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THE GOVERNANCE OF ALGORITHMS: PROFILING AND PERSONALISATION OF ONLINE CONTENT IN THE CONTEXT OF EUROPEAN CONSUMER LAW

LUDOVICA SPOSINI*

Algorithms exploit human weaknesses and emotions to influence users' purchasing behaviour in a context where the line between mere persuasion becomes manipulation.
Given, then, the importance of the matter for the protection of consumers, this contribution aims at analysing the current European regulatory framework concerning the protection of online users against the risks of profiling and personalisation practices by online platforms. This article will try to show that, despite the most recent interventions, the supranational law cannot efficiently address the problem of 'digital vulnerability' or 'substantial transparency'.
This conclusion seems to be very clear looking at the recent development of consumer law such as the so-called 'Digital Services Acts' (Regulation 2022/2065/EU) which requires, for instance, that online intermediaries provide all relevant information about the main parameters used by them to identify and profile the user. This provision clashes with the extreme complexity of algorithms, which leaves platforms with the discretion to decide which data to provide.
In this perspective, an attempt will finally be made to formulate some proposals that are more functional to the objective of maximum protection of online users, disarmed before the power of algorithms and large platforms.

1 THE PROBLEM OF ALGORITHMIC TRANSPARENCY AND INFORMATION OBLIGATIONS IN THE DIGITAL ENVIRONMENT

1.1 AN INTRODUCTION OF THE MATTER

In recent years, digital platforms have seen such rapid development that the European Commission , as early as 2016, had already sensed the fundamental role that these economic actors would play in the economic and social development of humanity.[1]

This initial enthusiasm has now been joined by an awareness of the power that platforms have acquired to the point of becoming decisive in economic and, in particular, political decisions.[2] It is no coincidence that the Commission itself has recognised that 'a

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[1] Commission, 'Communication on Online Platforms and the Digital Single Market Opportunities and Challenges for Europe' COM (2016) 288 final, 3, where it is said that 'The platform economy presents major innovation opportunities for European start-ups, as well as for established market operators to develop new business models, products and services'.

[2] Cf Matti Nelimarkka et al, 'Platformed Interactions: How Social Media Platforms Relate to Candidate–Constituent Interaction During Finnish 2015 Election Campaigning' (2020) 6(2) Social Media + Society <https://journals.sagepub.com/doi/10.1177/2056305120903856> accessed 01 March 2024; Chris Marsden, Trisha Meyer, and Ian Brown, 'Platform values and democratic elections: How can the law regulate digital

small number of large online platforms increasingly determine the parameters for future innovations, consumer choice and competition'.[3]

To avoid possible abuses from providers, the European Commission started to look for some instruments to guarantee the awareness of users. Traditionally, the consumer has been regarded as a perfectly rational economic actor and, therefore, always capable of making the most efficient choice.[4] According to this approach – typical of classical economic theory – the problem could therefore be solved by providing the subject with all available information so that he could choose the most efficient solution. Therefore, for a long time, the only interest of the Community was to impose increasingly specific and stringent information obligations on professionals. In other words, this tool was considered the most appropriate to guarantee transparency and eliminate the information asymmetry typical of B2C relations.

This neoclassical approach began to be challenged in the 1970s by a growing number of scientific studies that elaborated a new economic model based on the different assumption of human 'bounded rationality'.[5] It was observed that the traditional economic model did not actually represent what happens in reality, because decision-making processes are largely determined by the environmental and social context.[6] Man has limited rationality[7] and, as

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disinformation?' (2020) 36 Computer Law & Security Review 105; Patrícia Rossini et al, 'Social Media, Opinion Polls, and the Use of Persuasive Messages During the 2016 US Election Primaries' (2018) 4(3) Social Media + Society <https://journals.sagepub.com/doi/10.1177/2056305118784774> accessed 01 March 2024; Michael Bossetta, 'The Digital Architectures of Social Media: Comparing Political Campaigning on Facebook, Twitter, Instagram, and Snapchat in the 2016 U.S. Election' (2018) 95(2) Journalism & Mass Communication Quarterly 471. For an in-depth look at the platforms' business model see Lina M Khan, 'Amazon's Antitrust Paradox' (2017) 126 Yale Law Journal 710; Zoltan J Acs et al, 'The Evolution of the Global Digital Platform Economy: 1971-2021' (2021) 57 Small Business Economics 1629; Orly Lobel, 'The Law of the Platform' (2016) 101 Minnesota Law Review 87.

[3] Commission, 'Inception Impact Assessment, Digital Services Act package: Ex ante regulatory instrument for large online platforms with significant network effects acting as gate-keepers in the European Union's internal market' Ref Ares (2020) 2877647; Massimiliano Nuccio and Marco Guerzoni, 'Big data: Hell or heaven? Digital platforms and market power in the data-driven economy' (2019) 23(3) Competition & Change 312; Michael A Cusumano, Annabelle Gawer, and David B Yoffie, *The business of platforms: Strategy in the age of digital competition, innovation, and power* (HarperBusiness 2019); Laura Ammannati, 'Verso un diritto delle piattaforme digitali?' (2019) 7 Federalismi.it 1.

[4] For an in-depth look at the evolution of consumerism see Zygmunt Bauman, *Consumo, dunque sono* (12 edn, Laterza 2010); Antonio Catricalà Guido Alpa, *Diritto dei consumatori* (Strumenti Diritto, Il Mulino 2016); Giampaolo Fabris, *Il nuovo consumatore: verso il postmoderno* (Impresa, comunicazione, mercato, Franco Angeli 2010) 468.

[5] The theory of bounded rationality was developed by Herbert Simon in 1978. For a more in-depth discussion, see (unless Riccardo offers a comparison)Riccardo Viale, 'La razionalità limitata "embodied" alla base del cervello sociale ed economico' (2019) 1 Sistemi intelligenti, Rivista quadrimestrale di scienze cognitive e di intelligenza artificiale 193; Antonio R Damasio, *Descartes' Error: Emotion, Reason and the Human Brain* (Random House 2008) according to which 'we are not thinking machines that feel, we are feeling machines that think', precisely to emphasize how the emotional part acts before the rational one and, therefore 'the beginning of everything was emotion. Feeling is therefore not a passive process'. See also Christophe Morin, 'Neuromarketing: The New Science of Consumer Behavior' (2011) 48 Society 131.

[6] Piotr Winkielman and Kent Berridge, 'Irrational Wanting and Subrational Liking: How Rudimentary Motivational and Affective Processes Shape Preferences and Choices' (2003) 24(4) Political Psychology 657; Richard H Thaler, 'From Homo Economicus to Homo Sapiens' (2000) 14(1) Journal of Economic Perspectives 133.

[7] The theory was developed by Herbert Simon. On this point, see Herbert A Simon (edited by Massimo Egidi and Robin Marris), *Economics, Bounded Rationality and the Cognitive Revolution* (Edward Elgar Publishing 1992); Cass R Sunstein (ed), *Behavioral Law and Economics* (Cambridge University Press 2000); Amos Tversky and

such, is subject to various biases that influence him and lead him to make choices that are not necessarily the most efficient ones.[8]

This new awareness has prompted companies to invest in the implementation of machine-learning algorithms capable of studying and predicting users' traits and then using them to personalise offers that are highly suggestive.[9] Not only that, but the practice has amply demonstrated that personalisation not only aims to exploit users' vulnerabilities, but also causes real irrational behaviour as happened in 2014 when Facebook manipulated millions of users' newsfeeds to alter the emotional content of posts. This episode clearly demonstrated that human feelings can be deliberately manipulated by some specific posts[10] and, consequently, even a normally attentive and circumspect subject – answering to the canon of the 'average' consumer – runs the risk of being exposed to practices that have the capacity, by their effectiveness, to make him vulnerable.[11]

However, even though the risks arising from the profiling and personalisation of digital content are obvious, the current European legislation does not seem to be able to provide effective tools to prevent corporate abuse,[12] since information obligations are no longer sufficient; on the contrary, large information obligations are less effective and may even

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Daniel Kahneman, 'Judgment under Uncertainty: Heuristics and Biases' (1974) 185(4157) Science 1124; Robert B Zajonc, 'Feeling and thinking: Preferences need no inferences' (1980) 35 American Psychologist 151.

[8] For more, see Dagmar Schuller and Björn W Schuller, 'The age of artificial emotional intelligence' (2018) 51(9) Computer 38.

[9] Martin Ebers, 'Regulating AI and Robotics' in Martin Ebers and Susana Navas (eds), *Algorithms and Law* (Cambridge University Press 2020) 71, where the author says that: 'In this regard, several studies by researchers from the University of Cambridge have shown that the analysis of (neutral) Facebook "likes" provides far-reaching conclusions about the personality of an individual. [...] With the input of even more Facebook "likes", the algorithm was able to evaluate a person better than their friends, parents, and partners could, and could even surpass what the person thought they knew about themselves'.

[10] Cathy O'Neil, *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy* (Penguin Books 2017) 105 ff.

[11] Jon D Hanson and Douglas A Kysar, 'Taking Behavioralism Seriously: The Problem of Market Manipulation' (1999) 74(3) New York University Law Review 630, 637. The authors speak of 'a new source of market failure' in the sense that: 'Rather, it is that manufactures have incentives to utilise cognitive biases actively to shape consumer perceptions throughout the product purchasing context and independently of government requirements. Advertising, promotion and price setting all become means of altering consumer risk perceptions'.

[12] In this sense, see Ebers (n 9) 75. The author argues that: 'Existing European consumer and data protection law as well as national contract law arguably fail to provide sufficient instruments to effectively sanction such behaviour'. It has to be said, however, that the profiling of users through the collection of personal data (often particularly sensitive data) also raises urgent data protection issues. However, this topic goes beyond the scope of this contribution and, therefore, it must be assumed that the collection of data and their processing for profiling purposes has been carried out in full compliance with the GDPR. In any case, please refer to Frederike Kaltheuner and Elettra Bietti, 'Data is power: Towards additional guidance on profiling and automated decision-making in the GDPR' (2018) 2(2) Journal of Information Rights, Policy and Practice <https://jirpp.winchesteruniversitypress.org/articles/10.21039/irpandp.v2i2.45> accessed 01 March 2024; Reuben Binns and Michael Veale, 'Is that your final decision? Multi-stage profiling, selective effects, and Article 22 of the GDPR' (2021) 11(4) International Data Privacy Law 319 ff; Sandra Wachter, 'Normative challenges of identification in the Internet of Things: Privacy, profiling, discrimination, and the GDPR' (2018) 34(3) Computer Law & Security Review 436; Alžběta Solarczyk Krausová, 'Online Behavior Recognition: Can We Consider It Biometric Data under GDPR?' (2018) 12(2) Masaryk University Journal of Law and Technology 161; Federico Galli, 'Online Behavioural Advertising and Unfair Manipulation Between the GDPR and the UCPD' in Martin Ebers and Marta Cantero Gamito (eds), *Algorithmic Governance and Governance of Algorithms: Legal and Ethical Challenges* (Springer International Publishing 2021); Elena Gil González and Paul De Hert, 'Understanding the legal provisions that allow processing and profiling of personal data – an analysis of GDPR provisions and principles' (2019) 19 ERA Forum 597.

generate the opposite 'Overload effect'.[13] Therefore, it is not just a question of ensuring that the user knows all the elements needed to make a choice but that he actually understands them. Moreover, it is not a matter of providing as much information as possible (with a view to formal transparency only) but of ensuring the quality of the information provided in the peculiar digital environment (algorithmic transparency).

1.2 THE NEW PLATFORM SOCIETY TOWARDS A 'SURVEILLANCE CAPITALISM'

Given the extreme heterogeneity of the phenomenon, there is currently no unambiguously accepted definition of a 'platform'.[14]

Nevertheless, it was possible to identify some features that seem to unite most platforms. In particular, it was emphasised[15] that (i) they perform an intermediary function because they allow different groups of users (consumers, professionals, workers, service providers, producers) to interact with each other; (ii) they make it possible to reduce transactional costs such as those arising from the search for the information needed to make a purchase or those dependent on disputes in the event of non-performance or defective products; (iii) they are designed to constantly stimulate user involvement in order to obtain ever greater amounts of data; (iv) they generate barriers to market entry and, in particular, the so-called 'network effects', because the more final consumers use the platform, the more professionals will also use it and vice versa; (v) the platform economy is a business model based entirely on a reputational system that customers rely on to steer them towards certain products or services instead of others; finally, (vi) it is a model managed (almost) entirely by the algorithm, which enables it to capture, process and control every user activity in real time.[16]

This last element is, in fact, what increases the economic power of platforms. In other words, algorithms allow providers to collect and process huge amounts of information, both the information provided by users through their consent and the so-called 'behavioural'

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[13] Omri Ben-Shahar and Carl E Schneider, *More Than You Wanted to Know. The Failure of Mandated Disclosure* (Princeton University Press 2014).

[14] Sersia Kanikka and S K Sasikumar, 'Digital Platform Economy: Overview, Emerging Trends and Policy Perspectives' (2020) 61(3) Productivity 336; Cusumano, Gawer, and Yoffie (n 3); Ruonan Sun, Shirley Gregor, and Byron Keating, 'Information technology platforms: Definition and research directions' (2016) arXiv preprint arXiv:160601445; Juan Manuel Sanchez-Cartas and Gonzalo León, 'Multisided platforms and markets: A survey of the theoretical literature' (2021) 35(2) Journal of Economic Surveys 452. Among the various proposals, of particular interest is that of José Van Dijck, Thomas Poell, and Martijn De Waal, *The Platform Society: Public Values in a Connective World* (Oxford University Press 2018). The authors define the platform as 'a programmable architecture designed to organise interactions between users' and point out that 'a platform is fuelled by data, automated and organised through algorithms and interfaces, formalised through ownership relations driven by business models, and governed through user agreements'. However, there are those who have proposed adopting a functional approach to the problem, advancing the need to focus attention not so much on the creation of a general definition but, rather, on the different criteria by which to classify the various types of platforms, including, for instance, the activities and functions they serve; their sources of revenue and the business model they follow; the way they use and exploit data; and the level of control they exercise over users' activities. For an in-depth study, see Andrea Bertolini, Francesca Episcopo, and Nicoleta Cherciu, *Liability of Online Platforms* (European Parliamentary Research Service 2021) III ff.

[15] Frank Nagle, Robert Seamans, and Steven Tadelis, 'Transaction cost economics in the digital economy: A research agenda' (2020) Harvard Business School Strategy Unit Working Paper No 21-009.

[16] See Alex J Wood et al, 'Good Gig, Bad Gig: Autonomy and Algorithmic Control in the Global Gig Economy' (2019) 33(1) Work, Employment and Society 56, 75.

information. The latter comes from the tracking of users' online activity and allows them to study their purchasing preferences in order to influence their behaviour through various commercial strategies.[17]

It is clear, then, that there are two main risks of this new 'surveillance capitalism':[18] on the one hand, the constant monitoring of the user, who is only considered as an inexhaustible source of data, and, on the other hand, the manipulation of their behaviour to the detriment of fundamental human values such as autonomy.[19]

1.3 GOING DEEPER: PROFILING AND PERSONALISATION OF ONLINE CONTENT

Today, almost all digital platforms use increasingly sophisticated and complex algorithms and AI systems to process the collected data and create responses tailored to users' needs and desires. Technological development has made it possible to move away from the 'ruled based' approach – centred on the logic of '*if then*' – in favour of machine learning. This means that algorithms are no longer limited to executing preordained commands, but can also make autonomous decisions based on the experience they gain from processing large amounts of data. In other words, they improve the accuracy of their responses thanks to the experience gained by adapting them to concrete circumstances. An even more advanced type of machine learning is deep learning, which is based on (artificial) neural networks, i.e. processors organised on several levels and interconnected.[20] This technology is currently the basis of many AI techniques. This is therefore well beyond classic mass communication – directed at an anonymous mass of recipients – because companies tailor their product and service offerings to the needs and desires of each specific consumer.

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[17] See Naveen Kumar et al, 'Detecting Review Manipulation on Online Platforms with Hierarchical Supervised Learning' (2018) 35(1) Journal of Management Information Systems 350; Susan Morgan, 'Fake news, disinformation, manipulation and online tactics to undermine democracy' (2018) 3(1) Journal of Cyber Policy 39; Cass R Sunstein, 'Fifty Shades of Manipulation' (2016) 1(3-4) Journal of Marketing Behavior 213; Patrick Todd, 'Manipulation' in Hugh LaFollette (ed), *The International Encyclopedia of Ethics* (Blackwell 2013); T Martin Wilkinson, 'Nudging and Manipulation' (2013) 61(2) Political Studies 341; Daniel Susser, Beate Roessler, and Helen Nissenbaum, 'Technology, autonomy, and manipulation' (2019) 8(2) Internet Policy Review <https://policyreview.info/articles/analysis/technology-autonomy-and-manipulation> accessed 01 March 2024.

[18] The term was coined by Shohana Zuboff of Harvard University, see Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Profile Books 2019); John Bellamy Foster and Robert W McChesney, 'Surveillance Capitalism: Monopoly-Finance Capital, the Military-Industrial Complex, and the Digital Age' (2014) 66(3) Monthly Review 1; Shoshana Zuboff, 'Big other: Surveillance Capitalism and the Prospects of an Information Civilization' (2015) 30(1) Journal of Information Technology 75; Brett Aho and Roberta Duffield, 'Beyond surveillance capitalism: Privacy, regulation and big data in Europe and China' (2020) 49(2) Economy and Society 187.

[19] Morgan (n 17); Edward H Spence, 'Ethics of Neuromarketing: Introduction' in Jens Clausen and Neil Levy (eds), *Handbook of Neuroethics* (Springer Dordrecht 2015); Kathryn T Theus, 'Subliminal advertising and the psychology of processing unconscious stimuli: A review of research' (1994) 11(3) Psychology & Marketing 271.

[20] For an in-depth look at how deep learning works, see Yann LeCun, Yoshua Bengio, and Geoffrey Hinton, 'Deep learning' (2015) 521 Nature 436; Ian Goodfellow, Yoshua Bengio, and Aaron Courville, *Deep Learning* (MIT Press 2016); John D Kelleher, *Deep Learning* (MIT Press 2019); Nicole Rusk, 'Deep learning' (2016) 13 Nature Methods 35; Kumar et al (n 17); Pramila P Shinde and Seema Shah, 'A Review of Machine Learning and Deep Learning Applications' (2018) Fourth International Conference on Computing Communication Control and Automation (ICCUBEA) 1, 4 ff.

The highly customised offer of a product or service is a multi-step process. First, algorithms collect the data that the user provides (when agreeing to the contractual terms and conditions or when signing up) as a form of 'counter-performance' for using the provider's services.[21] In fact, the data provided with consent are not the only ones that are collected, since the algorithms also look at the traces left unconsciously by users while surfing online, such as the time they spend with the mouse cursor on a certain product before proceeding with the purchase.

From this information then begins the activity of consumer profiling. This is defined by the Data Protection Regulation (GDPR) as:

> any form of automated processing of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements.[22]

According to this definition, algorithms process all personal data collected to analyse consumer behaviour and preferences and, in doing so, create digital profiles of consumers. At this point, it becomes extremely easy for companies to devise marketing strategies that are much more effective than traditional ones precisely because they are tailored to consumers' preferences and behaviour. We speak, not by chance, of 'customization' of content, i.e. the 'strategic creation, modification and adaptation of content and distribution to optimise the fit with personal characteristics, interests, preferences, communication styles, and behaviours'.[23]

Content profiling and personalisation are not practices to be avoided *per se*, because they certainly bring many benefits to the market. Indeed, thanks to them, companies can understand and study which products and services consumers want, and which best suit their needs. Not only that, but it also gives companies the incentive to constantly improve their services to ensure that platform users have the best possible shopping experience. On the other hand, consumers can spend less time searching for information on products and services because they only receive advertisements and offers of what they really want to buy or need at that moment.[24] One need only think, for instance, of Amazon's 'You may also

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[21] Here we open the age-old debate on the monetisation of personal data and their economic nature. Not being the subject of this contribution, let us refer to Mohammad S Najjar and William J Kettinger, 'Data Monetization: Lessons from a Retailer's Journey' (2013) 12(4) MIS Quarterly Executive 213; Payam Hanafizadeh and Mohammad Reza Harati Nik, 'Configuration of Data Monetization: A Review of Literature with Thematic Analysis' (2020) 21 Global Journal of Flexible Systems Management 17; Petri Parvinen et al, 'Advancing data monetization and the creation of data-based business models' (2020) 47 Communications of the association for information systems 25; Alberto De Franceschi, *La vendita di beni con elementi digitali, vol 9* (vol 9 Diritto scienza tecnologia law science, Edizioni Scientifiche Italiane 2019).

[22] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1 (GDPR), Art 2(4).

[23] Nadine Bol et al, 'Understanding the Effects of Personalization as a Privacy Calculus: Analyzing Self-Disclosure Across Health, News, and Commerce Contexts' (2018) 23(6) Journal of Computer-Mediated Communication 370, 373.

[24] Several statistical studies have shown that 48% of consumers spend more when the experience is personalised and that 74% of consumers experience a sense of frustration when the content they are shown

like' section where one can find a series of products that algorithms consider to be in line with the user's personal preferences and tastes or that, based on (highly) probabilistic inferences, are considered to be of interest for future purchases.

Any further reflection on the profiling and personalisation of online content poses the need to strike the right balance between market development and the protection of consumers' decision-making autonomy. In this perspective, the next section is then dedicated to Directive 2005/29/EC (UCPD)[25] as it has always been considered a true pillar of EU consumer law. Although it remains a very important tool against such algorithmic commercial practices, this analysis will show how several critical issues can no longer be ignored, given the rapid development of AI systems in recent years.

2 PROFILING, PERSONALISATION, AND THE PROTECTION OF CONSUMERS IN THE EUROPEAN UNION

2.1 PROFILING AND PERSONALISATION PRACTICES UNDER THE UCPD: A CRITICAL ANALYSIS

The most relevant regulation to the topic is the UCPD, which aims to protect precisely the ability of consumers to make informed and considered choices from those commercial practices that, by impacting on human autonomy, are unfair (and are therefore prohibited).

Although it does not explicitly contain provisions for such activities, the directive can be considered to apply because it provides a very general definition of commercial practice. Indeed, it covers any action, omission, conduct or commercial communication (including advertising and marketing) by a trader to promote, sell or supply a certain product to consumers.[26] This definition includes, as confirmed by the CJEU, all commercial communications between professionals and consumers, including 'one-to-one commercial practices'. It thus also includes highly personalised ones.[27]

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online has nothing to do with what they are looking for. On this point, see Keith Bradley, Rachael Rafter, and Barry Smyth, 'Case-Based User Profiling for Content Personalisation' in Peter Brusilovsky, Oliviero Stock, and Carlo Strapparava (eds), *Adaptive Hypermedia and Adaptive Web-Based Systems* (Springer Berlin 2000); Stephen Searby, 'Personalisation – an Overview of its Use and Potential' (2003) 21(1) BT Technology Journal 13; Alastair Reed et al, 'Radical Filter Bubbles: Social Media Personalisation Algorithms and Extremist Content' (2019) Global Research Network on Terrorism and Technology: Paper No 8 <https://static.rusi.org/20190726_grntt_paper_08_0.pdf> accessed 01 March 2024; Joanna Strycharz and Bram Duivenvoorde, 'The exploitation of vulnerability through personalised marketing communication: are consumers protected?' (2021) 10(4) Internet Policy Review <https://policyreview.info/articles/analysis/exploitation-vulnerability-through-personalised-marketing-communication-are> accessed 01 March 2024.

[25] 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 ('Unfair Commercial Practices Directive') [2005] OJ L149/22 (UCPD).

[26] UCPD, Art 2(d). It should be noted that the UCPD was recently amended by the so-called 'Modernisation Directive' (Directive 2019/2161/EU), which aims to adapt consumer law to technological advancement. However, no provision was introduced that expressly deals with the personalisation of content. On this point, see Christian Twigg-Flesner, 'Bad Hand? The "New Deal" for EU Consumers' (2018) 15(4) Zeitschrift für das Privatrecht der Europäischen Union 166; Marco Loos, 'The Modernisation of European Consumer Law: A Pig in a Poke?' (2019) 27(1) European Review of Private Law 113.

[27] See Case C-388/13 *UPC Magyarország* EU:C:2015:225.

