericht*' (2020) 52 Revista General de Derecho Europeo 1.

[52] See classic doctrinal contributions, Claire Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts' (2015) 35 Oxford Journal of Legal Studies 325; Manuel López Escudero, 'La degradación de las exigencias del Estado de Derecho en el ámbito de la Unión Económica y Monetaria' in in Diego J Liñán Nogueras and Pablo Martín Rodríguez (eds), *Estado de Derecho y Unión Europea* (Madrid: Tecnos 2018). See also Martín Rodríguez (n 34) (n 39) (n 43).

after the crisis has subsided, which literature often describes as judicial or *court backlash*[53]. So it clearly emerges *actualization effect* of the procedural facet of the rule of law underlined by A. Zemskova.

In terms of the judicial scrutiny of the EU's response to the crisis, we can identify two distinct stages. Initially, when faced with the European measures implemented to address the crisis, the Court of Justice responded with a jurisprudence that provided legal endorsement without explicitly justifying the application of emergency law or imposing temporal limitations on these measures, even though they often involved the exercise of expanded powers.[54] During this initial stage, the Court's approach was also evasive. It relied on formal arguments to avoid undertaking a rigorous examination of the substantive compatibility of the response with EU primary law, effectively refraining from delivering a ruling. Zemskova's book presents numerous examples of this withdrawn stance taken by the Court. It is important to note that this approach resulted in the majority of litigation being referred to national judges, effectively signalling to them that Union law was not of significant relevance in this particular context.[55] It was a powerful message.

Since 2016, the Court has entered a second stage in which it openly acknowledges the legal context of emergency and evaluates the actions of EU institutions accordingly. Gradually, albeit in a limited manner, the Court has begun to restore EU primary law as a criterion for assessing the validity of measures taken during the emergency. Advocate General Wahl's Opinions in cases, such as *Kotnik* and *Dowling*, maybe signals a turning point by constructing more robust arguments related to emergency law.[56] Subsequent cases, such as *Ledra* and *Florescu* have further reinforced the use of the Charter as a binding framework for EU institutions acting outside the scope of EU law and brought MoUs back within the realm of EU law in cases involving purely EU financial assistance.[57] These developments have compelled the EU courts to elaborate more thorough legal reasonings in other cases, including *Sotiropoulou* or *Chrysostomides*, even though the rulings have not favoured individuals or claimants.[58]

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[53] David Dyzenhaus, 'Introduction: Legality in a Time of Emergency' (2008) 24 Windsor Review of Legal and Social Issues 1.

[54] Both Case C-370/12 *Pringle* (n 46) and Case C-62/14 *Gauweiler* (n 50) are illustrative examples of this business-as-usual legal reasonings where the Court avoids any legal sense of emergency (see Martín Rodríguez, '*Dialogical rule of law* y respuesta europea a la crisis' (n 3) 316-317).

[55] Considering the political sensitivity of the matter and the tenuous grounds for a 'constitutional' approach to EU emergency law, the Court of Justice opted for remitting substantive judicial review to Member States' constitutional courts, whose institutional and legal positions are more firmly rooted. While this choice could be seen as a rational one, it effectively eliminates EU primary law as a legality criterion and confines such litigation exclusively within the national legal framework with far-reaching consequences in terms of rule of law respect (see *Martín Rodríguez* (n 43) 291-293).

[56] Opinion of AG Wahl in Case C-526/14 *Tadej Kotnik and Others v Državni zbor Republike Slovenije* EU:C:2016:102; and Opinion of AG Wahl in Case C-41/15 *Gerard Dowling and Others v Minister for Finance* EU:C:2016:473.

[57] Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising Ltd and Others v European Commission and European Central Bank* EU:C:2016:701; Case C-258/14 *Eugenia Florescu and Others v Casa Judeţeană de Pensii Sibiu and Others* EU:C:2017:448.

[58] Case T-531/14 *Leïmonia Sotiropoulou and Others v Council of the European Union* EU:T:2017:297; Joined Cases C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P *Council v K. Chrysostomides & Co. and Others* EU:C:2020:1028.

However important this case law from Luxembourg may be at an abstract level,[59] it is true that significant uncertainties still persist in the current assessment of the economic governance of the EU. Firstly, the Court has not yet reached a point where it attributes acts of informal European instances (such as the Eurogroup or Euro Summits) or formally external entities (such as the ESM) to the Union. Secondly, the applicability of the Charter of Fundamental Rights to measures adopted by a Member State within the framework of a non-purely Community rescue (e.g., by the ESM or the European Financial Stabilization Facility) has not been unequivocally affirmed by the Court.[60] Lastly, as mentioned earlier, it is my belief that the Court still needs to recalibrate the profound reshaping of the economic and monetary governance architecture resulting from the crisis from the perspective of the rule of law.

5 CONCLUDING REMARK

It is indeed true that the examination of the European response to the economic and financial crisis has not only tested the resilience of the rule of law within the EU but has also revealed previously unexplored aspects of its emergency law. This scrutiny has brought to light the intricate legal framework resulting from the hybrid nature of the EU's emergency measures. Addressing judicial oversight cannot be resolved simply by retreating to the validity parameter of EU primary law and referring cases to constitutional jurisdictions, even though such an approach may initially appear understandable. However, the incomplete nature of the judicial backlash indicates the existence of significantly more complex factors related to the ambiguous definition of competences and the necessity of developing a nuanced European judicial discourse on emergency law that goes beyond a literal interpretation of specific safeguard clauses outlined in the Treaties.

Without a recalibration of these issues, it is difficult to reach any other conclusion than the one put forward by Anna Zemskova regarding the constitutional transformation occurring within the EU. While it is true that the general principles encompassed within the rule of law are influenced by legislation due to their contextual operational nature, the gradual slide towards legal normalcy can be explained, and the EU legislature should accordingly be deemed responsible. However, completely depriving these components of the ability to autonomously generate EU validity standards that can be enforced would reduce the rule of law to a mere formal and empty guarantee. Reducing the rule of law to this formal dimension would be inconsistent with the substantive level it has achieved within the constitutional

[59] It is important to acknowledge the limited practical impact of this case law. The Court recognizes that both institutions and Member States possess a wide margin of discretion when determining relevant measures, particularly when they need to be balanced with the overarching public interest of preserving financial stability in the Union, particularly in exceptional or emergency circumstances (Manuel Campos Sánchez-Bordona and Manuel López Escudero, 'Le contrôle de la Cour de justice sur les mesures contre la crise economique', in *L'Europe au présent! Liber amicorum Melchior Wathelet* (Brussels: Bruylant 2018) 249-286.

[60] Such a development would be facilitated by the alignment often observed between this external conditionality and European norms of economic governance. Progress in this regard would undoubtedly have a significant impact, as it would strengthen the preliminary reference procedure as a procedural avenue through which the Court of Justice could render judgments, thus bypassing the stringent requirements that direct actions impose on the standing of individuals. This is particularly important considering that the experience has shown that the legality control of the European response to the crisis has been primarily driven by individuals who face higher costs in accessing the Court of Justice, while privileged plaintiffs, such as Member States and institutions, have seldom challenged any of these measures.

frameworks of Member States, potentially jeopardizing their compatibility with the European project. Ensuring this compatibility has been, continues to be, and should remain the primary and most crucial legitimizing effect of upholding the rule of law in the European Union.