Wishing to protect the freedom of decision of consumers, the legislation in question places a generalised prohibition only on practices that are 'unfair', because they are contrary to professional diligence and in any case false or likely to distort the economic behaviour of the 'average' consumer to whom the same commercial practice is directed.[28]

In addition to this general clause, two other macro-categories of unfair commercial practices are then identified, respectively misleading ones (divided in turn into misleading acts and omissions in Arts 6 and 7) and aggressive ones in Arts 8 et seq. To these two sub-categories are then added those of the well-known 'black-list' which are always considered unfair (and consequently always prohibited) without any possibility of proving the contrary.[29]

Among these, the profiling and personalisation of online content fall within the scope of aggressive business practices, i.e. those that through coercion, harassment, undue influence or physical force are capable of restricting or significantly limiting the freedom of choice or economic behaviour of the average consumer who thereby takes a business decision that he or she would not otherwise have taken.[30] However, this subsumption is not as straightforward as it seems. Certainly, by exploiting human cognitive weaknesses, they induce consumers to engage in certain purchasing behaviour through undue psychological pressure that is often completely unconscious. However, this pressure must be such as to fall within the concept of undue influence, which the UCPD defines as 'exploiting a position of power in relation to a consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer's ability to make an informed decision'.[31] However, verifying whether in concrete terms such pressure has led to a conditioning such that it has significantly limited the consumer's freedom of choice is not always so easy, considering that the very purpose of such practices is precisely to identify human weaknesses and exploit them to the company's advantage in a totally unconscious manner. This makes it difficult to distinguish whether or not the pressure exerted on the user by such practices falls within the margin that the legislation itself allows.

Verification that there has indeed been undue influence is not in itself sufficient, in fact, to determine the unfairness of the practice, but it is also necessary that that influence has been 'considerable': that is to say, such as to have prompted the user to take a commercial decision that he would not otherwise have taken. This means that, a contrario, where there has been psychological pressure but not sufficient to considerably alter the consumer's behaviour, it is not relevant.[32] It is necessary, then, that the undertaking has exploited its

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[28] UCPD, Art 5. It has been observed that this legislation has an 'intersecting circles' structure. On this point, see Giovanni De Cristofaro, 'La nozione generale di pratica commerciale "sleale" nella direttiva 2005/29/CE' in *Studi in onore di Nicolò Lipari* (Giuffrè 2008) 744 ff; Maurizio Fusi and Paolina Testa, *Diritto e pubblicità* (Lupetti 2006) 438; Bram B Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practices Directive* (1st edn, Springer Cham 2015) 244 ff.

[29] UCPD, Annex I. See Geraint Howells, Hans-Wolfgang Micklitz, and Thomas Wilhelmsson, 'Towards a Better Understanding of Unfair Commercial Practices' (2009) 51(2) International Journal of Law and Management 69.

[30] UCPD, Art 8.

[31] UCPD, Art 2(j). Cf. Strycharz and Duivenvoorde (n 24).

[32] Cf. UCPD, recital 6. For a comment, see Giuseppe B Abbamonte, 'The Unfair Commercial Practices Directive and its General Prohibition' in Stephen Weatherill and Ulf Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques* (1st edn, Hart Publishing 2007) 24 ff.

position of superiority to its own advantage, and that in doing so it has applied such pressure on the consumer as to cause 'the forced conditioning of the consumer's will'.[33]

2.2 THE INADEQUACY OF THE 'AVERAGE CONSUMER' PARADIGM: A NEED FOR A RECONSIDERATION?

The difficulty of such syndication is further aggravated by the extreme opacity of the functioning of algorithms and the ability of AI to be increasingly efficient and fast in adapting content to the data collected and inferences drawn. This, too, leads to various empirical problems in identifying the very fine line between the psychological pressure that is tolerated by the law and that which goes far beyond.[34]

As is well known, the paradigm against which to measure the unfairness of a commercial practice is that of the average consumer, defined by the CJEU as a subject who is 'reasonably informed, observant and circumspect'.[35] This model assumes not only that the subject is aware of the persuasive intent of the advertisement, but also that they are familiar with the workings of the algorithm in such a way as to be able to adjust their behaviour rationally. This assumption does not, however, take into account that the algorithms' ability to detect biases and exploit them to the company's advantage only further reinforces the information asymmetry between the negotiating parties,[36] eventually turning even the average consumer into a vulnerable one.[37]

The EU has long since recognised that some consumers, by their mental or physical infirmity, age, or naivety, are particularly vulnerable and therefore need even more stringent protection.[38] This means that vulnerability is considered with respect to a series of well-designated subjects while excluding all those hypotheses in which it derives from specific factual and temporary circumstances. It is no secret that companies have used highly customised messages based on the psychological state or factual situation of the consumer at that given moment. Suffice it to say, for example, that the company Uber was repeatedly accused of charging higher prices in bad weather or when the user's phone battery was low

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[33] Opinion of AG Campos Sánchez-Bordona in Joined Cases C-54/17 and C-55/17 *AGCM v Wind and Vodafone* EU:C:2018:377 para 65.

[34] Cf. also Strycharz and Duivenvoorde (n 24).

[35] On the definition of the average consumer, please refer to Ludovica Sposini, 'Gli obblighi informativi del professionista e la garanzia commerciale del produttore nella giurisprudenza della Corte di Giustizia. Alcuni spunti a partire dal caso Absoluts' (2023) 1 Pactum 135.

[36] Laura Ammannati, 'Per Una "Nuova" Regolazione Delle Piattaforme Digitali' (2021) 10 Astrid Rassegna 1, 8, where the author said that: 'In particolare, l'uso di algoritmi di machine learning accresce l'opacità dei meccanismi e della decisione così che non è agevole verificare se il sistema ha reso possibili esiti scorretti o discriminazioni anche grazie all'utilizzo di dati personali e bias cognitivi e comportamentali degli utenti'.

[37] Strycharz and Duivenvoorde (n 24) 11, where it is said that: 'In particular, the average consumer benchmark disregards that all people may experience vulnerability in some situations'. In the same sense, see also Natali Helberger, 'Profiling and Targeting Consumers in the Internet of Things – A New Challenge for Consumer Law' in Reiner Schulze and Dirk Staudenmayer (eds), *Digital Revolution: Challenges for Contract Law in Practice* (Harvard University Press 2016) 22, where the author says that:'If one defines "vulnerability" as the "limited ability to deal with commercial practices" one may even wonder at which point digital marketing practices, and in particular if they are based on intrinsic data analysis, opaque algorithms and sophisticated forms of persuasion, turn the normally "average" consumer into a vulnerable one. So while it may be that the quantified consumer is technologically more sophisticated and empowered, it is similarly possible that as the "profiled consumer" she is also more credulous and defenseless against new, more sophisticated forms of personalised marketing in the Internet of Things'.

[38] UCPD, Art 5(3).

because in such situations the consumer's need for the service was greater and, consequently, so was his or her willingness to pay a higher amount.[39]

As has been correctly observed,[40] even with reference to Article 9 UCPD it is evident that the exploitation of the psychological state or weaknesses of consumers cannot integrate, except with difficulty and by way of interpretation, an aggressive commercial practice. This provision requires that, for the assessment of the existence of coercion, harassment or undue influence, one must consider, among other things, 'the exploitation by the trader of any specific misfortune or circumstances of such gravity as to impair the consumer's judgement, of which the trader is aware, to influence the consumer's decision with regard to the product'.[41]

Already, from these considerations, it is possible to realise that the UCPD, although it is a piece of legislation that still plays a central role in consumer protection, seems to leave room for those practices that exploit human vulnerabilities and, in so doing, allow algorithms to circumvent the prohibitions imposed by the legislation.

3 PROFILING AND PERSONALISATION OF ONLINE CONTENT BETWEEN RECENT DEVELOPMENT AND FUTURE PERSPECTIVES

3.1 A FIRST STEP FORWARD: THE (AMENDED) CONSUMERS RIGHTS DIRECTIVE

The second relevant piece of regulation is the Consumer Rights Directive (Directive 2011/83/EU, henceforth CRD).[42] It has recently been reformed by Directive 2019/2161/EU, known as the 'Modernisation Directive' because it aims to bring consumer law up to date with technological development.[43] This latter introduced specific provisions with regard to the particular business practice of price customisation, essentially introducing new disclosure requirements for companies that use it.[44] In particular, it is permissible for

[39] Strycharz and Duivenvoorde (n 24) 8 ff.
[40] ibid 16.
[41] UCPD, Art 9(c).
[42] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L304/64 (CRD).
[43] Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules OJ L328/7.
[44] CRD, recital 45 states that:

> 'Traders may personalise the price of their offers for specific consumers or specific categories of consumer based on automated decision-making and profiling of consumer behaviour allowing traders to assess the consumer's purchasing power. Consumers should therefore be clearly informed when the price presented to them is personalised on the basis of automated decision-making, so that they can take into account the potential risks in their purchasing decision. Consequently, a specific information requirement should be added to Directive 2011/83/EU to inform the consumer when the price is personalised, on the basis of automated decision-making. This information requirement should not apply to techniques such as "dynamic" or "real-time" pricing that involve changing the price in a highly flexible and quick manner in response to market

businesses to customise the prices of their offers for individual consumers or specific categories through automated processes or by profiling their behaviour. In this case, however, the trader must inform the recipient that the price has been automatically personalised, so that the latter is aware of this and can carefully weigh up the consequences of concluding the commercial transaction.[45] Therefore, this change undoubtedly represents an important step forward in the regulation of commercial practices based on profiling and algorithmic personalisation, but it presents several critical issues that risk undermining its effectiveness.

Specifically, it appears from the letter of the rule that the company may merely inform the consumer that that price has been customised by automated means, without, however, having to disclose to him what data has been processed and how the customised price differs from that applied to others.[46] Although the informational remedy is (still) indispensable to guarantee the consumer's freedom of choice, it is doubtful – all the more so after the results of cognitive science – that it is *ex se* sufficiently effective. Indeed, it must be noted that the imposition of a general obligation to inform the recipient that that price has been personalised by an algorithm on the basis of the data collected and on his online behaviour does not allow him, in any case, to understand the data based on which that personalisation was made. The consequence of this is that he is not put in a position to actually understand what biases and inferences the algorithm has detected – and subsequently exploited – to work out the price.

This issue is particularly evident in the digital environment, where the very workings of the algorithms are unclear, considering also all the limitations to disclosure obligations posed by trade secrecy.[47]

3.2 A SECOND STEP FORWARD: THE DIGITAL SERVICES ACT

An undeniable step forward is the very recent Regulation 2022/2065/EU (the 'Digital Services Act'(DSA))[48] aimed at creating a safer and fairer digital environment and which provided for new and more stringent disclosure, transparency, and accountability obligations for platforms (especially very large platforms and gatekeepers).[49] To achieve these results, on the one hand, Article 38 requires platform operators and very large search engines using recommendation systems to provide at least one option not based on a recommendation system or profiling (the so-called 'option not to be profiled') and, on the other hand, Article 26, regarding online advertising, requires digital service providers to give the user all relevant

demands when those techniques do not involve personalisation based on automated decision-making'.

[45] UCPD, Art 4.

[46] Strycharz and Duivenvoorde (n 24) 17-18.

[47] Frank Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information* (Harvard University Press, 2015) 320 ff.

[48] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1 (DSA).

[49] DSA, recital 72 states that: 'Transparency puts external pressure on gatekeepers not to make deep consumer profiling the industry standard, given that potential entrants or start-ups cannot access data to the same extent and depth, and at a similar scale'.

information on the main parameters (criteria and reasons for relative importance) used to identify the recipient of the advertising.

Once again, it must be noted that imposing a general obligation to describe the main parameters used cannot alone effectively guarantee full user awareness. This assertion is justified not only by cognitive studies that have shown that information obligations have a limited effect in reducing the information gap between the two parties,[50] but above all by the consideration that describing only the 'main parameters' is likely to result in mere formal compliance on the part of companies. The only result will therefore be a very long and technical list of parameters that will only serve to confuse the consumer and which, in most cases, will not even be read.

However, the DSA imposes to very large online platforms to conduct risk assessments for their systems, including those which are used for personalised recommendations. In this assessment, the provider must assess systemic risks stemming from the design, including algorithmic systems, functioning and use made of their services; at least once every year; and prior to deploying new functionalities.[51] This provision also clarifies that 'systemic risk' must include illegal content and actual or foreseeable adverse effects on fundamental rights (such as human dignity and consumer protection).

This is an important step forward in the protection of consumers against the governance of algorithms, since the imposition of risk assessment obligations – although limited to very large online platforms – shows a change of perspective in addressing those practices which exploit human vulnerabilities. In particular, the fact that the EU legislator requires to providers to consider foreseeable systemic risks shows the will to develop a new 'long-term thinking' in the industry.[52] As already noted,[53] imposing risk assessment obligations instead of information requirements presents some relevant advantages since they can mitigate harm upstream when products and services are not yet placed on the market. However, even this tool presents some concerns, since it mainly relies on self-assessment. Again, providers of online platforms play a key role even in the enforcement and application of legal provisions.

3.3 FINAL CONSIDERATIONS ON THE FUTURE OF CONSUMER PROTECTION AGAINST ALGORITHMS: IS IT ENOUGH?

As has emerged from this discussion, it is essential to ensure adequate protection for consumers against the dangers of profiling and personalisation of content in order to avoid prejudice to their freedom of decision-making. At the same time, it has been shown that the current EU regulatory framework does not always seem to be able to provide the best possible tools and, indeed, despite the fact that consumer discipline remains a fundamental pillar, this discussion has shown that such algorithmic practices have the potential to be

[50] Sandra Wachter, 'Affinity Profiling and Discriminatory By Association in Online Behavioral Advertising' (2020) 35(2) Berkeley Technology Law Journal 367 ff; Ben-Shahar and Schneider (n 13).
[51] DSA, Art 34.
[52] Sébastien Fassiaux, 'Preserving Consumer Autonomy through European Union Regulation of Artificial Intelligence: A Long-Term Approach' (2023) 14(4) European Journal of Risk Regulation 710, 728 ff.
[53] ibid 725.

detrimental in several respects. Therefore, it is necessary to adopt a holistic approach, i.e. a system of instruments that, as a whole, can guarantee comprehensive consumer protection.

First, a preliminary intervention is to interpret the UCPD in an evolutionary sense so as to include expressly – and not only by interpretation – also these commercial practices within its scope.

Another intervention could be in the direction of introducing disclosure requirements tailored to the specific risks that profiling and content personalisation bring. For instance, the imposition of a general duty to inform the consumer about the fact that that product or price has been personalised as well as the provision of a generic description of how the algorithm works seems neither sufficient nor effective. On the contrary, it might be more appropriate to introduce a specific duty of disclosure of the data and behavioural traits based on which the profiling and personalisation were carried out. On closer inspection, this measure would substantially implement the principle of transparency, the cornerstone of all consumer legislation.

To truly implement this principle, it is necessary to reconsider consumer law from a behavioural perspective to understand that, even if normally circumspect and careful, when it comes to commercial practices based on profiling and algorithmic personalisation, the individual finds himself vulnerable. Following this approach, one possibility could be to adapt the very concept of vulnerability to the digital environment, since this creates new forms of vulnerability that are often temporary and contextualised with respect to the specific situation.[54] Aware of this issue, in late 2021 the Commission has adopted some guidelines on the interpretation of the UCPD with a specific reference to the concept of vulnerability in the data-driven practices, stating that it should be better conceived as 'dynamic and situational'.[55] Although this recommendation is welcome since it expresses the awareness of adapting this traditional category to the digital world, its concrete application in cases is still to be analysed by the CJEU.[56]

Along these lines, there is also the proposal that it would be appropriate to introduce an obligation for companies using such practices to expressly disclose which categories of users have been targeted and against which parameters they have been chosen.[57] This latter solution would have the undoubted advantage of making it easier for judicial and supervisory authorities to determine which group to consider when assessing the unfairness or otherwise of such a practice. As we have already seen, this obligation has been provided for in Article 30 of the DSA whereby (only) the largest platforms must publish a database containing the

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[54] Nadine Bol et al, 'Vulnerability in a tracked society: Combining tracking and survey data to understand who gets targeted with what content' (2020) 22(11) New Media & Society 1996; Strycharz and Duivenvoorde (n 24) 22; Philipp Hacker, 'Manipulation by algorithms. Exploring the triangle of unfair commercial practice, data protection, and privacy law' (2021) 29 European Law Journal 142; Natali Helberger et al, 'Choice Architectures in the Digital Economy: Towards a New Understanding of Digital Vulnerability' (2022) 45 Journal of Consumer Policy 175; Fabrizio Esposito and Mateusz Grochowski, 'The Consumer Benchmark, Vulnerability, and the Contract Terms Transparency: A Plea for Reconsideration' (2022) 18(1) European Review of Contract Law 1.

[55] 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.

[56] Fassiaux (n 52). See also Christoph Busch, 'Self-regulation and regulatory intermediation in the platform economy' in Marta Cantero Gamito and Hans-Wolfgang Micklitz (eds), *The Role of the EU in Transnational Legal Ordering: Standards, Contracts and Codes* (Edward Elgar 2020).

[57] Strycharz and Duivenvoorde (n 24) 19-22.

targeted consumers for each advertisement displayed. This provision, although it should also be extended to other operators, represents a valuable tool to prevent the exploitation of users' vulnerabilities.

In conclusion, the development of technologies capable of recognising human emotions and exploiting them to guide consumer behaviour requires the presence of appropriate legislation to ensure a reliable system that respects fundamental values. Although the current regulatory framework, and in particular the UCPD, undoubtedly provides effective protection for the consumer, there are nonetheless several problematic nodes that need more attention from the EU legislator and that stem from the impact of algorithms with traditional legal categories.[58]

[58] Gabriele Spina Alì and Ronald Yu, 'Artificial Intelligence between Transparency and Secrecy: From the EC Whitepaper to the AIA and Beyond' (2021) 12(3) European Journal of Law and Technology, 5-6 <https://ejlt.org/index.php/ejlt/article/view/754> accessed 01 March 2024.

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THE OBLIGATION TO ESTABLISH AND UPHOLD JUDICIAL INDEPENDENCE UNDER ARTICLE 19(1) TEU

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This article explores the obligation of Member States, under Article 19(1) TEU, to uphold the judicial independence of all national courts who 'may' rule on Union law. The European Court of Justice (ECJ) first set out this obligation in their seminal ruling in Associação Sindical dos Juízes Portugueses and has since developed an extensive case-law. This article explores and discusses that case-law with the purpose of setting out, in a general manner, the key obligations Member States have under Article 19(1) TEU. Furthermore, where the ECJ has only set out general requirements without detailing their content, this article expands on the case-law by supplementing and contrasting solutions provided to similar issues in the case-law of the European Court of Human Rights (ECtHR), the recommendations of the Venice Commission and in wider International Human Rights Law. Finally, this article discusses whether judicial independence can be balanced against other aims, concerns and goals, and what room that leaves Member States to justify potential restrictions on judicial independence by the pursuit of (other) legitimate objectives.

1 INTRODUCTION AND BACKGROUND

1.1 RULE OF LAW-BACKSLIDING IN THE EUROPEAN UNION

Judicial independence has been under increasing pressure in Europe, with the so-called *Rule of law-backsliding* of several EU Member States. This has involved the deliberate capturing or weakening, by elected politicians, of internal checks on power like the judiciary, with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party.[1] This has particularly been observed in Hungary under *Fidesz* and Poland under *PiS*,[2] but there are multiple Member States in which the confidence in the judiciary, and in their independence, are low.[3]

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[1] Laurent Pech and Kim Lane Scheppele, 'Illiberalism within: Rule of Law Backsliding in the EU' (2017) 19 Cambridge Yearbook of European Legal Studies 3, 8 ff.; cf Damjan Kukovec, who argues that the term misrepresents what is in reality a larger 'crisis of common values', see Damjan Kukovec 'The Origins of the Crisis of Common Values of the European Union' in Tamara Ćapeta, Iris Goldner Lang, and Tamara Perišin (eds), *The Changing European Union – A Critical View on the Role of Law and the Courts* (Hart Publishing 2022) 161, 164.

[2] See Commission, '2021 Rule of law Report: The rule of law situation in the European Union' COM (2021) 700 final, 8 ff; Commission, '2023 Rule of Law Report: The rule of law situation in the European Union' COM (2023) 800 final. cf also the chapters on Hungary and Poland, see Commission, '2023 Rule of Law Report: Country Chapter on the rule of law situation in Hungary' SWD (2023) 817 final; Commission, '2023 Rule of Law Report: Country Chapter on the rule of law situation in Poland' SWD (2023) 821 final.

[3] Commission, 'The 2023 EU Justice Scoreboard' COM (2023) 309, section 3.3.1, citing Ipsos European Public Affairs, 'Flash Eurobarometer 519: Perceived independence of the national justice systems in the EU among the general public' (2023). However, Member States still score middle to high on rule of law metrics, see the World Justice Project, 'Rule of Law Index 2023' (2023) <https://worldjusticeproject.org/rule-of-law-index/ > accessed 28 March 2024.

This is an existential threat to the EU because the Union relies on decentralised enforcement of Union law by the national courts, which serve a dual role as both domestic and European courts.[4] Lack of independence and confidence in these courts will undermine the European project and inherently challenges the values and aspirations on which it builds.

These threats led the ECJ to find, in their seminal ruling in *Associação Sindical dos Juízes Portugueses v Tribunal de Contas (ASJP)*,[5] a general obligation under Article 19(1) TEU requiring Member States to establish and uphold independent national judiciaries. Following that ruling, the Court has developed an extensive case-law. This article will explore what obligations that case-law sets out for Member States under Article 19(1) TEU, and expand on it where possible.

1.2 ESTABLISHING AN OBLIGATION TO UPHOLD INDEPENDENCE UNDER ARTICLE 19(1) TEU

Before *ASJP*, Article 19(1) TEU largely served as a guarantee of effective remedies, mostly corresponding to what is now codified in Article 47(1) of the Charter of Fundamental Rights of the European Union (CFR). Control of whether national courts were independent was mostly a question of individual rights under the fair trial-standard, codified in Article 47(2) CFR, or as a requirement for courts wishing to refer cases to the ECJ under Article 267 TFEU.

However, these tools only gave the CJEU a rather limited ability to uphold and protect judicial independence. Article 47 CFR only applies where Member States are 'implementing Union law',[6] and any requirements under Article 267 TFEU only apply to the court making a preliminary reference. In essence, these provisions gave the Court insufficient tools to address internal Member State reforms that systematically sought to undermine the judiciary.

This left the Court open to criticism for being absent, or even marginalised,[7] in the ongoing rule of law debate. As an example, when confronted with Hungarian attempts at removing judges before the end of their terms by lowering the retirement ages, the Court had completely ignored the rule of law and independence aspects of the case and dealt with it as a matter of age discrimination.[8]

Against this backdrop, *ASJP*[9] was the case the Court chose to address their insufficient tools to combat rule of law-backsliding. The case concerned a series of Portuguese austerity measures, which among other things reduced remuneration in the public sector, including for judges. A union of Portuguese judges, representing judges in the *Tribunal de Contas*, argued before the Portuguese Supreme Administrative Court that the reduction breached the principle of judicial independence. That court then referred the case for a preliminary ruling from the ECJ.

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[4] Koen Lenaerts, 'New Horizons for the Rule of Law within the EU' (2020) 21(1) German Law Journal 29, 29–30. See also Case C-204/21 *Commission v Poland (Indépendance et vie privée des juges)* EU:C:2023:442 paras 128 and 274.

[5] Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas (ASJP)* EU:C:2018:117.

[6] See Article 51(1) CFR.

[7] See Matteo Bonelli and Monica Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary' (2018) 14(3) European Constitutional law Review 622, 623.

[8] Case C-286/12 *Commission v Hungary* EU:C:2012:687 paras 48–81.

[9] *ASJP* (n 5).

It was not obvious that these austerity measures were 'implementing Union law' so that the requirement of independence in Article 47 CFR would apply. In fact, the Court had not previously dealt with austerity measures or reductions in judicial remunerations under Article 47 CFR.[10] This might explain why the referring court asked about independence both under Article 47 CFR and under Article 19(1) TEU. The latter is not limited to measures 'implementing Union law', but states in its second subparagraph that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law', arguably giving it a wider scope of application.

In its ruling the ECJ chose to focus solely on Article 19(1) TEU,[11] finding that it obliged Member States to uphold the independence of all national courts that 'may rule' on questions of Union law,[12] which in practice includes almost all national courts. This operationalisation of Article 19(1) TEU allowed the Court to sidestep the more limited scope of Article 47 CFR and develop a broadly applicable provision with which to combat rule of law-backsliding.[13] This has generally been seen,[14] but not by everyone,[15] to constitute an expansion of Union intervention in the competences of Member States to organise their own judicial systems. However, it also made sure the Court was better prepared for the next round, with tools to uphold not just an economic union, but a union of common values.

1.3 THE OBJECTIVE OF JUDICIAL INDEPENDENCE UNDER ARTICLE 19(1) TEU

This section will analyse the aim and purpose of the obligation to uphold judicial independence under Article 19(1) TEU, which is relevant for the teleological style of

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[10] The Court rejected a case on austerity measures in Case C-128/12 *Sindicato dos Bancários do Norte and Others* EU:C:2013:149 para 12 and Case C-264/12 *Sindicato Nacional dos Profissionais de Seguros e Afins* EU:C:2014:2036 paras 20–21. Reductions in judges' pensions were dealt with as a matter of property rights and equal treatment in Case C-258/14 *Florescu* EU:C:2017:448 paras 43–60.

[11] Contrast this with AG Saugmandsgaard Øe, who found that Article 47 CFR applied to such measures and considered the questions on that basis, see his Opinion in Case C-64/16 *ASJP* EU:C:2017:395 points 52–53 and 69–82.

[12] *ASJP* (n 5) para 40, see also Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* EU:C:2019:531 para 51.

[13] Most seem to agree that this was the motivation: Laurent Pech and Sebastien Platon, 'Judicial Independence under Threat: The Court of Justice to the Rescue in the ASJP Case' (2018) 55(6) Common Market Law Review 1827, 1828; Bonelli and Claes (n 7) 636 ff; Charlotte Reyns, 'Saving Judicial Independence: A Threat to the Preliminary Ruling Mechanism?' (2021) 17(1) European Constitutional Law Review 26, 33; Edouard Dubout, *Droit Constitutionnel de l'Union européenne* (Bruylant 2021) 198. See also Michal Ovádek, 'Has the CJEU just Reconfigured the EU Constitutional Order?' (*Verfassungsblog*, 28 February 2018) <https://verfassungsblog.de/has-the-cjeu-just-reconfigured-the-eu-constitutional-order/> accessed 28 March 2024.

[14] Bonelli and Claes (n 7) 641–643. Pech and Platon (n 13) 1827 call it 'ground-breaking'. See also Ovádek (n 13). Koncewicz calls for Article 19(1) TEU to be rewritten to reflect its new meaning, see Tomasz Tadeusz Koncewicz, 'The Core of the European Public Space: Revisiting Art. 19 TEU in Times of Constitutional Reckoning' (*Verfassungsblog*, 30 June 2022) <https://verfassungsblog.de/the-core-of-the-european-public-space/> accessed 28 March 2024. AG Tanchev also called such an interpretation an 'unwarranted interference in the competence of Poland', see Opinion of AG Tanchev in Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* EU:C:2019:325 point 57; Opinion of AG Tanchev in Case C-192/18 *Commission v Poland (Independence of the ordinary courts)* EU:C:2019:325 point 70.

[15] AG Collins argues that it did not really establish anything new, see his Opinion in Case C-430/21 *RS* EU:C:2022:44 point 68. Koen Lenaerts and José A Gutiérrez-Fons argue that anything new it did was based on common constitutional traditions of Member States, and therefore did not 'impose' anything on Member States, see *Les méthodes d'interprétation de la Cour de justice de l'Union européenne* (Bruylant 2020) 65–67.

interpretation usually applied by the CJEU and will help detailing the specific content and requirements in the following sections.

The text of Article 19(1) TEU first appeared, in its French wording, in the draft Constitutional Treaty during the Convention on the Future of Europe,[16] and was later adopted in the final treaty.[17] With the failure of that treaty, it was instead added to the TEU by the Lisbon Treaty.[18] None of the *travaux préparatoires* explain the motivation for the addition, but it seems likely that it just sought to codify the principle of effective judicial protection as established in CJEU case-law.[19]

The purpose of that principle in case-law was originally to ensure the sufficiency of national remedies when individuals claimed a right deriving from Union law.[20] Recent case-law, following from *ASJP*, has clearly expanded the objective of Article 19(1) TEU, by clarifying that it is now a 'concrete expression the value of the rule of law stated in Article 2 TEU'.[21] In other words, the principle can be said to have an original narrower objective of ensuring sufficient remedies for individual Union rights, and a wide and newer objective of upholding shared Union values, like the rule of law.

Because the expanded application of Article 19(1) TEU in *ASJP* was justified by reading it in conjunction with the rule of law-objective in Article 2 TEU, the case-law on the obligation to uphold an independent national judiciary must therefore be read and interpretated in line with this wider objective of upholding the rule of law.[22]

That said, Article 19(1) TEU must also be interpreted in conjunction with the obligation of the Union to respect national and constitutional identities in Article 4(2) TEU. The organisation of national judiciaries is still intended to be a Member State competence, with Article 19(1) TEU only providing a parameter within which Member States must exercise their competence, thus ensuring that independence and the rule of law are upheld.[23]

This is further evident by the fact that the values in Article 2 and 19(1) TEU are themselves based on the common legal and constitutional traditions of Member States,[24] which are varied and represent different choices and priorities. Articles 2 and 19(1) TEU do not seek to standardise these variations, but represent common values Members States have

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[16] *Document du Praesidium : projet d'articles du titre IV de la partie I de la Constitution concernant les institutions* (23 avril 2002), draft Article 20(1) second subparagraph.
[17] Treaty Establishing a Constitution for Europe, Article I-29 second subparagraph.
[18] Treaty of Lisbon, amendment no. 20, Article 9 F.
[19] Anthony Arnull, 'Article 19 [The Court of Justice of the European Union]' in Hermann-Josef Blanke and Stelio Mangiameli (eds), *The Treaty on European Union – A Commentary* (Springer 2013) 767; Marcus Klamert and Bernhard Schima, 'Article 19 TEU' in Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) 182.
[20] See Matteo Bonelli, 'Effective Judicial Protection in EU Law: an Evolving Principle of a Constitutional Nature' (2019) 12(2) Review of European Administrative Law 35, 37–40.
[21] *ASJP* (n 5) para 32. See also Koen Lenaerts, Piet Van Nuffel, and Tim Corthaut, *EU Constitutional Law* (Oxford University Press 2021) 79. Koen Lenaerts signalled early on that the codification in Article 19(1) TEU could be an impetus for the Court to further develop the principle, see Koen Lenaerts, 'Rule of law and the Coherence of the Judicial System of the European Union' (2007) 44(6) Common Market Law Review 1625, 1629.
[22] Dubout (n 13) 197 argues that the wide interpretation given to Article 19(1) TEU had the purpose of allowing the Court to uphold the value of independence and the rule of law as enshrined in Article 2 TEU.
[23] Case C-430/21 *RS* EU:C:2022:99 para 43; *Commission v Poland (Indépendance et vie privée des juges)* (n 4) paras 72–74 and 263; Lenaerts, Van Nuffel and Corthaut (n 21) 755–756.
[24] Lenaerts and Gutiérrez-Fons (n 15) 65–67. See also *ASJP* (n 5) para 35; Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 *Euro Box Promotion and Others* EU:C:2021:1034 para 219.

undertaken to respect, and for which they will enjoy a certain discretion on how to implement in their national constitutional systems.[25] Article 19(1) TEU will therefore primarily take aim at the more serious or systematic failures of the rule of law.[26]

This also means that Article 19(1) TEU has a different and more systemic objective compared to for example independence under Article 6 ECHR and Article 47 CFR, which primarily seek to uphold judicial independence as a corollary to individual rights.[27] AG Bobek has argued that this difference in focus or objective means that the obligations Article 19(1) TEU imposes on Member States will more often concern the institutional and organisational aspects of judicial independence.[28]

Lastly, Article 19(1) TEU does not just seek to ensure that the judiciary *is* independent, but also that it *seems independent*. This is often expressed in the saying that justice must be 'seen to be done'.[29] The ECJ has expressed this as a consideration of whether a measure can give 'reasonable doubt in the minds of individuals' as to the independence of the judiciary.[30]

2 ESTABLISHING A SEPARATE AND INDEPENDENT JUDICIAL BRANCH

2.1 GENERAL REQUIREMENTS OF SEPARATION OF POWERS

The most basic aspect of judicial independence under Article 19(1) TEU is the obligation to ensure separation of powers, specifically the judiciary as a separate branch.[31] The organisation of the judiciary cannot be left to the discretion of other branches of power – or even judicial authorities themselves – but must be enshrined in law.[32] Best-practice would likely be to

[25] See Case C-156/21 *Hungary v Parliament and Council* EU:C:2022:97 paras 233–234; Case C-157/21 *Poland v Parliament and Council* paras 265–266; *Commission v Poland (Indépendance et vie privée des juges)* (n 4) para 73.
[26] As argued by AG Bobek in his Opinion in Case C-132/20 *Getin Noble Bank* EU:C:2021:557 point 39.
[27] Koen Lenaerts distinguishes these as 'the fundamental rights dimension' and the 'rule of law dimension' of judicial independence, see Koen Lenaerts, 'Judicial dialogue in a Changing World: Preserving Judicial Independence' in Tamara Ćapeta, Iris Goldner Lang and Tamara Perišin (eds), *The Changing European Union – A Critical View on the Role of Law and the Courts* (Hart Publishing 2022) 9, 19 and 26. The Venice Commission differentiates them as the objective and subjective components of judicial independence, see its 'Report on the Independence of the Judicial System Part I: The Independence of Judges' (2010) Study No. 494/2008, CDL-AD(2010)00, para 6.
[28] See the Opinion of AG Bobek in *Getin Noble Bank* (n 26) point 103. This is a difference in factual focus and threshold, not a difference in the definition and requirements of independence.
[29] A famous statement by Lord Hewart in *R v Sussex Justices, ex. p. McCarthy* [1924] 1 KB 256, 259 (Hewart J). See also the Opinion of AG Tanchev in Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and Others* EU:C:2019:551 point 120.
[30] Case C-132/20 *Getin Noble Bank* EU:C:2022:235 para 96. cf also the Opinion of AG Bobek in Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *AFJR* EU:C:2020:746 point 293–295, emphasising 'public perception'.
[31] Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and Others* EU:C:2019:982 para 124. Also required under the ECHR: see *Guðmundur Andri Ástráðsson v Iceland* App no 26374/18 (ECtHR, 1 December 2020) para 215. See also Romain Tinière and Claire Vial, *Droit de l'Union européenne des droits fondamentaux* (Bruylant 2023) 621.
[32] See Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *Asociația 'Forumul Judecătorilor din România' (AFJR)* EU:C:2021:393 paras 195–198; Case C-791/19 *Commission v Poland (Disciplinary regime of judges)* EU:C:2021:596 paras 167–168. cf UN Human Rights Committee (HRC), 'General Comment no 32: Article 14: Right to equality before courts and tribunals and to a fair trial' (2007) CCPR/C/GC/32, para 19.

enshrine separation of powers in the constitution.[33]

Furthermore, the branches of powers must be sufficiently separated to preclude any undue influence over the judiciary.[34] That includes, for example, situations where the courts are subject to hierarchical constraints, subordination, or subject to the instructions of other branches.[35] Lastly, individual judges must be protected against undue influence over their specific decisions, even from other judges.[36]

These requirements would likely preclude situations like the ECtHR dealt with in *Beaumartin*,[37] where a national court was obliged to refer certain legal questions to the executive branch for a binding answer, as that would be a type of instruction on how to decide a case. The ECtHR stated more generally that national courts had to have full independence to answer the legal question at hand, finding a breach of Article 6 ECHR in that case.[38]

2.2 THE USE OF SPECIAL COURTS OUTSIDE THE JUDICIARY

A challenge to the doctrine of separation of powers is the use of court-like bodies that are not a part of the ordinary judiciary, either being outside of it or having relations to other branches of power. This can include bodies like customary or religious courts, administrative tribunals, military courts, courts of impeachment or even constitutional courts when established outside the judiciary. Such bodies are both a threat to separation of powers and can be used by other branches to side-line the judiciary.

The ECJ has stated, commenting on constitutional courts, that it is not decisive whether the court is a part of the ordinary judicial system, as long as it fulfils the requirements of independence.[39] Because constitutional courts serve a limited and very distinct purpose,[40] this statement must be seen in that context and likely does not mean that special courts outside of the judiciary are generally acceptable.

The UN Human Rights Committee (HRC) has recommended under Article 14 ICCPR that the use of military and other special courts should be exceptional and limited to situations where they serve some objective that ordinary courts are otherwise unable to undertake.[41] Excessive recourse to special courts outside the ordinary judicial system would challenge the principle of separation of powers discussed above and must therefore be

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[33] As recommended by the Venice Commission, 'Report on the Independence of the Judicial System Part I' (n 27) para 22; Venice Commission, 'Rule of Law Checklist' (2013) Study No. 711/2013, CDL-AD(2016)007revm, recommendation E(1)(a)(i).

[34] See, on the need to avoid undue influence from other branches, inter alia, *Commission v Poland (Disciplinary regime of judges)* (n 32) para 86 and *Commission v Poland (Independence of the Supreme Court)* (n 12) para 72.

[35] See *RS* (n 23) para 41 and *Getin Noble Bank* (n 30) para 96.

[36] See for this, Case C-216/21 *AFJR II* EU:C:2023:628 paras 78–82; Opinion of AG Pikamäe in Joined Cases C-554/21, C-622/21 and C-727/21 *HANN-INVEST* EU:C:2023:816, points 63 ff. See also *Agrokompleks v Ukraine* App no 23465/03 (ECtHR, 25 July 2013) paras 137–139. This does not preclude directives from higher courts, especially in appeal proceedings, see *Yurtayev v Ukraine* App no 11336/02 (ECtHR, 31 January 2006) para 26.

[37] *Beaumartin v France* App no 15287/89 (ECtHR, 24 November 1994).

[38] ibid para 38.

[39] *Euro Box Promotion and Others* (n 24) para 232.

[40] See, for an overview of the role of constitutional courts, Venice Commission, 'Compilation of Venice Commission Opinions, Reports and Studies on Constitutional Justice (updated)' (2020) CDL-PI(2020)004, especially section 2.

[41] HRC General Comment no. 32 (n 32) paras 22–24.

similarly restricted under Article 19(1) TEU.

When Member States do use such special courts, they must necessarily also comply with requirements of independence. In case-law under Article 267 TFEU, the ECJ has found that the close links of administrative tribunals to the executive can undermine the independence of such bodies.[42] The ECtHR has similarly found that military courts which are organised as a part of the executive and under military discipline will violate the requirement of independence in Article 6 ECHR.[43]

2.3 OTHER ATTEMPTS AT SIDE-LINING OR INFLUENCING THE JUDICIARY

In addition to establishing courts outside of the judiciary, there are many other ways – formal and informal – by which other branches of power can seek to side-line or influence the judiciary.

The ECJ dealt with an attempt at formal side-lining in *Commission v Poland (Indépendance et vie privée des juges)*, where Poland had granted the Chamber of Extraordinary Review and Public Affairs exclusive jurisdiction on complaints regarding the independence of courts or judges. The ECJ stated that Member States in theory could grant such exclusive competence, but that it was not related to any benefit in this case, like specialisation or efficiency.[44] Rather, in the context of other reforms and the fact that even this chamber had a quite limited jurisdiction, the measure was likely meant to further weaken the effectiveness and monitoring of compliance with judicial independence, contrary to Article 19(1) TEU.[45] In *Commission v Poland (Disciplinary regime of judges)*, the Court similarly saw granting of exclusive jurisdiction to the Disciplinary Chamber of the Polish Supreme Court as one of the factors which undermined the independence of that Chamber.[46]

The cases illustrate that changes in jurisdiction can threaten independence in breach of Article 19(1) TEU when clearly used to side-line the judiciary. However, in most cases Member States will have a plethora of legitimate reasons to establish new judicial bodies, change rules or enact similar measures.[47] Article 19(1) TEU will not stand in way of these as long as it is not blatant side-lining without any justifying rationale.

The use of more informal means to attempt a side-lining or undue influence in the judicial process could also undermine independence in breach of Article 19(1) TEU. As AG Bobek has opined, Article 19(1) TEU cannot simply concern itself with the law as it is 'on the books', but entails a requirement that these laws, institutions and protections are actually upheld in practice.[48]

Some examples of such bad practices and undue influence can be found in the case-law of the ECtHR. That includes informal attempts to directly affect the outcome of

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[42] Case C-274/14 *Banco de Santander* EU:C:2020:17 paras 51–80.
[43] *Şahiner v Turkey* App no 29279/95 (ECtHR, 25 September 2001) paras 39–47. See also *Findlay v The United Kingdom* App no 22107/93 (ECtHR, 25 February 1997) paras 70–80.
[44] *Commission v Poland (Indépendance et vie privée des juges)* (n 4) paras 264–265 and 278–279.
[45] ibid paras 286–289.
[46] *Commission v Poland (Disciplinary regime of judges)* (n 32) para 89. See also *A.K. and Others* (n 31) para 147.
[47] See for example the Opinion of AG Campos Sánchez-Bordona in Case C-634/22 *OT and Others (Suppression d'un Tribunal)* EU:C:2023:913 points 51–71 where the abolishment of a court, in the context of a judicial reform, did not create issues of independence.
[48] See the Opinion of AG Bobek in *Getin Noble Bank* (n 26), point 98.

a case,[49] and practices where appearances give rise to doubts regarding the independence of the court, like a sitting judge being in a hiring process – and later being appointed – for the same ministry that was a party to the case.[50]

Article 19(1) TEU must likely contain similar obligations for Member State to avoid such informal interferences and practices, at least if they are of a more systematic or widespread nature that could threaten the independence of the judiciary as such.

3 JUDICIAL REMUNERATION AND THE FINANCIAL AUTONOMY OF THE JUDICIARY

Ensuring separation of powers and the establishment of an independent judiciary is not just a matter of rules and practice, but also of resources and funding. However, matters of public finance and spending priorities are closely tied to the national democratic process,[51] and quite far from the core objectives of Article 19(1) TEU. This means that Members States must have a large margin for national priorities.

Financial matters related to judicial independence have been before the ECJ in two cases, *ASJP* and *Vindel*. The cases concerned, respectively, Portuguese and Spanish austerity measures which reduced the wages of public employees, including judges.[52] The plaintiff in both cases were judges who alleged that this reduction was a threat to judicial independence, in breach of Article 19(1) TEU.

Such reductions could threaten independence under Article 19(1) TEU in two ways. Firstly, by a too low level of remuneration; and secondly, by using changes and differentiation in remuneration to reward or punish judges.

On the first issue, the absolute level of remuneration, the ECJ stated in both *ASJP* and *Vindel* that a level of remuneration which is 'commensurate with the importance of the functions' was an essential guarantee of independence under Article 19(1) TEU.[53] In *Vindel* the Court indicated that this only meant sufficient in light of the 'socio-economic context' and the 'average remuneration' of comparable employees.[54]

The purpose of that requirement is to protect judges from external interference and pressure.[55] This can include, for example, the risk inherent in judges taking on dual roles to increase their remuneration, or in the worst-case resorting to corruption.[56]

While both *ASJP* and *Vindel* dealt solely with the remuneration of judges, the same risks pointed out in those cases can arise with the underfunding of other parts of the judiciary. Dual roles, corruption, or in the worst-case a lack of sufficient resources for proper

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[49] *Agrokompleks* (n 36) paras 123–141, specifically 133 and 134.
[50] *Sacilor Lormines v France* App no 65411/01 (ECtHR, 9 November 2006) paras 68–69.
[51] Democracy is also a founding value of the EU, see Articles 2 and 10 TEU.
[52] *ASJP* (n 5) paras 11–18 and 46-49; Case C-49/18 *Vindel* EU:C:2019:106 paras 6–12 and 67.
[53] *ASJP* (n 5) para 45; *Vindel* (n 52) para 66. Reiterated in Case C-216/18 PPU *LM* EU:C:2018:586 para 64. cf also Venice Commission, 'Report on the Independence of the Judicial System Part I' (n 27) para 82 nr 7, and the HRC recommending 'adequate remuneration' in General Comment no. 32 (n 32) para 19.
[54] *Vindel* (n 52) para 70–73.
[55] ibid.
[56] Compare here the reasoning given by the Venice Commission for the same requirement: Venice Commission, 'Report on the Independence of the Judicial System Part I' (n 27) para 46; Venice Commission, 'Rule of Law Checklist' (n 33) para 85. See also the reasoning by the ECtHR in *Zubko and others v Ukraine* Apps nos 3955/04, 5622/04, 8538/04 and 11418/04 (ECtHR, 26 April 2006) paras 67–69.

functioning would clearly prevent the effective judicial protection required by Article 19(1) TEU. It therefore seems likely that the obligation to provide judges with a sufficient remuneration is a concrete expression of what the Venice Commission has recommended more generally, that the judiciary must be provided with adequate resources to live up to the standards required of it.[57]

On the second issue, using changes in remuneration to reward or punish judges, the ECJ emphasised in both *ASJP* and *Vindel* that the reductions were a part of general austerity measures to reduce the deficit, which were applied widely and equally.[58] They could therefore not be said to be 'specifically adopted' against the judges and did not threaten their independence.[59]

In other words, Member States can regulate wages of judges and the judiciary on a more general level. It is, as the Venice Commission has recommended, where the changes are so specific that they can be used as 'performance assessment' that it will risk undermining independence.[60]

That said, the best-practice solution on financial matters is likely to follow the recommendations of the HRC and Venice Commission to have clear rules and procedures for establishing remuneration[61] and allow input from the judiciary in budgetary proceedings.[62]

In total, Article 19(1) TEU can impose certain obligations on Member States when it comes to the funding of the judiciary and the administration of that funding. However, Member States will have a large room for economic priorities.[63] As long as remuneration is set based on transparent economic criteria, as a part of general measures not targeting specific judges, it will not threaten judicial independence.

4 ENSURING PROPER ASSIGNMENT OF CASES

Member States must ensure that the assignment of cases, both to judges and courts, is done in a manner which does not undermine the independence of those judges and courts.

The ECJ has dealt with the question of how to allocate cases in *Commission v Poland (Disciplinary regime of judges)*.[64] In that case, the president of the Disciplinary Chamber of the Polish Supreme Court, which had jurisdiction as an appellate court in disciplinary cases, had full discretion to decide which court had jurisdiction in the first instance without needing to base that decision on pre-existing criteria. The ECJ stated that such a system could be used to put pressure on judges by directing cases to certain judges while avoiding others.[65] Such

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[57] Venice Commission, 'Report on the Independence of the Judicial System Part I' (n 27) paras 52–55; Venice Commission, 'Rule of Law Checklist' (n 33) recommendation E(1)(a)(x).
[58] *ASJP* (n 5) paras 46–48; *Vindel* (n 52) para 67.
[59] *ASJP* (n 5) paras 49 and 51.
[60] See Venice Commission, 'Report on the Independence of the Judicial System Part I' (n 27) para 46, where it recommends avoiding discretion or individual assessments.
[61] HRC General Comment no. 32 (n 32) para 19; Venice Commission, 'Report on the Independence of the Judicial System Part I' (n 27) para 46.
[62] Venice Commission, 'Report on the Independence of the Judicial System Part I' (n 27) para 55; Venice Commission, 'Rule of Law Checklist' (n 33) recommendation E(1)(a)(x).
[63] Especially in an economic crisis. See the Opinion of AG Saugmandsgaard Øe in *ASJP* (n 11) point 82.
[64] *Commission v Poland (Disciplinary regime of judges)* (n 32).
[65] *Commission v Poland (Disciplinary regime of judges)* (n 32) paras 164–177.

discretion in assigning jurisdiction did not meet the requirements of Article 19(1) TEU.

The case can be said to establish the principle that jurisdiction must be determined by objective criteria set in advance.[66] The facts of the case only dealt with establishing jurisdiction for courts, but assigning jurisdiction to individual judges within courts raises similar concerns and issues. Discretion in such matters can be used to direct cases to certain judges for a preferred outcome, or to influence judges by overburdening some while rewarding others with high profile cases.[67] It is therefore likely that the statements in *Commission v Poland (Disciplinary regime of judges)* are an expression of a more general obligation to ensure that jurisdiction is based on objective criteria set in advance both for courts and judges.

Such an interpretation of Article 19(1) TEU would align well with the case-law of the ECtHR and the recommendations of the Venice Commission. Both require that the assignment of jurisdiction, to courts and to individual judges, must be determined by objective criteria set in advance.[68]

However, the requirement of jurisdiction being determined in advance does not mean that there is no room for flexibility. The Venice Commission takes no issue with cases being assigned to judges with specific competencies, or rules that consider the workload of judges.[69] Furthermore, rules that allow for the reassignment of cases in certain situations must also be permissible, like when the assigned judge falls ill. Problems arise where the rules are so flexible as to *de facto* allow for discretion in assigning jurisdiction, thereby allowing it to be used to reward or punish judges.

5 ENSURING PROPER APPOINTMENT OF JUDGES

5.1 GENERAL REQUIREMENTS FOR APPOINTMENT PROCEDURES

The appointment of judges[70] is an important avenue through which the judiciary can be influenced. That could involve everything from appointing judges with favourable viewpoints to packing the court with judges that are seen as more loyal.

For this reason, the ECJ has stated repeatedly that Article 19(1) TEU obliges Member States to have rules on appointment that can dispel any reasonable doubt as to the independence of a judge and their neutrality with respect to interests before them once appointed.[71] This must be ensured during the whole process of appointments, which includes

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[66] See further on this principle, Venice Commission, 'Report on the Independence of the Judicial System Part I' (n 27) section 11.

[67] cf the reasoning on discretionary transfer of judges in Case C-487/19 *W.Ż.* EU:C:2021:798 para 115.

[68] Venice Commission, 'Report on the Independence of the Judicial System Part I' (n 27) paras 73–81; Venice Commission, 'Rule of Law Checklist' (n 33) 22 recommendation IV. See also *Miracle Europe KFT v Hungary* App no 57774/13 (ECtHR, 12 January 2016) paras 57–67.

[69] Venice Commission, 'Report on the Independence of the Judicial System Part I' (n 27) para 80.

[70] Including transfers, secondments, reassignments and promotions. On promotions, see *AFJR II* (n 36) paras 65–67 and 71.

[71] See, inter alia, Joined Cases C-542/18 RX-II and C-543/18 RX-II *Simpson and HG* EU:C:2020:232 para 71; *Getin Noble Bank* (n 30) para 95. See from IHRL: HRC General Comment no. 32 (n 32) para 19; *Quintana Coello et al. v. Ecuador*, IACtHR, judgment of 23rd August 2013, Series C No. 266 para 144. See also Venice Commission, 'Report on the Independence of the Judicial System Part I' (n 27) paras 25–38.

the criteria used to evaluate appointees,[72] the procedural rules governing appointments,[73] and any potential irregularities during appointments.[74] These parts of the appointment procedure will be considered in turn.

5.2 THE CRITERIA USED TO SELECT APPOINTEES

The substantive criteria for selecting candidates is an important starting point for ensuring judicial independence. Article 19(1) TEU requires that the substantive conditions are known in advance,[75] and drafted in such a way as to not give rise to reasonable doubt as to the independence of the appointee.[76]

The primary criterion for appointments should be merit. This is clear from the ruling in *AFJR II*, where an evaluation of the work and conduct of a candidate based on randomly selected previous cases, records of previous hearings and their professional file were criteria the ECJ found to be 'relevant for the purpose of assessing the professional merits of candidates'.[77]

The case-law of the ECtHR has also emphasised merit-based selection as 'paramount' to ensuring the technical function and public confidence in the judicial system.[78] By 'merit', the ECtHR refers to both technical competence and moral integrity. The Venice Commission has similarly recommended that merit be the primary criteria for evaluating candidates because it ensures transparency and creates public trust.[79]

In other words, Member States must ensure that merit is the primary criterion. However, neither of these courts require it to be the only criterion, leading to the question of what margin Member States have to allow political considerations in appointments.

In *AFJR II*, the ECJ emphasised the importance of an 'objective assessment based on verifiable information', to avoid a discriminatory procedure.[80] At the same time, the ECJ has not inherently condemned appointments by the legislative or executive branches,[81] and neither has the ECtHR.[82] The acceptance of the involvement of other branches can be seen as a tacit acceptance of at least some political discretion in appointments, at minimum regarding the judicial philosophy or interpretive practices of the potential appointee.

Such a tacit acceptance is also supported by the fact that even blatant political motivations in appointments are somewhat common among Member States, at least for

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[72] *W.Ż.* (n 67) para 148; *Getin Noble Bank* (n 30) para 97.
[73] ibid.
[74] *Simpson and HG* (n 71) para 75 and *W.Ż.* (n 67) para 130.
[75] cf for secondments, Joined Cases C-748/19 to C-754/19 *Prokuratura Rejonowa* EU:C:2021:931 paras 78–79.
[76] Case C-896/19 *Repubblika* EU:C:2021:311 paras 55 and 57.
[77] *AFJR II* (n 36) paras 83–85. The details of the criteria are better explained in the Opinion of AG Emiliou in Case C-216/21 *AFJR II* EU:C:2023:116 points 72–73.
[78] *Ástráðsson* (n 31) paras 220–222; *Advance Pharma sp. z o.o. v Poland* App no 1469/20 (ECtHR, 3 February 2022) para 295.
[79] Venice Commission, 'Report on the Independence of the Judicial System Part I' (n 27) paras 25–27; Venice Commission, 'Rule of Law Checklist' (n 33) recommendation VI and para 79.
[80] *AFJR II* (n 36) paras 85–86.
[81] Case C-824/18 *A.B. and Others* EU:C:2020:1053 para 122; *Repubblika* (n 76) para 56.
[82] See *Absandze v Georgia* App no 57861/00 (ECtHR, 15 October 2002) section F (a); *Maktouf and Damjanović v Bosnia and Herzegovina* Apps nos 2312/08 and 34179/08 (ECtHR, 18 July 2013) para 49; *Thiam v France* App no 80018/12 (ECtHR, 18 October 2018) para 59; *Xero Flor w Polsce sp. z o.o. v Poland* App no 4907/18 (ECtHR, 7 May 2021) para 252.

constitutional courts.[83] Because Article 2 and 19(1) TEU build on the common constitutional traditions of Member States,[84] it seems unlikely that this would be entirely precluded. AG Hogan stated this clearly in *Repubblika*, arguing that it was 'pointless to deny that politics has played a role – sometimes even a decisive one – in the appointment of judges in many legal systems, including those in many Member States'.[85] He points out that these courts have still remained resolutely independent.

The objective of judicial independence under Article 19(1) TEU also seems to support such a view. It seeks to uphold effective judicial protection and the rule of law, which requires an independent judiciary but also a system of checks and balances. Some executive and legislative involvement in appointments can act as a 'check', ensuring democratic legitimacy and institutional balance for important matters like constitutional interpretation and review.[86] Furthermore, judges tend to not be very representative of wider society. Involvement of the other branches can therefore help ensure representativeness and outside input, avoiding an inward looking or technocratic judiciary.

That said, the room for political considerations or discretion for Member States cannot be very large. Firstly, if merit must be the primary criterion, political considerations are only acceptable as a secondary criterion where candidates are of roughly equal merit. Secondly, the ECJ has clearly disapproved of appointments where political discretion was decisive in the procedure.[87]

One way Member States try to balance the concern for judicial independence with the need for democratic legitimacy and checks on judicial power is by limiting political discretion in appointments to a constitutional court only.[88] The power of such courts to set aside, or limit, laws made by an elected parliament can put them at risk of lacking democratic legitimacy, or entail a higher risk of misuse. Involvement from the other branches in appointments can act as a check, and can help ensure a representative and balanced composition of the court. As constitutional courts don't decide the outcome of individual cases, some political involvement is arguably less problematic.

For Member States without a constitutional court, they must likely have some room to ensure similar checks at least over their supreme courts. However, these are courts that decide on individual cases, often with the state as a party. Too much political discretion in appointments could create doubt as to the outcomes of those cases. It therefore seems likely that the room for political discretion in appointments is smaller than what can be accepted

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[83] See for an overview, CJEU, Direction de la recherche et documentation, 'Note de Recherche – Procédures de nomination et de désignation des juges dans les États membres et rôle exercé par le pouvoir exécutif ou législatif dans le cadre de ces procedures' (October 2020) paras 53–74 and the relevant country chapters. See also Venice Commission, 'The Composition of Constitutional Courts, Science and technique of democracy, No. 20' CDL-STD(1997)020, section 1; Venice Commission, 'Compilation of Venice Commission Opinions' (n 40) section 4.

[84] *Commission v Poland (Indépendance et vie privée des juges)* (n 4) paras 69 and 73.

[85] See the Opinion of AG Hogan in Case C-896/19 *Repubblika* EU:C:2020:1055 point 57.

[86] In *Land Hessen* it was acceptable under Article 267 TFEU that a majority of members in a judicial council were appointed by the legislative for reasons of democratic legitimacy. See Case C-272/19 *Land Hessen* EU:C:2020:535 paras 53–58. However, when combined with other issues the result could be different. See *Commission v Poland (Disciplinary regime of judges)* (n 32) para 103. See also the discussion in CCJE Opinion No. 18 'The position of the judiciary and its relation with the other powers of state in a modern democracy' (2015) para 15.

[87] See *Commission v Poland (Disciplinary regime of judges)* (n 32) paras 88–112; *W.Ż.* (n 67) paras 129–130.

[88] See above n 83.

for a constitutional court.

5.3 THE PROCESS FOR APPOINTMENTS

The process for appointments is central both to ensuring that the criteria discussed above are actually followed, and to ensure that there are no undue influences in the procedure.

There are a multitude of processes for appointing judges throughout the Member States of the European Union,[89] and Article 19(1) TEU does not impose an obligation to adopt a specific procedure of appointments. It only requires that the procedure does not leave room for reasonable doubt as to the independence of the appointee.[90] That further requires that the procedure must be laid down in advance and that statements of reason are given, to ensure transparency and objectivity.[91] This section will consider how different systems of appointments align with these requirements.

The first system to be considered is appointment of judges by way of direct election. This is a rare system of appointment in Europe,[92] and has not been the subject of a case before the ECJ. The Venice Commission has stated that such systems provide democratic legitimacy but could also risk drawing judges into electoral politics, politicising the process.[93] It could create doubt as to the independence of judges if they reside over cases on policies they expressed support or opposition to in their electoral platforms.

A further problem with direct elections is that it would seem to conflict with the requirement, discussed above, that merit should be the primary criteria for appointments. However, as stated, merit has two sides: technical competence and moral integrity. Technical competence could be ensured in direct elections by requirements for legal competence to be eligible to run, while moral integrity seems like something an electorate might be well suited to consider. An advantage of direct elections would be that they, by nature, leave less room for the political preferences, or undue influence, of the other branches.

In total, direct elections are an unusual model with clear advantages and disadvantages. The answer would likely be that it is a matter which remains within the discretion of Member States and their capacity to choose their own constitutional systems. However, Article 19(1) TEU could oblige Member States to secure certain minimum standards and safeguards, like requiring minimum levels of legal competence to run.

The second system to be considered is the appointment of judges by the executive branch, typically direct appointments by the head of state or a minister. It is a common way of appointment,[94] and the ECJ has clarified in many cases that executive influence in appointments is acceptable, as long as the appointee remains independent once appointed.[95] An example is found in *Repubblika*, where appointments by the Maltese president, in

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[89] For an overview, see Venice Commission, 'Judicial Appointments Opinion No. 403/2006' CDL-AD(2007)028; CJEU, Direction de la recherche et documentation (n 83).
[90] See, inter alia, *Simpson and HG* (n 71) para 71.
[91] See *Prokuratura Rejonowa* (n 75) paras 78–79.
[92] Venice Commission, 'Judicial Appointments' (n 89) para 9 gives elections at the Swiss canton level as the sole example.
[93] ibid.
[94] Venice Commission, 'Judicial Appointments' (n 89) para 13 ff ; CJEU, Direction de la recherche et documentation (n 83).
[95] *Repubblika* (n 76) para 56; *Euro Box Promotion and Others* (n 24) para 233. See also from the ECtHR: *Ástráðsson* (n 31) para 207; *Xero Flor* (n 82) para 252.

combination with the prime minister, did not undermine independence because their discretion was sufficiently limited. Firstly, discretion was limited by requirements in law establishing minimum requirements for the competence of any appointee.[96] Secondly, discretion was limited by candidates being recommended by a judicial council.[97] The prime minister could diverge from these recommendations, but had to state reasons for any such divergence, which meant it was only done sparingly.[98]

The case indicates that, on the one hand, Article 19(1) TEU does not preclude direct appointments of judges by the executive as long it is based on objective requirements and merit-based evaluation. On the other hand, Article 19(1) TEU would preclude such appointments where the executive is left too much discretion. That was the case for the Polish Disciplinary Chamber, where all judges were newly appointed by the president and the judicial council was not sufficiently independent to limit presidential discretion.[99]

Constitutional courts are a special case where Member States have more leeway in how they appoint judges. In *Euro Box Promotion and Others* the ECJ accepted appointments to the Constitutional Court of Romania made by the executive and legislative. There were legal requirements aimed at securing a high level of merit, and guarantees of independence once appointed, but no judicial council or similar safeguard against political discretion.[100]

In total, direct appointments by the executive are acceptable under Article 19(1) TEU where it can be ensured that merit is the primary criteria for appointments and that executive discretion is sufficiently limited, for example by a judicial council.[101]

The last system to be considered is election of judges by the parliament. Such elections have some of the same benefits in ensuring democratic legitimacy as direct elections, but also carry similar risks of undue influence and the dominance of political motivations as elections by the executive branch. The nature of parliamentary votes, and the political games in the parliament, might even increase the risk of politicisation. The Venice Commission recommends that parliamentary votes are unsuited for appointing judges of regular courts.[102]

However, the ECJ has, in its case-law, not distinguished between the involvement of the legislative and executive branches in appointments. It has stated, for both branches, that it is a question of ensuring that the appointee is not subordinated and remains independent once appointed.[103]

That means that the discussion above about appointments by the executive will apply equally to elections by the legislative or other procedures whereby the legislature has influence on the appointment proceedings. Elections by the legislature would then be

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[96] *Repubblika* (n 76) para 70.
[97] ibid para 66, cf para 5.
[98] ibid para 71.
[99] *Commission v Poland (Disciplinary regime of judges)* (n 32) paras 88–112. The Chamber was new and composed exclusively of newly appointed judges appointed by a procedure dominated by the executive.
[100] *Euro Box Promotion and Others* (n 24) paras 233–235 and para 18.
[101] See, on the use and requirements of such councils, section 8 below. A judicial assessment board could fulfill a similar role, see *AFJR II* (n 36) para 75. A strong legal culture can also constrain discretion, see *Ástráðsson* (n 31) para 230; Venice Commission, 'Judicial Appointments' (n 89) para 5; Venice Commission, 'Rule of Law Checklist' (n 33) para 82.
[102] Venice Commission, 'Judicial Appointments' (n 89) paras 10–12.
[103] See *Commission v Poland (Independence of the Supreme Court)* (n 12) para 116; *Repubblika* (n 76) paras 53–56; *Commission v Poland (Disciplinary regime of judges)* (n 32) para 103; Opinion of AG Rantos in Case C-718/21 *Krajowa Rada Sądownictwa (Maintien en fonctions d'un juge)* EU:C.2023:150 points 28 and 67–68. See from the ECtHR: *Ástráðsson* (n 31) para 207; *Xero Flor* (n 82) para 252.

acceptable where sufficiently constrained by legal requirements and limitations on their discretion, like requiring that a judicial council recommends candidates. Member States likely have more leeway with elections to constitutional courts, possibly also to supreme courts.

5.4 IRREGULARITIES DURING APPOINTMENTS

In addition to ensuring that the law provides for legitimate criteria and a sufficient process, Member States must ensure that these requirements are upheld and followed in practice. Irregularities during appointments can range from procedural errors to outright interference or side-lining of the rules. This section seeks to analyse when irregularities are such as to threaten independence under Article 19(1) TEU.

As a starting point, minor irregularities during an appointment procedure will not affect the independence of the appointee.[104] As the ECJ has stated, it is only those irregularities which 'create a real risk that other branches of the State […] could exercise undue influence' that will undermine independence, which is the case when the irregularities have disregarded 'fundamental rules' in the appointment procedure.[105]

The ECJ has dealt with several cases on irregularities. In *Simpson and HG,*[106] the ECJ considered an irregularity in the appointment to the European Civil Service Tribunal, where it had issued a public call to fill two empty seats and made a list of the applicants, from which it also had drawn candidates to fill a later third seat. The Court found this to technically be an irregularity, as it violated the original public call.[107] However, it did not violate the court statute or any EU law and was not of such a gravity as to indicate any unjust use of power.[108] In other words, purely technical irregularities will not undermine the independence of an appointee.

The Court dealt with two irregular appointments in *Getin Noble Bank*.[109] The first judge had originally been appointed during the Polish Peoples Republic (PPR), an undemocratic regime, and reappointed on the recommendation of a judicial council which was not transparent and whose decisions could not be challenged.[110] The second judge had been appointed, years ago, on the recommendation of a judicial council whose member used rules on tenure that were later declared unconstitutional, retroactively making their composition irregular.[111]

The Court found that neither of these irregularities were a threat to independence. The ECJ saw no reason why being originally appointed under the PPR would in any way enable any undue influence over that judge today.[112] The Court stated similarly that no reasons had been presented as for why neither insufficient transparency and lack of an ability to challenge decisions, nor unconstitutional rules for tenure on judicial councils, were irregularities that

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[104] *Getin Noble Bank* (n 30) para 123.
[105] *Simpson and HG* (n 71) para 75; *W.Ż.* (n 67) para 130; *Getin Noble Bank* (n 30) para 122. Taken from the test developed in *Ástráðsson* (n 31) paras 244–247.
[106] *Simpson and HG* (n 71).
[107] ibid para 68. On the basis of Article 47 CFR.
[108] ibid paras 79–82.
[109] *Getin Noble Bank* (n 30).
[110] ibid paras 80, 101–103 and 111.
[111] ibid para 110.
[112] ibid paras 105–107.

would give rise to reasonable doubt about the independence of these judges today.[113]

In other words, even if an appointment procedure or irregularity possibly could have violated Article 19(1) TEU today, the best approach if the irregularity is old can be to apply a *laissez faire* approach unless it allows undue influence over judges in existing and future cases. In fact, this approach might be necessary to protect independence, by precluding the executive from using old irregularities as a means of pressuring judges.[114]

A case where the irregularities were grave enough to undermine the independence of the appointee was *W.Ż.*[115] The judge in question had been recommended by the Polish National Council of the Judiciary, but that recommendation had been suspended by the Supreme Administrative Court on appeal, pending a referral before the ECJ.[116] The Polish president disregarded this suspension and proceeded to appoint the judge in question to the Chamber of Extraordinary Control and Public Affairs of the Supreme Court. In the view of the ECJ, this irregularity had violated 'fundamental rules' in the appointment procedure.[117]

Contrasting the results in *W.Ż.* with those in *Getin Noble Bank* and *Simpson and HG*, the Court seems to take a functional approach, focusing on whether the irregularity gives the current executive or legislative undue influence over the judiciary. The president disregarding established procedure to push through his appointee in *W.Ż.* created such a risk of undue influence, whereas in *Getin Noble Bank* and *Simpson and HG*, the irregularities were, respectively, old and of a technical nature.

ECtHR case-law similarly indicates that it is only where irregularities are grave enough to increase the discretion of the executive or legislative over appointments that they will be seen to undermine independence. This was the case in *Ástráðsson*, where the Icelandic minister of justice failed to both state reasons and have individual votes in Parliament on changes to the proposed ranking of applicants to the appellate court. The ECtHR saw that as a breach of 'fundamental rules' in that procedure.[118] Similarly, 'fundamental rules' were breached in *Xero Flor* because the Polish president had refused to take the oaths of lawfully appointed judges, instead delaying until the next parliamentary session so that the new majority could appoint judges.[119]

In conclusion, the irregularities that cause a breach of Article 19(1) TEU are those which grant other branches increased discretion to appoint their own preferred judges. This will typically not be the case for minor or technical irregularities. Older irregularities will have to be examined on the basis of whether they still give rise to a risk of reasonable doubt towards, or undue influence over, the judges in question.

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[113] *Getin Noble Bank* (n 30) paras 125–131.
[114] This was largely what seems to be the reality behind the reference in *Getin Noble Bank*. See Paweł Filipek, 'Drifting Case-law on Judicial Independence: A Double Standard as to What Is a 'Court' Under EU Law? (CJEU Ruling in C-132/20 Getin Noble Bank)' (*Verfassungsblog,* 13 May 2022) <https://verfassungsblog.de/drifting-case-law-on-judicial-independence/> accessed 28 March 2024.
[115] *W.Ż.* (n 67).
[116] This pending case was *A.B. and Others* (n 81).
[117] *W.Ż.* (n 67) paras 134–152.
[118] *Ástráðsson* (n 31).
[119] *Xero Flor* (n 82).

6 ENSURING SUFFICIENT TENURE AND IRREMOVABILITY OF JUDGES

6.1 LENGTH OF TENURE AND USE OF TEMPORARY APPOINTMENTS

For judges to be able to judge independently, their position must be secure regardless of the result of their rulings. It is a generally accepted standard of independence that judges must have security of tenure either until mandatory retirement age or the expiry of their term in office, both in EU law[120] and in general IHRL.[121] However, this standard raises some problems. Firstly, how long must terms of office be. If they are too short, they do not offer much security. Secondly, how does the use of probationary or provisional appointments of judges stack up against this standard.

On the first problem, the duration of terms, there is no minimum term length in EU case-law, but the ECJ has stated generally that the length of service is a relevant factor in considering the independence of a judge or court.[122] The Court did touch upon the issue of short appointments in *Commission v Poland (Independence of the Supreme Court)*.[123] In that case, the Polish president could extend the duration of Supreme Court judges' terms beyond the age of retirement by three years, up to two times. The Court found such an arrangement to undermine independence in violation of Article 19(1) TEU. This conclusion was primarily motivated by the large discretion the Polish president had in deciding extensions, but could still indicate that three-year terms are on the shorter end.[124]

The ECtHR has dealt more extensively with term lengths and has accepted rather short terms. A 3-year long renewable term was accepted in *Sramek*, as well as the possibility of even shorter terms if a judge was appointed in the middle of a term.[125] Similarly, a 2-year renewable term was accepted by the grand chamber in *Maktouf and Damjanović*.[126] That case concerned an internationally seconded judge in a temporary war crimes chamber, so the Court found the short terms 'understandable given the provisional nature of the international presence at the State Court and the mechanics of international secondments'.[127] In *Sigl̇fir̄ingur* the ECtHR stated more generally that a 'rather short' term 'cannot […], by itself affect their

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[120] *Commission v Poland (Independence of the Supreme Court)* (n 12) para 76; Case C-192/18 *Commission v Poland (Independence of the ordinary courts)* EU:C:2019:924 para 113; Opinion of AG Tanchev in *Commission v Poland (Independence of the ordinary courts)* (n 14) point 104.

[121] See HRC General Comment no. 32 (n 32) para 19; *Quintana Coello* (n 71) para 145; *Zamora v. Venezuela* Comm. No. 2203/2012, CCPR/C/121/D/2203/2012 para 9.3; *Ástráðsson* (n 31) para 239. See also Venice Commission, 'Report on the Independence of the Judicial System Part I' (n 27) paras 33–35; Venice Commission, 'Rule of Law Checklist' (n 33) para 76.

[122] *Commission v Poland (Independence of the Supreme Court)* (n 12) para 74; *Commission v Poland (Independence of the ordinary courts)* (n 120) para 66.

[123] *Commission v Poland (Independence of the Supreme Court)* (n 12).

[124] Ibid para 98 ff.

[125] *Sramek v Austria* App no 8790/79 (EctHR, 22 October 1984), paras 26 and 38. cf the 3-year terms for unpaid appointees in *Campbell and Fell v The United Kingdom* Apps nos 7819/77 and 7878/77 (EctHR, 28 June 1984) para 80.

[126] *Maktouf and Damjanović* (n 82).

[127] Ibid para 51.

independence'.[128]

In other words, the term duration itself is rarely decisive in ECtHR case-law on independence. However, while not decisive in itself, the ECtHR has seen short terms as one of the factors that undermine independence. In *Incal*, the ECtHR found that a term which 'is only four years and can be renewed' was one of the factors which lead it to conclude that the court in question lacked independence.[129]

To summarise, the ECtHR takes a very flexible approach. A two-year term was acceptable in *Maktouf and Damjanović* where it served a useful purpose and created no obvious issues, whereas in *Incal* a four-year term was seen as one factor among several, which in total undermined independence.

Such an approach seems useful and should likely be adopted by the ECJ as well. The acceptability of short terms under Article 19(1) TEU could be considered on a case-by-case basis, taking into account their duration, whether they are justified by some legitimate aim, and the context of whether the short terms compound with other issues which, in total, undermine independence.

On the second problem, the use of provisional appointments,[130] provisional appointments are by their nature at odds with judicial independence and their use is an exception to the general rule that judges be employed on tenure. A temporary job where continuing employment might depend on how a third party evaluates their work leaves a lot of room for undue pressure.

The ECJ has dealt with several types of provisional appointments, and as a general rule it is problematic where it gives the executive a lot of sway over the employment of a judge. The case mentioned above, *Commission v Poland (Independence of the Supreme Court)*, where the ECJ disapproved of a Polish system whereby a judge's term could be extended two three-year periods after their ordinary retirement age on the discretion of the president, is illustrative in that regard.

The benefits and problems of provisional appointments were most clearly dealt with in *Prokuratura Rejonowa*.[131] The case concerned a system for the secondment of judges where the minister could second a judge for a fixed or indefinite period and could terminate it at any time.[132] The ECJ stated that temporary secondments were permissible 'in the interests of the service',[133] but that several features of this system undermined the independence of the seconded judge, including the discretionary power of the minister to terminate the secondment.[134] In other words, secondments are acceptable when they are useful for the judicial service, but must be accompanied by sufficient guarantees to protect the temporary judge against undue influence.

This reasoning could be applied to other provisional appointments as well. For example, temporary appointments can help cover temporary caseloads and ensure resource efficiency, and probationary periods (trial periods) can be useful to ensure the competency

[128] *Sigfirðingur Ehf v Iceland* App no 34142/96 (EctHR, 7 September 1999).
[129] *Incal v Turkey* case no 41/1997/825/1031 (EctHR, 9 June 1998) para 68. See also *Çıraklar v Turkey* case no 70/1997/854/1061 (EctHR, 28 October 1998) para 39.
[130] Meaning all appointments of a temporary nature or which can be terminated at discretion.
[131] *Prokuratura Rejonowa* (n 75).
[132] Ibid paras 9 and 80.
[133] Ibid para 72.
[134] Ibid paras 77–87, especially 80–83.

of an appointee. However, both of these also create similar risks of undue influence and must be accompanied by safeguards. The HRC has recommended more generally that all provisional appointments must have 'appropriate guarantees' and be 'exceptional and limited in time'.[135]

In conclusion, therefore, it seems that provisional appointments are acceptable under Article 19(1) TEU as long as there are sufficient guarantees and their use is exceptional and limited to what is necessary in the interests of the service.

6.2 IRREMOVABILITY OF JUDGES DURING TENURE

Ensuring tenure for judges must necessarily mean that they cannot, ordinarily, be removed before the expiration of their term. This is often called the principle of irremovability, and is widely acknowledged by the ECJ,[136] the ECtHR,[137] and in wider IHRL.[138] If judges could be removed before the expiration of their terms, the executive or legislative could pressure judges for favourable outcomes or seek to remove disloyal judges.

This section will take a closer look at, firstly, what constitutes a 'removal' of a judge, and secondly, in which situations Member States legitimately can remove judges.

Firstly, on what constitutes a 'removal' of a judge. The ECJ has clarified that the principle of irremovability applies to more than just removal in a strict sense. In *W.Ż.* the Court stated that the principle also applies to the transfer of a judge to another position.[139] In *Commission v Poland (Independence of the Supreme Court)* and *Commission v Poland (Independence of the ordinary courts)* the Court clarified that more indirect ways of removal are also covered, like being prematurely removed by lowering their retirement age.[140]

The scope of the principle of irremovability must therefore be interpreted broadly and will likely apply to any measure which has the consequence of changing the position of a judge, without their consent, before the expiration of their term as it was originally set.

Secondly, on when removal is permitted. The ECJ has stated as a general rule that no exceptions from irremovability are allowed unless justified by 'legitimate and compelling grounds, subject to the principle of proportionality'.[141] Situations where it could clearly be justified includes where a judge is deemed unfit for carrying out their duties, or due to serious breaches of their obligations, provided that appropriate procedures are followed.[142] Member States can also transfer judges to positions of equal rank when they reorganise their judicial systems, given sufficient safeguards.[143]

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[135] *Zamora v. Venezuela* (n 121) para 9.3.
[136] See, inter alia, *Commission v Poland (Independence of the Supreme Court)* (n 12) para 76; *Commission v Poland (Independence of the ordinary courts)* (n 120) paras 113 and 125.
[137] *Ástráðsson* (n 31) para 239.
[138] HRC General Comment no. 32 (n 32) para 19; Venice Commission, 'Report on the Independence of the Judicial System Part I' (n 27) para 43; *Quintana Coello* (n 71) para 145.
[139] *W.Ż.* (n 67) paras 114–115. See also the Opinion of AG Campos Sánchez-Bordona in *OT and Others (Suppression d'un Tribunal)* (n 47) points 72 ff.
[140] *Commission v Poland (Independence of the Supreme Court)* (n 12) paras 75–96; *Commission v Poland (Independence of the ordinary courts)* (n 120) paras 115–130.
[141] *Commission v Poland (Independence of the Supreme Court)* (n 12) para 76; C*ommission v Poland (Independence of the ordinary courts)* (n 120) para 113. See further on justification in section 10.
[142] *Commission v Poland (Independence of the ordinary courts)* (n 120) para 113; *W.Ż.* (n 67) para 112.
[143] See the Opinion of AG Campos Sánchez-Bordona in *OT and Others (Suppression d'un Tribunal)* (n 47) points 72–80.

An example where the removals were not justified is found in *Commission v Poland (Independence of the Supreme Court)*.[144] The alleged objectives of standardising the retirement age applicable to all workers and improving the age balance among senior members of the Supreme Court,[145] could not justify lowering retirement ages and early termination of the judges' tenure.[146]

Furthermore, if any early removal of a judge is to be proportionate, it must be accompanied by sufficient safeguards. The ECJ has required the same safeguards for the early removal of judges as it has for the imposition of disciplinary sanctions.[147] This makes sense, disciplinary sanctions are one of the ways in which judges could be removed before the expiration of their term. Which safeguards removals of judges requires will therefore be discussed in the following section dealing with disciplinary regimes.

7 LIMITING AND SAFEGUARDING DISCIPLINARY REGIMES

Upholding the rule of law can necessitate checks and balances even on the judiciary, to combat misuse of power. One often-used check is the establishment of disciplinary regimes for judges. On the one hand, a well-functioning disciplinary regime can help guarantee the proper conduct and impartiality of judges. On the other hand, investigating and sanctioning judges for job-related conduct can easily be misused as a means to pressure judges and courts.

The ECJ has stated that it is up to the Member States whether they want to employ disciplinary regimes to ensure the accountability and effectiveness of the judicial system.[148] However, any use of such a system, or similar systems of sanctioning in other areas of law,[149] must fulfil certain requirements. Firstly, liability must be limited to 'entirely exceptional' cases arising from requirements relating to the sound administration of justice;[150] and secondly, there must be sufficient safeguards to avoid political abuse.[151] These two requirements will be discussed in turn.

The first requirement, namely, the requirement of being limited to 'entirely exceptional' cases, applies to all sides of the potential liability. Examples of an exceptional situation could be violations of law done 'deliberately and in bad faith' or as a result of 'serious and gross negligence', or exercise of duties in a manner which is 'arbitrary' or 'denies justice'.[152]

In some cases, the ECJ has essentially found that judges were held liable for actions which by their nature were not 'entirely exceptions' situations justifying liability. In *IS* and the fifth complaint in *Commission v Poland (Disciplinary regime of judges)*, judges in Hungary and Poland, respectively, could be held liable for making references to the ECJ under

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144 *Commission v Poland (Independence of the Supreme Court)* (n 12).
145 ibid para 81.
146 ibid paras 82–97.
147 ibid para 77; *Commission v Poland (Independence of the ordinary courts)* (n 120) para 114.
148 *AFJR* (n 32) para 229; *Commission v Poland (Disciplinary regime of judges)* (n 32) para 136.
149 See *Commission v Poland (Indépendance et vie privée des juges)* (n 4) paras 96–100, which states that the same principles must apply to liability in other areas, like criminal law or labour law.
150 *Commission v Poland (Disciplinary regime of judges)* (n 32) para 139; *Commission v Poland (Indépendance et vie privée des juges)* (n 4) para 127.
151 *Commission v Poland (Disciplinary regime of judges)* (n 32) paras 136 and 138.
152 ibid para 137; *Euro Box Promotion and Others* (n 24) para 238. cf also Venice Commission, 'Republic of Moldova – Amicus Curiae Brief for the Constitutional Court – On the Right of Recourse by the State Against Judges' (2016) Opinion No. 847/2016, CDL-AD (2016)015 paras 69, 75 and 77–80.

Article 267 TFEU. The Court stated that such liability was a threat to independence.[153]

In *Euro Box Promotion and Others* and *RS*,[154] judges in Romania could be held liable for failing to comply with a judgment of the Constitutional Court in their adjudication, even where the judges held that the Constitutional Court had misinterpreted, for example, EU law. The ECJ stated that Article 19(1) TEU did not inherently preclude liability as a result of judicial decisions adopted by judges, but that the liability was clearly not limited to 'entirely exceptional' circumstances in this case. Article 19(1) TEU would therefore preclude national rules under which any failure to comply with the decisions of a constitutional court could trigger liability.[155]

In other cases, the ECJ has focused more on the wording of the provision. It has stated that a provision must be sufficiently clear, precise and limited so that only entirely exceptional cases are punished.[156] One example is found in *AFJR*,[157] where Romanian judges could risk financial liability for 'judicial errors'. The ECJ found it permissible to have such general and abstract provisions in theory, but not if they were interpreted in such a way that judges could be held personally liable for the simple fact that a decision contained a judicial error.[158]

Similarly, in the first complaint in *Commission v Poland (Disciplinary regime of judges)*,[159] judges could be held liable for 'errors' entailing an 'obvious' violation of law. This provision had been given a broad interpretation in recent case-law, and the ECJ took the view that it risked judges being held liable solely for the 'incorrect' content of their decisions, which undermined independence.[160]

Lastly, in *Commission v Poland (Indépendance et vie privée des juges)*,[161] the provisions were wide enough to, in practice, allow judges to be held liable for considering the independence of a judge or court under Article 19(1) TEU or Article 47 CFR. The Court therefore found that the provisions were both insufficiently precise, and that such liability by its nature could undermine independence.[162]

While the case-law is quite casuistic, the common thread seems to be that liability is problematic where it by its nature isn't suitable or necessary for ensuring the sound administration of justice, or where it is so vague and imprecise that it cannot be sufficiently delimitated. More generally, a useful yardstick seems to be how well disciplinary liability balances the need to ensure accountability with the need to safeguard independence.

Regarding the second requirement of ensuring sufficient safeguards to avoid political abuse,[163] the ECJ has stated that the mere prospect of disciplinary proceedings without sufficient safeguards, or by a body lacking independence, can have a chilling effect on judges that undermine their

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153 Case C-564/19 *IS* EU:C:2021:949 para 91; *Commission v Poland (Disciplinary regime of judges)* (n 32) para 234. Both cases were considered exclusively under Article 267 TFEU, but the result would likely have been the same if considered under Article 19(1) TEU. See also Joined Cases C-558/18 and C-563/18 *Łódzki and Others* EU:C:2020:234 paras 55–59.

154 *Euro Box Promotion and Others* (n 24); *RS* (n 23).

155 *Euro Box Promotion and Others* (n 24) paras 238–243; *RS* (n 23) paras 81–89.

156 *AFJR* (n 32) para 234; *Commission v Poland (Disciplinary regime of judges)* (n 32) para 140. cf the HRC General Comment no. 32 (n 32) para 19.

157 *AFJR* (n 32).

158 ibid paras 228–241, see especially 234. The main problem in the case was however the lacking safeguards.

159 *Commission v Poland (Disciplinary regime of judges)* (n 32).

160 ibid paras 134–158, especially 144; *Commission v Poland (Indépendance et vie privée des juges)* (n 4) paras 164–169.

161 *Commission v Poland (Indépendance et vie privée des juges)* (n 4).

162 ibid paras 134–163.

163 See *LM* (n 53) para 67; *W.Ż.* (n 67) para 113.

independence.[164]

A disciplinary regime must therefore ensure that the procedures fulfil the requirements 'of a fair trial, and, in particular, the requirements relating to the respect for the right of the defence'.[165] This includes the right to challenge disciplinary liability before a body or court which itself fulfils the requirements of independence.[166] The Court has even recently confirmed, in *YP and Others*, that national courts are required to disregard suspensions of duty and transfers of cases coming from the bodies, like the Polish Disciplinary Chamber, whose independence is not guaranteed.[167]

These guarantees of a fair trial were not upheld in *Commission v Poland (Disciplinary regime of judges)*.[168] The Disciplinary Chamber of the Supreme Court was not sufficiently independent[169] and had excessive power to determine which court had jurisdiction in the first instance, allowing it to influence proceedings.[170] Moreover, the system allowed for the possibility of judges being investigated indefinitely[171] and allowed for proceedings to go on despite the justified absence of the accused or their counsel.[172] The ECJ also criticised lacking safeguards in *AFJR,* because the legislation did not ensure the right of the defendant judge to be heard.[173]

Furthermore, because an initiation of disciplinary proceedings in general can have a chilling effect, the independence of the investigators and prosecutors must also be ensured.[174] In *AFJR* the Public Prosecutors office was not sufficiently independent, and could be used to pressure the judges,[175] there were not sufficient resources to conduct investigations within a reasonable time,[176] and the minister was left large discretion in whether to commence proceedings or not, which created a risk of undue pressure on judges.[177]

In *Inspecția Judiciară*,[178] the chief inspector had large powers over the inspectorate and decisions to initiate disciplinary proceedings. If the chief inspector misused their power, proceedings could only be brought by deputy inspectors, over whom the chief had large influence. The Court therefore found that the national legislation lacked safeguards for preventing disciplinary proceedings being misused to pressure judges.[179]

In total, a disciplinary regime can be used for political interference or at least have a

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[164] *AFJR* (n 32) para 236; *Commission v Poland (Indépendance et vie privée des juges)* (n 4) para 101.
[165] *Commission v Poland (Disciplinary regime of judges)* (n 32) paras 203 and 213; *Commission v Poland (Indépendance et vie privée des juges)* (n 4) para 95.
[166] *Commission v Poland (Disciplinary regime of judges* (n 32) para 82. See also paras 88-112 for the consideration of the Disciplinary Chamber. From the ECtHR, see, inter alia, *Oleksandr Volkov v Ukraine* App no 21722/11 (ECtHR, 9 January 2013) paras 109–117; *Denisov v. Ukraine* App no 76639/11 (ECtHR, 25 September 2018) para 72.
[167] Joined Cases C-615/20 and C-671/20 *YP and Others (Levée d'immunité et suspension d'un juge)* EU:2023:562 paras 50 ff.
[168] *Commission v Poland (Disciplinary regime of judges)* (n 32).
[169] ibid paras 88–112.
[170] ibid paras 164–176.
[171] ibid paras 189–202.
[172] ibid paras 208–213.
[173] *AFJR* (n 32) para 239.
[174] Case C-817/21 *Inspecția Judiciară* EU:C:2023:391 para 49.
[175] *AFJR* (n 32) paras 216–220. See also paras 199–200.
[176] ibid paras 221–222.
[177] ibid paras 239–241.
[178] *Inspecția Judiciară* (n 174).
[179] ibid paras 53–73.

chilling effect. To avoid this, Member States must ensure that disciplinary liability is used only where strictly necessary, and with sufficient safeguards against abuse. That requires independent investigations and proceedings which uphold fair-trial standards.

8 THE USE OF JUDICIAL COUNCILS TO ENSURE INDEPENDENCE

Judicial councils are commonly used by the Member States to safeguard judicial independence in various processes which can affect the judge or the judiciary.[180] The term 'judicial council' refers to a type of institution which, while varying in composition and competences among Member States,[181] plays an important role in establishing a degree of autonomy and judicial representation for the administration of the judiciary.

Judicial councils have been mentioned several times in this article as a possible safeguard of independence. This section will take a closer look at what is required of councils if they are to fulfil the role of a safeguard under Article 19(1) TEU. As a starting point, the ECJ has stated that councils themselves must be sufficiently independent.[182]

That was not the case in *A.K. and Others* and *Commission v Poland (Disciplinary regime of judges)*, where the ECJ found that the Polish National Council of the Judiciary was not sufficiently independent, for three reasons. Firstly, Poland's reform of the Council had reduced the terms of existing members so that they could be replaced by the new ones. Secondly, the vast majority of judges elected to the Council were appointed by the legislative and executive branches. Thirdly, these changes came at the same time as lowering the retirement ages of judges and the establishment of two new Supreme Court chambers with vacant posts for the council to fill.[183]

In other words, members of judicial councils must, like judges, have some form of security of tenure, and there cannot be excessive legislative and executive influence on such councils. However, this doesn't preclude that the legislative or executive branch can appoint some of the members. In *Land Hessen*, 7 out of 13 council members were appointed by the legislature.[184] The Court acknowledged it as one factor which could affect the independence but stated that it was not sufficient by itself to undermine the independence of an appointee to the council.[185]

This balance struck by the Court in *Land Hessen* seems to be to a large extent in line with the recommendations of the Venice Commission. It has recommended a balanced composition, to ensure both accountability and autonomy.[186] However, because the primary

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[180] See the Opinion of AG Tanchev in *A.K. and Others* (n 29) point 124, with further references. Ad hoc assessment boards can fulfil some of the same roles, see *AFJR II* (n 36) para 75.
[181] See for their composition and role in appointments: CJEU, Direction de la recherche et documentation (n 83) paras 14–51.
[182] *A.K. and Others* (n 31) paras 137–138; *A.B. and Others* (n 81) paras 124–125; *Repubblika* (n 76) para 66.
[183] *A.K. and Others* (n 31) para 143; *Commission v Poland (Disciplinary regime of judges)* (n 32) paras 103–108. See also the case-law of the ECtHR on the Polish judicial council: *Reczkowicz v Poland* App no 43447/19 (ECtHR, 22 July 2021) paras 225–282; *Dolińska-Ficek and Ozimek v Poland* Apps nos 49868/19 and 57511/19 (ECtHR, 8 November 2021) paras 281–320 and 340–355; *Advance Pharma* (n 78) paras 303–321 and 336–351.
[184] *Land Hessen* (n 86) para 53.
[185] ibid paras 54–58. The case was decided under Article 267 TFEU, but was reiterated in *Commission v Poland (Disciplinary regime of judges)* (n 32) para 103.
[186] Venice Commission, 'Judicial Appointments' (n 89) para 27.

function of such councils is ensuring judicial independence, it recommends that the majority of members be elected by the judiciary.[187]

When evaluating how effective such councils are at safeguarding judicial independence, the ECJ will overlook issues or irregularities that are of a more technical or minor nature. This is clear from *Getin Noble Bank* where a provision regulating security of tenure for, and rules for the distribution of, members of the judicial council had been declared unconstitutional. The ECJ stated that this issue, unlike those in *A.K. and Others* and *Commission v Poland (Disciplinary regime of judges)* discussed above, had not reinforced the influence of the executive or legislative branches in appointment procedures.[188]

Lastly, if a judicial council is to act as an effective safeguard, it must not only be independent, but also have sufficient powers and jurisdiction. An example is *Repubblika*.[189] The Maltese president did not have to follow the recommendations of the Judicial Appointment Committee, but had to state sufficient reasons for any divergence from the recommendations. The ECJ found that such powers were sufficient to act as a safeguard on presidential appointments.[190]

In conclusion, judicial councils are an effective way of ensuring judicial autonomy and self-administration in procedures and for measures affecting the judiciary.[191] Article 19(1) TEU does not oblige Member States to establish such bodies, and it might not be necessary in states where legal culture or other types of institutions can ensure the same result.

9 ENSURING THE AVAILABILITY OF REMEDIES AND SUBSEQUENT CONTROL

This section will consider the relevance of existing national remedies and subsequent control within the domestic system for upholding independence under Article 19(1) TEU. Remedies are important because they, if sufficient, can allow the national legal system to 'fix' the elements and issues that might otherwise restrict or threaten independence under Article 19(1) TEU.

The ECJ has, for example, stated that the existence of judicial review for an appointment decision is an important factor that could help safeguard against improper exercise of authority or errors in law or assessment of facts,[192] and that the 'existence of a judicial remedy available to unsuccessful candidates […] would be necessary in order to help safeguard the process'.[193] Furthermore, the sudden removal of existing possibilities of a remedy or review can give rise to doubts as to whether independence is being upheld.[194] Remedies can also act as a guarantee for decisions taken by bodies which themselves are not

[187] ibid para 29; Venice Commission, 'Report on the Independence of the Judicial System Part I' (n 27) paras 31–32. See also the Opinion of AG Tanchev in *A.K. and Others* (n 29) point 126.
[188] *Getin Noble Bank* (n 30) paras 125–128.
[189] *Repubblika* (n 76).
[190] ibid paras 66–72.
[191] Including, inter alia, appointments, disciplinary proceedings and financial autonomy. See Venice Commission, 'Report on the Independence of the Judicial System Part I' (n 27) paras 43 and 55.
[192] See, inter alia, *A.K. and Others* (n 31) para 145; *A.B. and Others* (n 81) para 128.
[193] *A.B. and Others* (n 81) para 136. However, this does not oblige Member States to allow remedies also for representative organisations. See the Opinion of AG Collins in Case C-53/23 *AFJR III* EU:C:2024:104 para 32 ff.
[194] *A.B. and Others* (n 81) para 129.

independent.[195] More generally, remedies and review act as a guarantee that procedures were conducted with no undue interferences.

However, some measures affecting independence cannot, by their nature, be fixed by available remedies. The ECJ generally does not refer or consider remedies in cases where the rules and systems themselves are the problem. The availability of remedies does not fix a disciplinary provision being too vague, or the lack of rules on how cases should be assigned. Instead, such issues will remain restrictive of independence as long as they remain in force.

10 POTENTIAL JUSTIFICATION OF RESTRICTIONS OR THREATS TO INDEPENDENCE

10.1 SOME RESTRICTIONS CAN BE JUSTIFIED

When discussing the requirements under Article 19(1) TEU, this article has occasionally used the terminology of when measures create 'issues' or 'threats' for independence, rather than asking definitively when there is a breach of Article 19(1) TEU. This is because whether a measure is in breach of Article 19(1) TEU or not, at least in some cases, can depend on the *justification* presented by the Member State.

The ECJ has not established a general test for when it will find a breach for Article 19(1) TEU, nor does it consistently apply any balancing test allowing for justification. Rather, in most cases it seems to apply a threshold test where the measure either undermines independence or not. There could be many reasons for why justifications only come up in some cases, including the nature of the issue or simply whether the Member State in question alleged any justifying objectives before the Court or not. The case-law so far has a very ad hoc approach in this area, and one can only hope that the Court clarifies it going forward.

That said, this section will take a closer look at the cases where the Court does, at minimum, indicate that justification by some type of legitimate aim is relevant to whether there is a breach of Article 19(1) TEU. Statements indicating that restrictions on independence can be justified by legitimate objectives are found in many cases, but especially in two types of cases:

Firstly, in cases on the principle of *irremovability*, the ECJ has stated that removal by the lowering retirement ages[196] and the transfer of a judge without consent[197] are measures which must be justified by the pursuit of a legitimate aim. Secondly, for the establishment of *disciplinary regimes*, the Court has emphasised that any liability must be justified,[198] and the same for restrictions on the procedural rights of judges in disciplinary proceedings.[199]

There seems to be no reason why justifications of restrictions or threats to independence should be limited to these two types of cases. Rather, it seems more likely that

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[195] C-403/16 *El Hassani* EU:C:2017:960 para 39.
[196] *Commission v Poland (Independence of the Supreme Court)* (n 12) paras 77 and 79; *Commission v Poland (Independence of the ordinary courts)* (n 120) paras 113 and 115. See for the possibility of continuing beyond retirement age, the Opinion of AG Rantos in *Krajowa Rada Sądownictwa (Maintien en fonctions d'un juge)* (n 103), points 48 and 70.
[197] *W.Ż.* (n 67) paras 112 and 118; the Opinion of AG Campos Sánchez-Bordona in *OT and Others (Suppression d'un Tribunal)* (n 47) points 72–80.
[198] See *AFJR* (n 32) paras 213 and 233; *Commission v Poland (Disciplinary regime of judges)* (n 32) para 139; *Euro Box Promotion and Others* (n 24) paras 239–240; *RS* (n 23) para 86; *Commission v Poland (Indépendance et vie privée des juges)* (n 4) para 127. cf. also the Opinion of AG Bobek in *AFJR* (n 30) point 295.
[199] *Commission v Poland (Disciplinary regime of judges)* (n 32) para 207.

these are just case types where Member States might often have legitimate aims, like transferring judges to reorganise courts or establishing disciplinary liability to combat corruption. This could at least explain why it came up or was alleged in the proceedings of these cases. In principle, the points discussed here should therefore apply to other types of restrictions and threats for which a Member State alleges legitimate aims.

10.2 LEGITIMATE OBJECTIVE

The ECJ has not elaborated much on what constitutes a 'legitimate objective'. In the case-law that deals with disciplinary regimes for judges it has taken a narrow approach, stating that disciplinary liability must be justified by objectives relating to the 'sound administration of justice'.[200]

Such objectives have also been accepted in the cases on *irremovability* of judges. The Court stated generally that judges being deemed unfit to carry out their duties constitutes legitimate grounds for removal.[201] AG Campos Sánchez-Bordona has also argued that, in regards to the abolish of a court and the unvoluntary transfer of judges, the reorganisation of the judicial system in order to make it more effective and better uphold independence was a legitimate aim relating to the sound administration of justice.[202] In general it seems clear that the necessities of justice and the judiciary itself can constitute legitimate aims.

The Court has also accepted more general policy objectives. In *Commission v Poland (Independence of the Supreme Court)*, the Court accepted that employment policy objectives like standardising retirement ages and a better age balance at the court could constitute legitimate objectives for lowering retirement ages of the Supreme Court's judges.[203] The judgments in *ASJP* and *Vindel* can also be read such that reducing an 'excessive budget deficit' was as legitimate reasons to justify lowering wages of judges.[204] In *W.Ż.*, the Court mentions 'distribution of resources' more generally as a potential justification for the transfer of a judge.[205]

Overall it seems likely that the Court could accept a variety of policy objectives as legitimate aims. That would be in line with how legitimate aims is considered in other areas of EU law, where only more irrational or arbitrary objectives will be seen as illegitimate.[206]

10.3 PROPORTIONALITY

If the Court finds the objective to be legitimate, it will also have to consider whether the restriction is proportionate to that objective. Proportionality is a general principle of EU law,[207] codified in Article 52(1) CFR. The ECJ has affirmed a principle of proportionality

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[200] ibid.
[201] *Commission v Poland (Independence of the ordinary courts)* (n 120) para 113; *W.Ż.* (n 67) para 112.
[202] See the Opinion of AG Campos Sánchez-Bordona in *OT and Others (Suppression d'un Tribunal)* (n 47) point 65 and implicitly in points 74–80.
[203] *Commission v Poland (Independence of the Supreme Court)* (n 12) para 81.
[204] *ASJP* (n 5) para 46; *Vindel* (n 52) para 67. The cases can also be read such that the measure just did not threaten independence, with no need for justification.
[205] *W.Ż.* (n 67) para 118, also mentioning the sound administration of justice as a legitimate objective.
[206] Tobias Lock, 'Article 52 CFR' in Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) 2252.
[207] Case C-482/17 *Czech Republic v Parliament and Council* EU:C:2019:1035 para 76; Case C-452/20 *PJ* EU:C:2022:111 para 36.

as a part of justification under Article 19(1) TEU in several cases.[208]

Despite affirming a principle of proportionality, there are very few cases where the Court actually conducts a clear proportionality analysis under Article 19(1) TEU. The clearest example is found in *Commission v Poland (Independence of the Supreme Court)*. The Court firstly stated that lowering retirement ages seemed *inappropriate* to achieve the objective of standardising retirement ages, because judges could continue their work with a presidential approval.[209] Secondly, that Poland had not explained why it was *necessary* to design the rules in that manner.[210] And thirdly, seemed to indicate that the measures, on balance, restricted independence too much for them to be proportionate *stricto sensu*.[211]

This case is interesting because the ECJ seems to consider all elements of proportionality (*appropriateness*, *necessity,* and *proportionality stricto sensu*). This contrasts with the general approach of CJEU of focusing primarily on *appropriateness* and *necessity* while leaving proportionality for the national court or national politics.[212] The case might indicate that rule of law-issues is an area where the Court is more inclined to closely review the proportionality of Member States' restrictions.

A less clear but still interesting example of a proportionality analysis is found in the recent Opinion of AG Campos Sánchez-Bordona in *OT and Others (Suppression d'un Tribunal)*.[213] The case concerned the transfer of judges against their will in the context of a reorganisation of the judicial system. AG Campos Sánchez-Bordona found that this transfer was not contrary to the principle of irremovability, including the requirement of proportionality. It was a legitimate reorganisation of the judiciary, and the AG emphasised that the judges were transferred to a court with the same rank, according to general criteria, with no disruption or intrusion of their existing cases.[214]

The case illustrates that even if there is a proportionality requirement, Member States are left a large room for democratic governance. General measures done according to proper procedures will usually only pose a small or minimal threat to judicial independence.

In all the cases dealing with disciplinary regimes, which as mentioned had to be justified by objectives relating to the 'sound administration of justice', the ECJ does not mention proportionality explicitly. However, as discussed in section 7, the Court does apply a test of whether liability is limited to the 'entirely exceptional'. This is quite reminiscent of a test of *necessity*, meaning whether the measure goes beyond what is necessary to achieve its aim. Even if the ECJ doesn't explicitly consider proportionality, it therefore achieves some of the same balancing with other words. However, in line with Venice Commission recommendations that disciplinary liability should be proportional to the problem it is trying to solve,[215] there

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[208] *Commission v Poland (Independence of the Supreme Court)* (n 12) paras 76, 79 and 89–95. Reiterated in *Commission v Poland (Independence of the ordinary courts)* (n 120) paras 113 and 115; *W.Ż.* (n 67) para 112. See also *Commission v Poland (Disciplinary regime of judges)* (n 32) para 207; Opinion of AG Rantos in *Krajowa Rada Sądownictwa (Maintien en fonctions d'un juge)* (n 103) points 76–79.

[209] *Commission v Poland (Independence of the Supreme Court)* (n 12) paras 89–90.

[210] ibid para 90.

[211] ibid paras 91–93.

[212] Lenaerts, Van Nuffel and Corthaut (n 21) 106–107.

[213] Opinion of AG Campos Sánchez-Bordona in *OT and Others (Suppression d'un Tribunal)* (n 47).

[214] ibid points 72–80. See also points 51–71.

[215] Venice Commission, 'CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "the Former Yugoslav Republic of Macedonia"' para 18; Venice Commission, 'CDL-

is certainly room for the Court to clarify its approach.

As this overview of case-law illustrates, it is clear that some restrictions or threats to independence can be justified by a legitimate and proportionate aim, but also that the Court rarely engages in any substantive analysis of proportionality. It remains to be seen whether this is deliberate or mostly a consequence of what has been argued before the Court. This author is of the opinion that a proportionality test would be useful in many cases under Article 19(1) TEU and would allow the Court to more clearly separate legitimate democratic policies from situations of early *rule of law-backsliding*.

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EU-CHILE HORIZONS: CLIMATE JUSTICE FOR A SHARED STRATEGY ON CRITICAL MINERALS

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The European Union has not only raised the need for strategic autonomy, but has also opened itself up to establishing new international relations. One of these relations in the spotlight is Latin America, which has the highest concentration of critical minerals, key, among other things, for the just energy transition of the Union and of Latin America itself. However, the instruments of EU law have become more flexible beyond Mercosur and the prevailing formalism, and a new cycle of relations is being generated. To a large extent, this adaptation can combine new ways of conceptualizing the role of 'strategic for both parties', since EU energy autonomy and the idea of public diplomacy, which has manifested itself in cases such as Chilean business diplomacy, are not mutually exclusive. The Chilean case is paradigmatic of this crossroads, as the country inserts itself in the idea of putting the sovereignty of natural resources at the service of new imaginary of development that raises horizons for various facets of climate justice. It will also give way to new aspirations proposing, among other things, the circular economy as a mechanism of climate justice or transformations in EU law.

1 INTRODUCTION

At a press conference in Buenos Aires in October 2022, Josep Borrell, High Representative of the European Union for Foreign Affairs and Security Policy, declared that 2023 should be the year of Latin America in Europe and Europe in Latin America. This narrative that set a horizon for both the European Union (EU) and Latin America (LATAM) was a space for imagining horizons between the two.[1] However, the High Representative himself pointed out that it would not be easy to rebuild this strategic partnership, so the design of an economic program would be the first step to unlock. This is where the role of critical minerals appears, which can configure a space for interaction between Latin America and Europe.

According to this, it was pointed out that it would be necessary to draw a panorama that concentrates the contemporary needs of the European Union, the emerging needs of Latin America (especially Chile for the purposes of this research), the role of Permanent Sovereignty over Natural Resources in LATAM, and of course, the new commercial, diplomatic and legal strategies that intertwine new horizons on climate justice.

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[1] Detlef Nolte 'The European Union and Latin America: Renewing the Partnership after Drifting Apart' (2023) Hamburg: German Institute for Global and Area Studies (GIGA) - Leibniz-Institut für Globale und Regionale Studien, Institut für Lateinamerika-Studien, 1-2 <https://nbn-resolving.org/urn:nbn:de:0168-ssoar-85384-1> accessed 01 March 2024.

The needs of the EU are marked by the economic context of the continent, which to a large extent also cannot be decontextualized from the war in Ukraine. As a result, Europe is in a real hurry to seek an open strategic autonomy, considering new networks and alliances. Consequently, Latin America is seen as a strategic partner in these new ties, due to the mutual support between the two sides, support and closeness in international politics. However, it is worth asking why the persistence of relations with EU is still relevant for LATAM, which raises the debate on the strength of the economy in the reality of the continent. That is to say, between 2005 and 2019 trade in services between the EU and LATAM grew an average of 23 percent per year, compared to 5 percent of trade in goods.[2] In 2020, the EU's share of LATAM's services imports was 31.2 percent and in turn, exports increased to 19.7 percent.[3] In this context, another factor of utmost importance in joint trade relations cannot be excluded, namely the EU's 'geo-economic turn in trade policy', which consists of trade expansion based on the use of economic instruments to pursue strategic domestic and foreign trade policy objectives.[4] Within this strategic orientation, the importance of raw materials as a joint economic structure for Latin America and the EU is highlighted. It is not news to anyone that Europe seeks to lead in technology transfer and, in turn, to ensure the supply of energy for its citizens. Latin America also has the potential to become a major producer and exporter of critical minerals.

As a result of the above, it will be relevant to analyse the emerging needs of Latin America, among which is the ability of governments to freely structure the strategic protection of their national industries in free trade agreements, since one of the central objectives is to obtain a financial capacity as a means to promote public policies in favor of overcoming social inequality and social justice. Thus, in this debate, it is key to focus on factors such as EU financing, understood as strategic financing, since the fight of Latin American countries against climate change is intense, and even more persistent is the fight against poverty and inequality. Likewise, States such as Chile are part of the group of developing countries, which make great efforts in the consumption and production of modern technologies to recognize the long-term balance between GDP growth and environmental concerns thus constituting a new forms of justice.[5]

The Latin American position, in general terms, recognizes that Europe has lost ground as a trading partner to the Asian investment phenomenon. Despite this, European companies continue to be the main investors in the region, and Europe continues to have soft power or power of attraction in Latin America. This soft power has been based and extended in commercial and diplomatic relations, despite the Latin American risk of reproducing a

[2] Antoni Estevadeordal, 'Geopolitics and Trade: Future Relations between the European Union and Latin America and the Caribbean' in Patricia García-Durán Huet and Eloi Serrano Robles (eds), *Geopolitics and Trade in Changing Times: A view from Barcelona* (CIDOB 2020) 28.

[3] Jon D Haveman, Usha Nair-Reichert and Jerry G Thursby, 'How Effective are Trade Barriers? An Empirical Analysis of Trade Reduction, Diversion, and Compression' (2003) 85(2) Review of Economics and Statistics 480.

[4] Johan Adriaensen and Evgeny Postnikov, 'Geo-economic Motives and the Negotiation of Free Trade Agreements: Introduction' in Johan Adriaensen and Evgeny Postnikov (eds), *A Geo-Economic Turn in Trade Policy? EU Trade Agreements in the Asia-Pacific* (Springer International Publishing 2022) 3-4.

[5] Muhammad Usman et al, 'Are Mercosur economies going green or going away? An empirical investigation of the association between technological innovations, energy use, natural resources and GHG emissions' (2022) 113 Gondwana Research 53, 53-56.

traditional asymmetric relationship.[6] Therefore, in the face of this fear anchored in the relationship, Borrell has taken giant steps in recognizing the fact that the EU has interiorised an idea of Latin America isolation in recent years under the idea of the divergence of respective interests.[7]

The Chilean case will be a central part of this research because, like other states in the global South, Chile has deepened its search for access to relevant low-carbon technologies in order to integrate them into national value creation systems. This idea is based on the thesis of replacing a fossil-based, path-dependent rentier state with a fundamentally different, low-carbon economic model.[8] This decision is risky, but it is based on a deep state conviction, which coincides with the EU High Representative's statement that 'there can be common ground between open strategic autonomy and active non-alignment'.[9] For the purposes of the Chilean experience, and in line with other countries in the world, technology transfer qualifies as an emerging challenge that has meant that 74% of the signatories of the Paris Agreement have committed to quantifiable energy targets and 94% have included renewable energy targets in one way or another in their national plans.[10] In simple terms, energy transition refers to the shift from one energy pattern to a new energy system, including sources, carriers and services.[11] The International Renewable Energy Agency has defined this phenomenon as 'the path towards the transformation of the global energy sector from a fossil fuel-based to a carbon-free one during the second half of this century'.[12] The World Economic Forum calls it a 'transition to a more inclusive, sustainable, affordable and secure global energy system, without compromising the energy balance'.[13]

This energy balance cannot be dissociated from the role of critical minerals (rare earths, platinum group elements, nickel, zinc, etc.), as they constitute an essential standard for high-tech products,[14] often undervalued by market dynamics. These minerals exist mainly in the form of co-association, and operate on the current small scale of their market as

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[6] Detlef Nolte 'The European Union and Latin America: Renewing the Partnership after Drifting Apart' (2023) Hamburg: German Institute for Global and Area Studies (GIGA) - Leibniz-Institut für Globale und Regionale Studien, Institut für Lateinamerika-Studien, 5 <https://nbn-resolving.org/urn:nbn:de:0168-ssoar-85384-1> accessed 01 March 2024.

[7] See Josep Borrell's statement in 2022, in his column called 'Why Europe and Latin America Need Each Other' (*The Diplomatic Service of the European Union*, 30 November 2022) <https://www.eeas.europa.eu/eeas/why-europe-and-latin-america-need-each-other_en> accessed 01 March 2024.

[8] Andreas Goldthau, Laima Eicke, and Silvia Weko, 'The Global Energy Transition and the Global South' in Manfred Hafner and Simone Tagliapietra (eds), *The Geopolitics of the Global Energy Transition* (Springer International Publishing 2020) 322.

[9] See Josep Borrell's statement in 2022 (n 7).

[10] International Renewable Energy Agency (IRENA), 'NDCs and renewable energy targets in 2021: Are we on the right path to a climate-safe future?' (2022) International Renewable Energy Agency, Abu Dhabi <https://www.irena.org/-/media/Files/IRENA/Agency/Publication/2022/Jan/IRENA_NDCs_RE_Targets_2022.pdf> accessed 01 March 2024.

[11] Peter O'Connor 'Energy Transitions' (2010) The Pardee Papers Series No.12 <https://www.bu.edu/pardee/files/2010/11/12-PP-Nov2010.pdf> accessed 01 March 2024.

[12] IRENA, 'Energy Transition' (2020) International Renewable Energy Agency, Abu Dhabi.

[13] World Economic Forum, 'Fostering Effective Energy Transition' (2018) A Fact-Based Framework to Support Decision-Making, vol. 40, McKinsey Co. <https://www3.weforum.org/docs/WEF_Fostering_Effective_Energy_Transition_report_2018.pdf> accessed 01 March 2024.

[14] Benjamin Ballinger et al, 'The vulnerability of electric vehicle deployment to critical mineral supply' (2019) 255 Applied Energy 113844.

a by-product of the extraction of other bulk minerals. The overview of critical minerals often shows that they are hidden in indirect and integrated trade, which leads to neglecting the analysis of their reserves when assessing mineral production and import/export trade.[15] Although within the supply of critical minerals, the environmental and social impacts of their products are often overlooked when assessing the transition from fossil energy economies, critical minerals remain the only way to create the cycle necessary for a smooth transition to renewable energy systems.

According to a November 2021 assessment, 140 countries had already announced their own net zero emissions targets.[16] The path to net zero will depend heavily on renewable energy sources, electricity and access to critical minerals. Now, renewables-based electricity harnesses the energy potential of the sun or wind or water, but relies on other raw materials to do so, making these energy generation and storage activities extremely intensive in photovoltaic minerals such as crystalline silicon, which is used for grid-scale technology. Undoubtedly, the availability of technological advances and substitutable materials can influence their importance in economic activity. This may explain why the list of critical materials continues to change over time.[17] In the same way, global strategic objectives are born, which are anchored in responsible sourcing, responsible supply and accessibility to critical minerals, integration of national and European perspectives of equity, global monitoring of mineral potential, markets, supply chains and fair global trade.[18]

Faced with the challenge of developing a strategy oriented towards technology transfer, we find that the interaction between sovereign states inevitably produces diplomatic dialogues, i.e. states talking to states about the affairs of states, creating an 'infrastructure of world politics'.[19] From here appears the desire for a public diplomacy that primarily addresses the challenges of climate change, which is why one of the first approaches in this area is linked to the idea of public diplomacy as a 'social practice'[20] that is oriented towards climate justice, and which will later manifest itself in phenomena such as entrepreneurial diplomacy. Consequently, we speak of the shaping of a form of interaction between social actors that is structured by rules, norms and habits, and which is productive of social resources. These rules define and constrain the practice of diplomacy and, in turn, are reproduced and modified as they are used. The new literature on practice in international relations unifies around the idea that there is a sociality that always interconnects, constrains and enables the 'particles' of social life throughout its movement.

In this permanent movement of international relations, globalization brings people around the world closer together and has the potential to create transnational legal problems

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[15] Stevan Fortier et al, 'USGS critical minerals review' (2022) 71 Mining Engineering 35 <https://apps.usgs.gov/minerals-information-archives/articles/usgs-critical-minerals-review-2021.pdf> accessed 01 March 2024.
[16] Climate Action Tracker 'CAT net zero target evaluations' (2022) <https://climateactiontracker.org/global/cat-net-zero-target-evaluations/> accessed 01 March 2024.
[17] Nidhi Srivastava and Atul Kumar, 'Minerals and energy interface in energy transition pathways: A systematic and comprehensive review' (2022) 376 Journal of Cleaner Production 134354, 2.
[18] Ralph Watzel, 'Minerals for future technologies – How Germany copes with challenges' (2022) 526 Geological Society, London, Special Publications 13, 13-14.
[19] Ian Hurd, 'Law and the Practice of Diplomacy' (2011) Summer, International Journal 581, 582-583.
[20] ibid.

and issues.[21] Indeed, it is distressing for legal communities to find intersecting interests in the climate emergency. Therefore, the importance of understanding the phenomenon that intertwines diplomacy and normative factors will be raised to provide better analysis or solutions to large-scale climate problems. It is also worth mentioning that solutions to global legal and judicial problems may be easier and better if collaborative efforts are made between legal communities around the world.[22] In particular to what underlies the further development of this work, it will be a challenge to raise a horizon immersed in the Chilean diplomatic strategy from the idea of business diplomacy, open to flexible but resolute legal methods in the face of critical mineral market interaction, especially in accordance with the sustainability of the EU climate diplomacy model.[23]

The method to be carried out in this research will be based on a qualitative analysis on the linkage between law (normative plane) and Chilean and European Union diplomacy, with the objective of seeking horizons that link critical factors of the debate, such as the Renaissance of Permanent Sovereignty of Natural Resources in the countries of the Global South, the National Strategies of Critical Minerals such as the Chilean one, and climate justice. To this end, a generic question is posed that asks the following question: what is the strategy and the normative and diplomatic path that intertwines the need for the use of critical minerals? For the purposes of this question, the normative analysis will focus on the elements contained in EU and transnational law versus binding phenomena such as diplomatic strategies on raw materials.

This research will be divided into a first item that will deepen the position of the European Union and Latin America in the geopolitical chessboard, with the objective of installing in the debate the positions and needs of both parties, mainly extending towards critical minerals. The second part is related to the revival of the idea of Permanent Sovereignty of Natural Resources in Chile and Latin America, which will be key to outline the legal and political position of the EU and Chile. There will be a third item, which will deal with the understanding of Chile's Diplomatic Cycle, guiding it through an understanding of the dynamics of Chilean entrepreneurial diplomacy. Finally, it will give way to a key item on the normative dimension of climate justice and critical minerals, to finally raise additional challenges for the European Union connected to Chilean entrepreneurial policy.

2 THE EU AND LATAM ON THE GEOPOLITICAL CHESSBOARD

To understand the basis of the political meeting between the EU and LATAM, it is necessary to place ourselves on the geopolitical chessboard of both zones, that is, what elements are on the negotiating table and focus of both structures.

The first focal factor of the EU Green Deal has been the macro idea that has guided the challenge of ensuring a flexible and adequate energy source for use in energy-intensive sectors on the continent, both for heavy industry (cement and steel) and transport (freight, shipping and aviation). The second central factor of the Green Deal is the decarbonization

[21] Niedja Santos, 'Public diplomacy, collaborative power & law community' (2022) 2 Undecidabilities and Law 39, 50-51.
[22] ibid.
[23] Marc Pallemaerts and Sebastian Oberthür, *New Climate Policies of the European Union: Internal Legislation and Climate Diplomacy* (Academic & Scientific Publishers 2010).

of the global economy, a process necessary to address the climate crisis and the new wave of technological evolution characterized by artificial intelligence (AI) and 5G networks. The EU's perspective in the latter focus, is to position itself as a propellant in the race to ensure uninterrupted access to critical mineral commodities (critical raw materials, CRM), i.e. those minerals that are part of the production of high-tech applications.[24] For both focuses, the European position has been shaken by the effects of the Russian invasion of Ukraine , as it has caused the continent to rethink a different plan, in legal and geopolitical terms, especially with regard to the creation of a structure with Latin America, which considers the latter as a strategic-horizontal partner. The question that arises in this matter is whether the deepening of this agreement will continue to be based on the Mercosur treaty.

Mercosur will not be the main object of this analysis, but it will be necessary to mention some context, since to date this agreement has enjoyed inconsistencies between the Mercosur-EU Agreement itself and the European Green Deal in its current state. Some theorists have argued that this incoherence is mainly due to the lack of complementarity, since the EU has concentrated much of the environmental focus on the European geographical area, and has not put forward a strong external legal and geopolitical strategy. However, according to other authors such as Sanahuja and Rodríguez, the solution is by no means to abandon this agreement, but rather to integrate it into the EU's environmental policy.[25]

The European Green Deal is in a state of rectification with respect to Mercosur, which makes it necessary to consider the need to add an environmental strategy to any global trade agreement, just as the Association Agreements do, which strictly speaking are manifested as a binding commitment to the effective application of the Paris Agreement. Thus, the environmental clause of the Green Deal should be applied in a manner analogous to the well-known democratic clause that since the 1990s the EU has made mandatory in its agreements. Authors such as González suggest that an additional protocol could be added to the agreement that includes binding obligations for both parties in line with what is agreed in the Paris Agreement and includes the obligation to implement policies that can effectively and efficiently mitigate climate change. However, there is little chance of safeguarding the EU-Mercosur agreement, as the very idea of promoting a joint declaration clarifying the commitments of the 'Trade and Sustainable Development' (TSD) chapter suffers to date from excessive 'associated formalism'.[26] This refers to two dimensions. The first relates to the factor that involves Mercosur with respect to the inter-state imbalance due to political and institutional control. The second dimension lies in the excessive legalism associated with the resolution of controversies and the dynamics of cooperation. In Mecham's words, Mercosur opted for the latter approach, thus the very ethos of Mercosur differs substantially

[24] Sophia Kalantzakos, 'The Geopolitics of Critical Minerals' (2022) 19 Instituto Affari Internazionali (IAI) papers, 2 <http://www.jstor.org/stable/resrep23660> accessed 01 March 2024.
[25] José Antonio Sanahuja and Jorge Damián Rodríguez, *El acuerdo Mercosur - Unión Europea: Escenarios y opciones para la autonomía estratégica, la transformación productiva y la transición social y ecológica* (Fundación Carolina 2021).
[26] See at Andrés Malamud, 'Assessing the political dialogue and cooperation pillar of the EU-Mercosur Association Agreement: towards a bi-regional strategic partnership?' (2022) In-Depth Analysis Requested by the AFET committee (European Parliament's Committee on Foreign Affairs), 14 <https://www.europarl.europa.eu/thinktank/en/document/EXPO_IDA(2022)653652> accessed 01 March 2024.

from that of the EU system.[27] Also, the sustainability commitments in the EU-Mercosur agreement require a *quid pro quo* in terms of public procurement and protection (for example, by extending the transition period) for certain industries, thus further expressing the slowing down of strategic objectives.

Mercosur's inconsistencies have materialized in precautions for Latin America, as a result of the history of the relationship between the two.[28]Faced with this, the EU has placed new strategies of enlargement on trade defense aiming to re-establish a level playing field between EU producers and their external competitors. There have been elucidated, among other elements, the Foreign Subsidies Regulation (FSR), the updated Trade Enforcement Regulation (TER), the International Procurement Instrument (IPI), the Investment Control Mechanism (FISM), the Anti-Coercion Instrument (ACI) and the Carbon Border Adjustment Mechanism (CBAM).[29] Within all of these external EU instruments, the European Commission has described these measures as an ambitious, open, sustainable trade policy that will require action at all levels to effect climate justice mechanisms.[30] For this reason, Latin America has the great challenge of making a deliberative and reflective process of how the countries of the continent negotiate with the European Union, articulating the different types of foreign policy (e.g. Chile's turquoise foreign policy or the entrepreneurial foreign policy) with the sovereign strategies on critical minerals and the urgencies arising from the climate crisis.

3 THE ROLE OF PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES

Thomas Wälde portrayed the period from 1965 to 1980 as a historical epoch marked by 'the exercise of permanent sovereignty over natural resources by developing countries, mainly through the large-scale nationalization of mineral extraction facilities, the renegotiation of existing agreements and the creation of state-owned enterprises'.[31] The restructuring of the meaning of sovereignty remains to this day, but has found a strong foundation and consensus in the idea of self-determination, which extends to all nations empowered to choose their own political, economic, social and cultural destinies. Thus, Permanent Sovereignty over Natural Resources (PSNR) is in fact 'an extrapolation of the right to self-determination'.[32] The United Nations has so far adopted several resolutions in which the freedom of people

[27] Michael Mecham, 'Mercosur: A Failing Development Project?' (2003) 79(2) International Affairs 369, 382.
[28] One of the strongest precautions is the reproduction of colonial dynamics which are described in the texts of Diana Vela Almeida et al, 'The "Greening" of Empire: The European Green Deal as the EU first agenda' (2023) 105 Political Geography 102925, 1-2. The other is Sabelo Ndlovu-Gatsheni, 'The cognitive empire, politics of knowledge and African intellectual productions: reflections on struggles for epistemic freedom and resurgence of decolonization in the twenty-first century' (2019) 42(5) Third World Quarterly 882.
[29] Harri Kalimo, Ferdi De Ville, and Simon Happersberger, 'The Unilateral Turn in EU Trade Policy? The Origins and Characteristics of the EU's New Trade Instruments' (2023) 28(Special Issue) European Foreign Affairs Review 15, 16.
[30] ibid 21.
[31] Thomas Wälde, 'Permanent Sovereignty over Natural Resources Recent Developments in the Mineral Sector' (1983) 7(3) Natural Resources Forum 239.
[32] Ian Brownlie, 'Legal Status of Natural Resources in International Law (Some Aspects)' (1979) 162 Collected Courses of the Hague Academy of International Law <http://dx.doi.org/10.1163/1875-8096_pplrdc_A9789028605305_02> accessed 01 March 2024.

to pursue their general development and, in particular, their economic development has been confirmed.[33]

Currently, the resurgence of Permanent Sovereignty over Natural Resources (PSNR) is highlighted, understanding that this idea is largely based on a position of political rethinking. In this way, the political rethinking goes through solving the problems facing the sustainable supply of critical minerals, highlighting the break with a single, linear mentality on the subject. Sovereignty is not only a matter of resource security, but also a matter of development and justice, thus the establishment of a sustainable critical mineral supply network must fully respect the interests of all participating parties, especially those nations that have been excluded. Under the old international order, there were many unreasonable linkages in the critical minerals supply area, but the contemporary world needs a new system of global governance of critical minerals to maintain supply chain stability and promote climate justice, where all parties accept the concept of equitable development of the SDGs.[34]

This reformulation has accelerated since the Paris Agreement, where the establishment of energy transition objectives with a dominant role for renewable energy technologies has led to the opportunity to redefine the position of States on economic development models, where for example in the case of Latin American States, a door is opened not only for the export of raw materials, but also for the configuration of an economy based on value-added products.

In the face of climate change, authors such as Werner Scholtz have argued that while the developing world is plagued by the environmental problems of poverty and the developed world by the environmental problems of its excess wealth. Revoking permanent sovereignty or making it obsolete means that the developing world will not be able to address its environmental problems. This means that permanent sovereignty still has an important role to play in accordance with its intended purpose as a component of achieving development. However, to address the environmental problems of poverty, developing states must follow a sustainable development path. Now, the importance of sustainable development in international environmental law must be taken into account when interpreting permanent sovereignty and its relationship to common concern. From this, it is imperative to 'green' the economic aspect of sovereignty rather than declare it obsolete.[35] Consequently, the question would rather be how the concern for the right of states to freely dispose of their natural resources to respond to the challenges of global environmental degradation, such as climate change, changes beyond the prototypical idea of protectionism but rather, the sovereignty approach is directly intertwined with the developmentalism of states.

Developmentalism allows the placement of special emphasis on the national level, since under the paradigm of sovereignty this will have a strategic and territorial extension, a reflection of this is demonstrated in the new frontiers of 'green' resources, particularly what

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[33] Yogesh Tyagi, 'Permanent Sovereignty over Natural Resources' (2015) 4(3) Cambridge Journal of International and Comparative Law 588, 588-590.

[34] Shiquan Dou et al, 'Critical mineral sustainable supply: Challenges and governance' (2023) 146 Futures 103101, 2-3.

[35] Werner Scholtz, 'Greening Permanent Sovereignty through the Common Concern in the Climate Change Regime: Awake Custodial Sovereignty!' in Oliver C Ruppel, Christian Roschmann, and Katharina Ruppel-Schlichting (eds), *Climate Change: International Law and Global Governance. Volume II: Policy, Diplomacy and Governance in a Changing Environment* (Nomos 2013) 208.

have been the cases in Latin America.[36] One of the emblematic cases is lithium mining in Argentina, Bolivia and Chile, a geopolitical and economic phenomenon which several studies have analysed and documented, understanding the frontier as an association between minerals, land, people, ecosystems, means and lifestyles in these areas.[37] This wave of sovereignty is situated in an expansionist dynamic of climate justice, i.e. various governments, regardless of their resource reserves and dependence on mineral resources, have initiated an expansion of the regulation of critical minerals in pursuit of this justice factor. Such is the case, for example in the U.S., where the U.S. Department of Energy published a Critical Materials Strategy in 2011 and, similarly, the U.S. Geological Survey (USGS) published a strategic list of 50 minerals.[38] At the same time, the European Commission (EC) had published a list of 14 critical raw materials in 2011 as a priority action in the raw materials initiative.[39] The list has since been revised and currently includes 30 minerals following the 2020 Communication on Critical Raw Materials.[40] In conclusion, we are facing a regulatory consensus on critical minerals, which involves geopolitical power, of which we will later analyse the legal factors which interact therewith.

For the purposes of this research, special emphasis will be placed on the case of Europe, since, faced with the supply of raw materials and the effect triggered by the metal price hikes in 2003-2008, the European Commission developed the famous Raw Materials Initiative (RMI).[41] This initiative established an integrated strategy to respond to the various challenges related to access to non-energy and non-agricultural raw materials. The initiative was based on three pillars[42]:

1) Fair and sustainable supply of raw materials from global markets, ensuring access to resources in third countries;
2) Promoting the sustainable supply of raw materials of European origin;
3) Promoting resource efficiency and the supply of secondary raw materials through recycling.

There have been attempts to unify an EU mining policy, and the case described above is part of such attempts. However, these types of experiences have not been consolidated. A reflection of this is that neither objective 1 nor 2 of the 2008 mineral policy has been covered to date, and they have only managed to comply with the circular economy plan

[36] Marie Forget and Vincent Bos, 'Harvesting lithium and sun in the Andes: Exploring energy justice and the new materialities of energy transitions' (2022) 87 Energy Research & Social Science 102477.
[37] Felix M Dorn and Fernando Ruiz Peyré, 'Lithium as a Strategic Resource: Geopolitics, Industrialization, and Mining in Argentina' (2020) 19(4) Journal of Latin American Geography 68, 68-72.
[38] See at US Geological Survey, '2022 Final List of Critical Minerals' (*U.S.Federal Register*, 22 February 2022) <https://www.usgs.gov/news/national-news-release/us-geological-survey-releases-2022-list-critical-minerals> accessed 01 March November 2024.
[39] See at Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Tackling the challenges in commodity markets and on raw materials' COM (2011) 25 final.
[40] See at Marco Keersemaker, *Suriname Revisited: Economic Potential of its Mineral Resources* (Springer International Publishing 2020) 69-82.
[41] See at Commission, 'Communication from the Commission to the European Parliament and the Council. The raw materials initiative – meeting our critical needs for growth and jobs in Europe' COM (2008) 0699 final.
[42] Ibíd.

corresponding to point 3.[43] Part of the failure or inadequacy of the 2008 project has also extended to other initiatives, as is the case of the Horizon 2020[44] and the Seventh Framework Program, which although they have financed more than 2 500 projects on raw materials, covering technical, social, political or governance aspects of mining, they have neglected to form long-term partnerships with the Global South or agreements that consider a win-win strategy with Latin America.[45]

In the absence of results from the previous proposals, the possibility of establishing an EU Mining Agency has been examined, which has the potential to structure a strategy for the potential mineral resources to be exploited, understanding the whole mining cycle from exploration to foreclosure.[46] Another idea that has been fostered on the European continent, was the systematisation of the 2012 proposals for a regional mining strategy for the two northernmost regions in Sweden (Norrbotten and Västerbotten)[47], the 2013 Northern Engineering project and the MIN-GUIDE project.[48] With this idea what has been sought is to channel the immense variety of interests involved and serve the purposes of the Green Deal but it has not yet borne much fruit.

Despite the above, the EU continues to obtain a regulatory expansion of critical minerals in the Global South, mainly in the case of Chile.[49] The Chilean dynamics of sovereignty try to survive the times of globalization through development strategies which lie in the diversification of the export matrix, and also in the added value that materials such as lithium could have. In this last topic, a political debate has begun on a bill that seeks to strengthen the fiscal regime in order to increase revenues from minerals, in line with what has been done by Brazil, Zambia and the Philippines.[50] Likewise, the country has also designed a network of mechanisms for greater control over its own natural resources that considers new technological responses and greater development.

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[43] Commission, 'Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the implementation of the Circular Economy Action Plan' COM (2019) 190 final.

[44] See Regulation (EU) 2021/695 of the European Parliament and of the Council of 28 April 2021 establishing Horizon Europe – the Framework Programme for Research and Innovation, laying down its rules for participation and dissemination, and repealing Regulations (EU) No 1290/2013 and (EU) No 1291/2013 [2021] OJ L170/1.

[45] Manuel Regueiro and Antonio Alonso-Jimenez, 'Minerals in the future of Europe' (2021) 34(2) Mineral Economics 209, 215.

[46] Magnus Ericsson, 'Mining industry corporate actors analysis' (2012) POLINARES working paper n.16 2012 <https://goxi.org/sites/default/files/2019-06/Mining%20industry%20corporate%20actors%20analysis.pdf> accessed 01 March 2024.

[47] Both cases can be visualized and analyzed in the text by Eva Johnson and Magnus Ericsson, 'State ownership and control of minerals and mines in Sweden and Finland' (2015) 28 Miner Econ. 23.

[48] See the project at Commission, 'Minerals Policy Guidance for Europe' (*CORDIS EU research results*, last update 10 March 2023) <https://cordis.europa.eu/project/id/689527> accessed 01 March 2024.

[49] Alejandra Bernal, Joerg Husar, and Johan Bracht, 'Latin America's opportunity in critical minerals for the clean energy transition' (*IEA*, 07 April 2023) <https://www.iea.org/commentaries/latin-america-s-opportunity-in-critical-minerals-for-the-clean-energy-transition> accessed 01 March 2024.

[50] Damian Nyer and Silvia Marchili, 'A new wave of resource nationalism in the mining & metals industry' (*White & Case*, 15 September 2021) <https://www.whitecase.com/insight-our-thinking/new-wave-resource-nationalism-mining-metals-industry> accessed 01 March 2024.

Much of Chile's political orientation has been guided by the comparative experiences carried out by international agencies,[51] such as the International Energy Agency, the International Renewable Energy Agency, and the World Bank, among others.[52] For the purposes of the extension of the Chilean case, it is necessary to understand Chilean foreign policy (based on the idea of entrepreneurial diplomacy) and particularly, to observe how this type of orientation is inserted in EU law.

4 UNDERSTANDING THE CHILEAN CYCLE: A LOOK AT ENTREPRENEURIAL DIPLOMACY FOR CLIMATE JUSTICE

The Chilean case is based on the idea of the concentration of lithium resources, which are highly concentrated in the country and in other neighboring areas of South America, referring especially to the case of Argentina, which has about 14.8 million tons of lithium, Bolivia which has 9 million tons of estimated untapped lithium and Chile itself, with more than 8.5 million tons of lithium available. This accumulation of resources is extrapolated to a dominant position of these three states, which have come to be recognized as the 'lithium triangle', precisely because they have in their hands the possibility of using this resource for their interests.[53]

Bolivia,[54]Argentina,[55] and Chile[56] have been discussing and implementing policies to redefine their roles in the Lithium production networks. Likewise, authors such as Barandiarán[57] have argued that the position projected by Bolivia, Argentina and Chile, in each case, has portrayed a collective project of national construction through the concept of development imaginaries deployed in the lithium industry. Two positions stand out in the imagination of these countries of the Global South. The first position is related to the consideration of lithium as a banal product in which the State must facilitate its extraction and rapid export. The second point refers to lithium as a strategic product, and it is there where the thesis of this research will be focused, since from the strategic element a new position of the State is configured, as it controls the supply of the mineral and, in turn, takes advantage of its strategic position to generate geopolitical power aimed at greater climate justice.

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[51] These institutions often publish detailed reports on the status and role of minerals and metals in the global energy transition. Likewise, the literature stimulated by these agencies linked to this topic has also grown exponentially, especially on issues of governance, geopolitics and foreign trade.

[52] Kirsten Hund et al, *Minerals for Climate Action: The Mineral Intensity of the Clean Energy Transition* (Washington, DC: World Bank 2023).

[53] See at United States Geological Survey, 'Mineral commodity summaries 2019: U.S. Geological Survey' (U.S. Govt. Print. Off. 2019), 98-99 <https://d9-wret.s3.us-west-2.amazonaws.com/assets/palladium/production/atoms/files/mcs2019_all.pdf> accessed 01 March 2024.

[54] For the Bolivian case, see the text by Vincent Bos and Marie Forget, 'Global Production Networks and the lithium industry: A Bolivian perspective' (2021) 125 Geoforum 168.

[55] See for the Argentine case the text by Felix Malte Dorn and Hans Gundermann, 'Mining companies, indigenous communities, and the state: The political ecology of lithium in Chile (Salar de Atacama) and Argentina (Salar de Olaroz-Cauchari)' (2022) 29(1) Journal of Political Ecology 341.

[56] For the Chilean case, see the report by Rafael Poveda, *Estudio de caso sobre la gobernanza del litio en Chile* (Santiago de Chile, ECLAC 2020) <https://repositorio.cepal.org/items/df6ebea2-1e1c-40ee-94c1-21d48fb430e6> accessed 01 March 2024.

[57] Javiera Barandiarán, 'Lithium and development imaginaries in Chile, Argentina and Bolivia' (2019) 113 World Development 381.

The Chilean case is dual, as it considers new dynamics of foreign policy and development imaginary, all this from the strategic conduction for greater climate justice by the State in terms of critical minerals. In my opinion, this intertwining that Chile presents results from two facets, the first is at the internal level, since the country is currently proposing signs of an economic opening with mechanisms that allow both a reduction of the external vulnerability of the national economy and a fairer and more sustainable development model. Likewise, political agreements on national sustainability are part of the viability, legitimacy and projection equation of the political decisions of the current Chilean State. With respect to the second facet, the focus is foreign policy, where the deployment of turquoise diplomacy and the so-called business diplomacy has been characterized by the capacity for innovation and diplomatic initiative and the building of ad hoc regional and global strategic coalitions.

The state of Chilean foreign policy has also been recognized by new approaches during the administration of President Boric, among them is the so-called entrepreneurial policy, where authors such as Bywaters, Soto and Gertner, have described it as a new cycle of Chilean foreign policy. Having said this, it will be pertinent to analyse the elements of this new cycle, in the first place this new cycle 'must be distinguished from the point of view of the general strategic approach by its intensity'.[58] The latter, in the words of the same authors, means that 'the expansion of diplomatic ties will continue to be an important task, an intensive strategy that must focus on the quality and density of the presence in the world'.[59] A second element of entrepreneurial diplomacy is the maximization of the country's diplomatic room for maneuver, which means that the country 'instead of promoting rigid partnership schemes and/or inconsistency with a multipolar system, should establish flexible partnership schemes with the entire spectrum of actors in the system (state, non-state, international organizations, civil society, etc.)'.[60] The third element to consider is 'the deployment of a niche diplomacy, capable of concentrating and strengthening the country's external efforts in areas where it already has comparative advantages'.[61] A clear example of this last case is the country's proactivity in the defense of the environment, as well as the prolongation that the State has had in the economy of critical minerals. The fourth element is related to 'the development of specialized human capacities in the diplomatic niches selected by the country'.[62]

Now, it is worth asking on what level all these elements of entrepreneurial diplomacy are deepened with the idea of development based on lithium. We would say that the rationale behind the idea of entrepreneurial diplomacy lies in considering that the lack of hard power capabilities that distinguishes great powers gives small and medium-sized countries the possibility to exert influence on their external environment by concentrating their diplomatic activities in alternative fields of action that contribute to the good governance of international society.[63] This process of good governance and alternative action should also consider a legal

[58] Cristóbal Bywaters, Daniela Sepúlveda, and Andrés Villar, 'Chile y el orden multipolar: autonomía estratégica y diplomacia emprendedora en el nuevo ciclo de la política exterior' (2021) 9 Análisis Carolina, 7 <http://dx.doi.org/10.33960/ac_09.2021> accessed 01 March 2024.
[59] ibid.
[60] ibid.
[61] ibid.
[62] ibid 8.
[63] Bywaters et al (n 58) 8.

extension manifested in different elements of environmental justice, which will be discussed in later items.[64]

Consequently, Chile faces a challenge of magnitude, i.e. to design and perfect its resource targeting mechanisms in specific areas that will allow it to compensate for its weaknesses in other areas. Continuing with this argument, we would say that far from condemning Chile to irrelevance, it should be said that Chile's status as a small or medium-sized country offers possibilities that, if addressed with the appropriate vision and instruments, will contribute to the creation of conditions for greater strategic autonomy, the expansion of external agency capacity and the improvement of the country's international status.[65] The targeting of critical minerals is part of the Chilean strategy, consistently linked to the recent trajectory of lithium policies in Argentina and Bolivia. This point is key, as absolute free market arguments are losing influence in favor of a convergence around the idea that lithium can provide opportunities for a form of development that, according to its proponents, breaks with past patterns of cyclical or highly unequal growth, extrapolating lithium development to the industrialization of critical minerals with 'value added' for greater wealth and justice.[66]

5 THE NORMATIVE DIMENSION OF CRITICAL MINERALS AND CLIMATE JUSTICE

Market power often allows the EU to be a potential regulatory leader, i.e., its rules have an expansive effect on third (non-member) states that must comply with EU requirements to access the EU market. This regulatory power is also based on the assumption that the EU is able to regulate non-state actors, such as mining companies, within and outside its own territory. This number of actors involved accelerates their participation in the relationship between the economy and critical minerals, as it is evident that non-state actors, such as companies and civil society organizations, take a leading role in the implementation of many projects. Consequently, the legal culture on minerals is experiencing a shift of power towards the private sector through new forms of self-regulation, co-regulation and the rise of 'private authority', which has manifested itself in the idea called by Vogel as 'upward trade'.[67]

This idea of trade must recognize the role of just energy transition and environmental justice. However, for key Latin American and European horizons, it is worth raising the need for coordination that mitigates private authority through an intersection between climate justice, entrepreneurial diplomatic development and the new regulatory horizons implied by the transition. Thus, given the broad role that critical minerals play in the development of the low-carbon economy that most countries have committed to achieve through the COP21 Paris Agreement, there is a need for a broad vision of justice that can encapsulate this global

[64] Cedric Ryngaert and Sven Sobrie, 'Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia' (2011) 24(2) Leiden Journal of International Law 467, 467-470.
[65] Alex Weisiger and Keren Yarhi-Milo, 'Revisiting Reputation: How Past Actions Matter in International Politics' (2015) 69(2) International Organization 473.
[66] Barandiarán (n 57) 389.
[67] Shannon K Mitchell and David Vogel, 'Trading up: Consumer and Environmental Regulation in a Global Economy' (1996) 63(1) Southern Economic Journal 271.

industry. In this context, this research raises components of climate, environmental and energy justice, which are derived from the JUST Framework[68], which are:

a) Distributive justice
b) Procedural justice
c) Recognition justice
d) Cosmopolitan justice
e) Restorative justice

a) Distributive justice: the first perspectives of justice is related to the distribution of the benefits of the energy sector and also of the negative effects. This gives rise to debates such as those on the form of revenue sharing between states or factors such as liability for environmental damage. This extension of justice has been intertwined in the EU, in some OECD-led initiatives, which have proposed reforms related to energy taxation and resource extraction.[69] In addition, this OECD initiative represents more than 60 countries, for which the extraction of energy and mineral resources represents an important opportunity to increase revenues for many governments, of which the Global South and Latin America are part.

On the Chilean and Latin American side, there is room for maneuver with respect to EU guidance on the use of trade regimes that act as a distributive engine to foster a just global energy transition. An example of this is carbon border adjustments, which impose a levy on carbon-intensive imports on a more horizontal basis. The big challenge here is to find a balance between the interests of both parties. Even if the conjunction of interests is key, the EU may need to focus on material incentives and informal networks. This would present a challenging stance to the Mercosur idea, attempting to overcome the futility of declaratory regionalism[70] and precocious institutionalization, which have been part of the frustrating equation to date.

Regarding the use of trade regimes by the EU and Chile, it is worth focusing on the EU's association agreement with Chile, as this agreement contains a number of indirect innovations that place climate change as a relevant element of the treaty relationship.[71] Instead of reopening the legal text, the parties decided from the outset that the new EU-Chile Advanced Framework Agreement will not contain a treaty provision declaring climate change as an essential element, even though the new Chilean government and the EU share a strong commitment to climate action, but both committed to review within 12 months the

[68] Raphael J Heffron, 'The role of justice in developing critical minerals' (2020) 7(3) The Extractive Industries and Society 855, 857.
[69] Dan Devlin, 'Limiting the Impact of Excessive Interest Deductions on Mining Revenues' (*Policy Commons*, 28 May 2018) <https://policycommons.net/artifacts/3815155/limiting-the-impact-of-excessive-interest-deductions-on-mining-revenues/4621071/> accessed 01 March 2024.
[70] This idea can be understood in greater detail in the text of Nicole Jenne, Luis Leandro Schenoni, and Francisco Urdinez, 'Of words and deeds: Latin American declaratory regionalism, 1994–2014' (2017) 30(2-3) Cambridge Review of International Affairs 195-215.
[71] Markus Gehring, 'EU Constitutional Aims and External Relations - Legal Consequences of Climate Provisions in EU Trade Accords' (2023) University of Cambridge Faculty of Law Research Paper No. 2/2023, 15 <https://ssrn.com/abstract=4387594> accessed 01 March 2024.

trade and sustainable development obligations of the treaty text after the entry into force of the interim tariff trade agreement.[72]

The parties have committed to intensify cooperation, especially in the mining industry, on the basis of their complementarity, common objectives and shared values. Complementarity also extends to the commitments of the EU-Latin America Mining Development Network Platform (MDNP), which includes various actors such as companies, the State and all entities linked to the economic dynamics.[73] But, even more strongly in this agreement, bridges connecting climate justice and complementarity (a key feature of sustainable trade), since both dimensions recognize the strategies for the development of sustainable trade. This multifaceted strategy mentioned above also encompasses the establishment of a national lithium corporation and a private technological institute, ensuring greater state participation, a comprehensive assessment of available wages and the establishment of a protective network for these components.

b) Procedural justice: this second perspective of justice relates to the focus here on the legal process and the complete legal steps necessary to be observed in order to intertwine the interests between the EU and Chile, particularly for Latin America. Here, procedural justice focuses specifically on the legal process of taking a project from start to finish, from planning and construction to operation and end use, with special emphasis on stakeholders having a legitimate opportunity to participate. Therefore, in this matter the key issue for the development of the mining industry critical to procedural justice is the Environmental Impact Assessment process.

There are two points that intersect between the normative factor, climate justice and critical minerals between the EU and Chilean regimes in particular. The first is linked to the Equator Principles, which have played an important role in the critical minerals industry, as they cover the majority of international project finance debt within developed and emerging markets and, in particular, essentially require that the project has gone through assessment processes prior to releasing project finance.[74] Following the extension of the principles, we find the coordination of Extractive Industries Transparency Initiatives, such as the United Nations (UN) Fowler Report or the Extractive Industries Transparency Initiative (EITI) in 2002 led by the British Government. The latter was the first time that a EU government took action to prevent the mineral trade from financing conflict.

In the same way, we can see that in the field of transparency and evaluation processes, international law has played a coordinating role in this area and, at the same time, has tended to respect the sovereignty of EU and non-EU states. The concept of sovereignty reappears in Latin American states and the EU has understood that it is part of the 'basic constitutional doctrine of the law of nations'.[75] In the current interconnected world order, critical minerals

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[72] See EU-Chile Advanced Framework Agreement, 'Joint Statement on Trade and Sustainable Development' (2022) <https://circabc.europa.eu/rest/download/96cafa19-80fe-4455-b63b-ea36adf2635a> accessed 01 March 2024.

[73] Joanna Kulczycka, Ewa Dziobek, and Michał Nowosielski, 'Promotion and implementation of Polish mining investments in foreign markets on the example of Latin America' (2023) 2(4) Energy Storage and Saving 608, 610.

[74] The Equator Principles, 'Equator Principles' (2020) <https://equator-principles.com/about-the-equator-principles/> accessed 01 March 2024.

[75] Clare Church and Alec Crawford, 'Minerals and the Metals for the Energy Transition: Exploring the Conflict Implications for Mineral-Rich, Fragile States' in Manfred Hafner and Simone Tagliapietra (eds), *The Geopolitics of the Global Energy Transition* (Springer International Publishing 2020).

have an internal and external dimension, for the latter is key to horizons that conform to equality between sovereign states that enter into agreements with Latin America and Europe.

c) Recognition justice: this dimension of justice is linked to the idea of human rights and business as an important area of legal research and practice, particularly in terms of the distribution of tax revenues and their relationship to human rights.[76] In this regard, the recent report of the UN Committee on Economic, Social and Cultural Rights highlights the role of states and also of companies in determining the realization of economic, social and cultural rights.[77] For typologies such as the Chilean one, this issue is linked to the factor of private actors, since for the challenges faced by the lithium industry.

Currently, responsibility for lithium extraction rests with two dominant companies, SQM and Albemarle, which are primarily engaged in the export of raw lithium. Over the years, the State, acting through CORFO, has assumed management of the minerals and overseen the complex interaction with these companies, albeit marked by intermittent conflicts related to tax remittances and contract compliance. Since 2010, under the auspices of the center-right administration of Sebastián Piñera and driven by growing global demand, concerted efforts have been made to push the lithium enterprise towards greater exploitation.[78] Subsequently, during the Bachelet administration (from 2014 to 2018), a national lithium policy was formulated that envisaged further industrialization and market regulation through a series of instruments, albeit with relatively marginal implementation.[79] More recently, in May 2023, the Chilean government unveiled its national lithium strategy, outlining a course of action aimed at mobilizing capital, technology, sustainability and value enhancement within the lithium production sector, in order to set out a joint strategy between private and state actors for Chilean economic development under the guidance of respect for human rights.[80]

d) Cosmopolitan justice: this fourth sub-section refers to the effects beyond our borders and from a global context, that is, from a transnational justice perspective. For this, the deepening of the multilateral trade regime is key, since it is a vital space for the European Union. At the same time, it is a space where Latin America, and especially Chile, has much room for its developmental strategies.

Import and export restrictions serve different purposes and pose different challenges in the face of climate change. Certainly, import restrictions have been discussed extensively

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[76] Stéphane Brabant and Elsa Savourey , 'From Global Toolbox to Local Implementation: The IBA Practical Guide on Business and Human Rights for Business Lawyers' (2017) 2(2) Business and Human Rights Journal 343, 343-345.

[77] United Nations Economic and Social Council (UNESC), 'Committee On Economic and Social and Cultural Rights – General comment No. 24 (2017) On State Obligations Under the International Covenant On Economic, Social and Cultural Rights in the Context of Business Activities' (2017) <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1a0Szab0oXTdImnsJZZVQcIMOuuG4TpS9jwIhCJcXiuZ1yrkMD%2FSj8YF%2BSXo4mYx7Y%2F3L3zvM2zSUbw6ujlnCawQrJx3hlK8Odka6DUwG3Y> accessed 01 March 2024.

[78] Mauricio León, Cristina Muñoz, and Jeannette Sánchez, 'La gobernanza del litio y el cobre en los países andinos' (Comisión Económica para América Latina y el Caribe, 2020) <https://repositorio.cepal.org/server/api/core/bitstreams/61e6dc94-90fe-4ce4-afd4-c52f424f6c74/content> accessed 01 March 2024.

[79] Sebastián Carrasco and Aldo Madariaga, 'The Resource Curse Returns?' (2022) 54(4) NACLA Report on the Americas 445, 445-452.

[80] José Aylwin Oyarzún, 'La Estrategia Nacional de Litio y los derechos humanos' (Observatorio Ciudadano, 2023) <https://observatorio.cl/la-estrategia-nacional-de-litio-y-los-derechos-humanos/> accessed 01 March 2024.

in trade negotiations and in the literature,[81] but export barriers have not received the same level of attention until now, when the issue of critical minerals is submerged.[82] For the purposes of access to the latter, export restrictions imposed by resource-rich countries are of vital importance.

Both at the WTO level and in the EU's global energy plan, the presence of corporations and non-state actors is playing a key role in foreign policy. Bilateral investment treaties (BITs) are also another example of cooperation agreements that have increased since the mid-1990s and have been inserted into the new dynamics of critical minerals policy alongside all actors. From this perspective, Free Trade Agreements (FTAs) and Preferential Trade Agreements (PTAs) can become important tools, provided they go beyond the traditional rhetoric of tariff reduction and/or elimination and extend to areas such as mineral processing, value addition and the supply chain of critical minerals used in renewable energy technologies'.[83] Finally, in order to achieve a correct equation with LATAM, the EU must understand that its regulatory power depends on the various actors it has with influence and power at the table. This has already been defined in ideas explained by authors such as Muller and others, who define 'Intelligent Combination rather than regulatory heterogeneity',[84] as a space of opportunity for the linkage of heterogeneity of initiatives, instruments and standards, involving the global South and North in equal opportunities.

It is also relevant to highlight the WTO-plus commitments, which are negotiated on a country-by-country basis, and there is great variation in the language and levels of the agreements. The difference in the requirements contained in members' accession protocols creates vagueness and inconsistency for the Union. In fact, additional WTO obligations with respect to export restrictions have not prevented countries from introducing trade restrictive measures on minerals. A look at recent critical mineral export restrictions shows that the countries imposing such measures are also those that have committed to additional WTO obligations in their accession protocols. This point is important to note, because these states have a negotiating space with Latin American states, such as Chile.

e) Restorative justice: this last perspective of justice is posed under a key parameter, which relates to the energy sector's moral duty to rectify itself and focus on the need to enforce particular laws (i.e. energy sites should be returned to their previous use, therefore waste management policy and decommissioning should be done properly). This could be in the form of project revenue distribution (but that is mainly covered by distributive justice, already discussed above). The key issue for the critical minerals industry would be that these energy sites should be returned to their former use. Therefore, waste management policy and decommissioning should be completed and properly calculated within a project and

[81] Haveman, Nair-Reichert, and Thursby (n 3).
[82] Mark Wu, 'Export Restrictions' in Aaditya Mattoo, Nadia Rocha, and Michele Ruta, *Handbook of Deep Trade Agreements* (The World Bank 2020).
[83] Srivastava and Kumar (n 17) 8; Nidhi Srivastava, 'Trade in Critical Minerals: Revisiting the Legal Regime in Times of Energy Transition' (2022) SSRN Electronic Journal <http://dx.doi.org/10.2139/ssrn.4255549> accesed 01 December 2023.
[84] Melanie Muller et al, 'From Competition to a Sustainable Raw Materials Diplomacy' (2023) Stiftung Wissenschaft und Politik (SWP) Research Paper 2023/RP 01 <www.swp-berlin.org/publikation/from-competition-to-a-sustainable-raw-materials-diplomacy#hd-d31874e3767> accessed 01 March 2024.

according to the standards set out in legislation. In addition, restorative justice can help identify where prevention should take place.[85]

6 ADDITIONAL CHALLENGES FOR THE EUROPEAN UNION IN CONNECTION WITH CHILEAN ENTREPRENEURSHIP POLICY AND CLIMATE JUSTICE

The European Union has established a clear regulation of critical minerals in the CRM Act[86],with particular emphasis on the International Energy Agency's Critical Minerals Market Review 2023 report[87], which detailed that there are two ongoing concerns: limited progress in terms of diversification of the global supply chain and current environmental and social concerns linked to increased mining exploration.[88] There, countries such as Chile are in the right place to respond to how they fit into the dynamics of progress in supply chains, new methods of interaction with local communities and above all climate justice. There are many examples of the need for a foreign policy consistent with dynamics of global climate change, but one that clearly shows this interaction between the EU and Chile is the duplication in the extraction of water from natural sources for use during industrial processes, which has evidently become a challenge or phenomenon necessary to achieve the goal of zero net emissions by 2050 and, in turn, is configured as a strategy to finance the energy transition of both parties.[89] With this, we could say that the EU has the challenge and the capacity to articulate an economic, legal and diplomatic strategy to improve monitoring, risk management and governance of critical minerals.[90]

One of the topics that the EU should consider as a objective for the Green Deal and the extension of Chile's foreign policy is the possibility of creating a CRM industry based in the EU, but at the same time rethinking the value chain for countries in cooperation, such as Chile. Therefore, it is key to be able to advance sustainability governance in the more diversified copper supply chain from the Andes to the EU, hand in hand with Chile's state-owned CODELCO[91] and a handful of multinationals that are decisive players in lithium management.[92] Mainly vertically integrated companies involved in multiple stages of the supply chain exert great influence.

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[85] Raphael J Heffron, 'The role of justice in developing critical minerals' (2020) 7(3) The Extractive Industries and Society 855, 859.

[86] See the development of the EU Commission initiative called 'European Critical Raw Materials Act' (2022) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13597-European-Critical-Raw-Materials-Act_en> accessed 01 March 2024.

[87] See the International Energy Agency, 'Key market trends – Critical Minerals Market Review 2023 – Analysis - IEA' (2023) <www.iea.org/reports/critical-minerals-market-review-2023/key-market-trends> accessed 27 March 2024.

[88] Peter Leon et al, 'EU Critical Raw Minerals Act Highlights Intensifying Competition in Race to Net Zero' (2023) 4(1-2) Global Energy Law and Sustainability 138, 138-139.

[89] ibid 139.

[90] Alessandra Hool, Christoph Helbig, and Gijsbert Wierink, 'Challenges and opportunities of the European Critical Raw Materials Act' [2023] Mineral Economics 5 <https://link.springer.com/article/10.1007/s13563-023-00394-y> accessed 01 March 2024.

[91] In Spanish it is called 'Corporación Nacional del Cobre de Chile'.

[92] The International Copper Study Group (ICSG), 'The World Copper Factbook 2020' (2020) <https://copperalliance.org/wp-content/uploads/2021/01/2020_10_13_ICSG_Factbook_2020.pdf> accessed 01 March 2024.

This certainly applies to CODELCO, whose state-owned status and dominance of mining and processing give it a dual role in implementation and enforcement. Commodity traders such as Glencore and metals exchanges such as the LME also have great influence over sustainability governance in the copper supply chain. They are just beginning to introduce standards for sustainability and transparency, so scope and enforcement still leave room for improvement. On the other hand, there have been cases where business managers have mentioned their interest in developing the value chain in Chile and building the largest value-added chain in Latin America based in the country. In this aspect, not implementing an accumulation strategy that attracts more advanced stages of the value chain to Chile means a significant loss of time in a highly innovative production network.[93] However, European law itself through the Green Deal will have to address sustainability issues such as responsible sourcing, ethics and geopolitics as a matter of urgency.[94]

The European Union must succeed in interlinking a value chain of critical raw materials for mining, refining, processing and recycling activities. This could be achieved by identifying strategic projects with strict EU environmental and social standards. Therefore, it would be essential to provide the Chilean state with better access to financing for environmental projects and collaboration to provide simplified legislation. The latter is no coincidence, as these various elements are part of the package of fair and sustainable conditions for both parties. In the same line, one should not forget many of the challenges posed by the EU Global Gateway Strategy,[95] which considered cooperation in research and innovation along commodity value chains, including: mineral knowledge and minimization of the environmental and climate footprint; cooperation to bring environmental, social and governance (ESG) criteria into line with international standards; the implementation of infrastructure, both physical and intangible, for the development of projects, while minimizing their environmental and climate impact; and capacity building, vocational education and training, and skills development along sustainable commodity value chains in accordance with international labor standards.

Now we witness a clear challenge for the European Union in the governance framework that underpins the permitting process, i.e. this is an element that may affect the ultimate success of the Critical Minerals Act. According to the Organisation for Economic Co-operation and Development (OECD), the main elements of good governance are accountability, transparency, efficiency, effectiveness, responsiveness and the rule of law.[96] In my opinion, these principles are the basis of the EU rule of law, which can be part of the conversation between EU law and Chilean law, since they are shared democratic and normative structures. Another of the key normative elements that the EU should raise for a better approach to the targeting of minerals promoted by Chilean foreign policy, is to

[93] Felipe Irarrazaval and Sebastian Carrasco, 'One step forward, two steps back? Shifting accumulation strategies in the lithium production network in Chile' (2023) 15 The Extractive Industries and Society 101327, 8.
[94] Manuel Regueiro and Antonio Alonso-Jimenez, 'Minerals in the future of Europe' (2021) 34(2) Mineral Economics 209, 219.
[95] Commission, 'Global Gateway' (*European Commission*, 1 March 2023) <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/stronger-europe-world/global-gateway_es> accessed 01 March 2024.
[96] See OECD, '2015 Pocket edition: Policy Framework For Investment' (2015) 6-7, 53 <https://web-archive.oecd.org/2017-06-28/368675-PFI-Pocket-Edition-2015.pdf> accessed 01 March 2024.

elaborate a list of strategic objectives that consider criteria including economic importance, concentration of supply and demand, substitution, strategic applications and expected supply gaps. Likewise, to avoid conflicts with local communities, EU law should guide a network of early warning mechanisms that conduct stress tests on critical supply chains, that can map strategic mineral resources and provide a list of strategic projects by zone.

Another key issue for EU directives relates to the promotion of the circular economy sector. This can be done through new updated rules for the design of products containing raw materials with the aim of increasing their ease of dismantling and recycling and the duration of the product's useful life, as has been done in the Waste from Electrical and Electronic Equipment Directive (WEEE).[97] The circular objective is not exclusive to the Chilean experience, since there are several projects that stand out in the Latin American and Chilean market for circular innovation and its approach to strategic recycling.[98] Therefore, both at the regulatory level and in the extension of the foreign policy of both parties, the promotion of general eco-design programs, design for sustainability and design for circularity should be focused, following guidelines based on criteria such as durability, reusability, repairability and recyclability. There is an additional objective in increasing the collection rates of waste containing critical raw materials, for which it would be useful to introduce shared legislation that makes producers responsible for recycling the products they manufacture.[99]

The thematic clusters of Horizon Europe are a good start on how to elaborate an orientation towards a just transition based on R&I through the critical minerals industry. Going forward, most of the actions on mineral raw materials will be located in the 'Digital, Industry and Space' cluster, thus there is a mission in climate justice on critical minerals, entrepreneurial diplomacy and new regulatory dynamics, which implies having a shared democratic culture to address climate change. In other words, for the sake of technology transfer, one cannot make the mistake of lacking transparency, deliberation and citizen participation. An example of this, involving concealment from, and hence ignorance of, the public, is the case of the Memorandum of Understanding of 30 January 2023 between the German company Aurubis AG and CODELCO, which was part of the circular economy cooperation agreements,[100] around smelting operations and projects of the Chilean-German Association of Raw Materials.[101]

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[97] Directive of the European Parliament and of the Council 2012/19/EU of 4 July 2012 on waste electrical and electronic equipment (WEEE) [2012] OJ L 197/38.

[98] Concept deepened in the text by Raphael Danino-Perraud, 'Face au défi des métaux critiques, une approche stratégique du recyclage s'impose' (2018) Éditoriaux de L'Ifri - Édito Énergie <https://www.ifri.org/sites/default/files/atoms/files/danino-perraud_metaux_critiques_recyclage_2018.pdf> accessed 01 March 2024.

[99] Alessandra Zanoletti, Antonella Cornelio, and Elza Bontempi, 'A post-pandemic sustainable scenario: What actions can be pursued to increase the raw materials availability?' (2021) 202 Environmental Research 111681, 9.

[100] See at Aurubis Bulgaria, 'Aurubis and Codelco Sign an Agreement to Cooperate on a More Sustainable and Responsible Copper Value Chain' (*Aurubis Bulgaria press release*, 30 January 2023) <https://www.aurubis.com/en/bulgaria/media/press-releases/aurubis-and-codelco-sign-an-agreement-to-cooperate-on-a-more-sustainable-and-responsible-copper-value-chain> accessed 01 March 2024.

[101] See at Deanne Toto, 'Aurubis, Codelco Sign an MoU as Part of a Wider German-Chilean Raw Materials Partnership' (*Recycling Today*, 30 January 2023) <https://www.recyclingtoday.com/news/codelo-aurubis-sign-mou-german-chilean-raw-materials-partnership/> accessed 01 March 2024.

Germany stated that the cooperation agreement signed on 29 January 2023 between the Federal Ministry for Economic Affairs and Climate Action and the Chilean Ministry of Mines on the German-Chilean partnership for mining, raw materials and the Circular Economy 'strongly supports the rapid entry into force of the modernized EU-Chile trade agreement', but did not elaborate further on what 'modernized' means in practice.[102] This fact categorically reflects that the relationship between extrapolating the idea of democracy to clean, low-carbon industry in conjunction with the direction of new manufacturing technologies, advanced materials, circular industries or emerging enabling technologies is inseparable.[103]

7 CONCLUSIONS

At the same time, Chile and the rest of Latin America need to meet emerging needs of the continent, among which is the ability of governments to freely structure strategic protection to overcome inequality in the population. Therefore, the first objective is to internalize the strategic element derived from considering raw materials as a joint economic structure for Latin America and the EU, extending this idea in that both parties seek to guarantee the supply of energy to their citizens. Likewise, the base construction of a new position of the Chilean State must consider the control of the mineral supply and, in turn, the recognition of the strategic position to promote climate justice, in its different variants, that is to say, in the restorative, cosmopolitan, recognition, procedural and distributive levels.

In the first instance, EU law should provide a rapprochement with Chilean foreign policy by elaborating a list of strategic objectives that considers criteria including economic importance, concentration of supply and demand, substitution, strategic applications and expected supply gaps. Therefore, the European Union has the immense challenge of coordinating the governance framework that intertwines the Critical Minerals Act, where the main elements to be promoted should be accountability, transparency, efficiency, effectiveness and the rule of law. Along with this, both at the regulatory level and in the extension of the foreign policy of both parties, the promotion of general eco-design, design for sustainability and design for circularity programs should be focused, following guidelines based on criteria such as durability, reusability, reparability and recyclability. At the same time, it should not be forgotten that the mission of anchoring the critical minerals industry, entrepreneurial diplomacy and new regulatory dynamics also implies a shared democratic culture for greater climate justice. Similarly, it is essential that EU policy and law be oriented towards a shared R&I strategy across the critical minerals industry.

Despite all these elements of relevance, EU law must overcome the formalism that has been anchored to Mercosur, and must prolong the Green Deal with the idea of rethinking the value chain focused on the strategic partnership with Chile. Likewise, the EU should continue to shape its directives in favor of promoting the circular economy sector. However, it must always remain cautious of what regulatory adaptation means in Chile and Latin America.

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[102] Sophia Pickles, 'Value Addition in the Context of Mineral Processing' (2023) Study, publication commissioned by the Heinrich Böll Foundation, 60 <https://www.boell.de/sites/default/files/2023-11/e-paper_value_addition_in_the_context_of_mineral_processing.pdf> accessed 01 March 2024.
[103] Regueiro and Alonso-Jimenez (n 94) 220.

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EXPLORING THE EVOLUTION OF CONTRACTUAL CONCEPTS WITHIN REGULATION NO 1215/2012 THROUGH CJEU JUDGMENTS: CIVIL AND COMMERCIAL MATTERS, CONTRACTS, TENANCIES OF IMMOVABLE PROPERTY, AND PROVISION OF SERVICES UNDER EXAMINATION

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Starting with the ruling of the Court of Justice of the European Union in the Obala case, this article explores: how the Court has redefined the concepts of 'contract matters' and 'tort, delict, or quasi-delict matters'; actions related to 'tenancy agreements for immovable property' versus 'rights in rem'; and the evolving interpretation of 'services' within the Brussels I Recast Regulation on jurisdiction, recognition and enforcement of judgments in civil and commercial matters. It also illustrates the discrepancies in the analysis of the term 'civil and commercial matters'. The Obala ruling has led to changes in how these concepts are understood and studied in certain contexts, thereby reshaping their interpretative contours. As a result, this article conducts a retrospective analysis to grasp these changes and their implications.

1 INTRODUCTION. *OBALA* CASE AND METHODOLOGY OF STUDY

Case C-307/19, under the name *Obala,*[1] concerns a monetary claim put forth by the corporate entity known as 'Obala i lučice' (Obala). This claim is directed towards 'NLB Leasing', a Slovenian entity. Obala operates as a municipal enterprise in Croatia and maintains authority over the management of the communal vehicular parking facility within the jurisdiction of the city of Zadar.

Obala's monetary claim entails the restitution of a fee for a complete day's usage of the parking 'services' provided by them, along with the expenses and foreseeable charges. This petition is contended against NLB Leasing in connection to a vehicle that was stationed on a specifically designated parking area situated along a public roadway within Zadar. A practicing notary in Pula (Croatia) initiated a claiming procedure on behalf of Obala, and NLB Leasing contested the claim at the Commercial Court of Pazin, which could have been deemed jurisdictionally competent based on the notary's place of practice. However, this court declared its lack of jurisdiction and transferred the case to the Commercial Court of Zadar, where the designated parking area is located. The latter court also ruled on its lack of jurisdiction, leading to the resolution of this jurisdictional dispute by the Commercial Court

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[1] Case C-307/19 *Obala i lučice d.o.o. v NLB Leasing d.o.o.* [2021] EU:C:2021:236.

of Appeal of Croatia. Seeking guidance on the application of Regulation No 1215/2012[2] (also known as Brussels I Recast Regulation), the Commercial Court of Appeal of Croatia referred the matter to the Court of Justice of the European Union (CJEU) for a preliminary ruling.

This article delves into four crucial concepts within the Regulation that formed part of the preliminary ruling: the classification of a case as 'civil and commercial matter'; the distinction between 'contract matters' versus 'tort, delict, or quasi-delict matters'; actions concerning 'tenancy agreements for immovable property' versus 'rights *in rem*'; and the inclusion of 'services provision' within the Regulation's ambit. To explore these areas, the analysis starts with a specific case (*Obala*)[3] and thereafter conducts a retrospective study to comprehend various perspectives embedded within the most pertinent judgments in these domains.

The Regulation explicitly confines its scope to civil and commercial matters, as indicated by its name ('[…] on jurisdiction and the recognition and enforcement of judgments in *civil and commercial matters*'). Although the primary focus of this article is not to delve into this concept extensively, given its thorough examination in academia, this aspect cannot be overlooked since failure to align the case within the delineation of a civil and commercial matter would automatically lead to the dismissal of Brussels I Recast Regulation's application.

The *Eurocontrol*[4] case marked the inaugural analysis of this term, wherein the CJEU established a comprehensive interpretation. Notably, the CJEU treats it as an autonomous concept, thereby preventing interpretation solely based on terms employed in different legislations. Nevertheless, despite a relatively clear definition, Advocate General (AG) Mr. Michal Bobek[5] observed three distinct approaches employed by the CJEU, namely: the 'subject matter' perspective, the 'legal relationship' perspective and a hybrid approach.

The 'subject matter' perspective focuses on the interrelation between involved parties and the legal action initiated by the plaintiff. Conversely, the 'legal relationship' approach is more intricate, relying on two indicators. Firstly, it establishes a 'reference framework' by determining the ordinary legal rules governing interactions between private individuals. This involves examining the 'basis of the action brought' and the procedural rules outlined in the relevant national law of the Member State. Secondly, it evaluates if the dispute arises from a unilateral exercise of public powers beyond this 'reference framework'. Recent years have seen the application of both the 'subject matter' and 'legal relationship' approaches, with no clear preference identified within the case law. In fact, the most recent judgments of the CJEU use these two approaches indistinctively, constituting the third approach. Cases such

[2] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1 (Brussels I Recast Regulation).
[3] *Obala* (n 1).
[4] Case C-29/76 *LTU Lufttransportunternehmen GmbH & Co. KG v European Organization for the Safety of Air Navigation (Eurocontrol)* [1976] EU:C:1976:137
[5] Case C-307/19 *Obala i lučice d.o.o. v NLB Leasing d.o.o.* [2020] EU:C:2020:971, Opinion of AG Bobek, paras 73-66.

as *Sapir*,[6] *flyLAL-Lithuanian Airlines*[7] and *Aannemingsbedrijf Aertssen*[8] serve as examples in this context.

In examining the *Obala*[9] case, the highlighted aspect holds significance due to the notable divergence in perspectives among the legal entities involved. On one side, the German and Slovenian governments approached the case through the 'subject matter' perspective, emphasizing the origin and execution of the contract. From their viewpoint, the obligation to pay for parking usage was mandated, establishing a relationship of imposition between the plaintiff and the defendant. Obala, acting under the directives of the city government, delineated and managed parking spaces in Zadar. Additionally, the city government enforced the payment for parking, indicating a unilateral exercise of public powers.[10]

On the opposing side, the European Commission, the plaintiff, and the Croatian government adopted the 'legal relationship' perspective.[11] They highlighted the clear requirement for payment evident from street signals and supported by a law specifying the relationship publicly. Moreover, they underscored that the procedure for fee recovery, including interests and costs, operated under private law provisions governing contractual obligations. Consequently, they argued against the presence of any unilateral exercise of public powers.

In its resolution of the *Obala*[12] case, the CJEU consolidated these divergent perspectives and ultimately concluded that the matter falls within the realm of civil and commercial affairs. This determination stemmed from the observation that the legal action was pursued as a private litigation without Obala assuming a superior governmental position. This pivotal distinction – highlighting the absence of a governmental role for Obala – led to the ruling that the case pertains to a civil and commercial matter. However, the amalgamation of these varying perspectives within the *Obala*[13] case has generated conflicting and confusing positions.

This distinction is crucial for readers, as cases like *BUAK*[14] or the *Pula Parking*[15] adopt solely the 'legal relationship' perspective, a trend often observed in the decisions of the Third Chamber.

Having witnessed how the interpretation of the civil and commercial matter concept

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[6] Case C-645/11 *Land Berlin v Ellen Mirjam Sapir, Michael J Busse, Mirjam M Birgansky, Gideon Rumney, Benjamin Ben-Zadok, and Hedda Brown* [2013] EU:C:2013:228.
[7] Case C-302/13 *flyLAL-Lithuanian Airlines AS, in liquidation, v Starptautiskā lidosta Rīga VAS, and Air Baltic Corporation AS* [2014] EU:C:2014:2319.
[8] Case C-523/14 *Aannemingsbedrijf Aertssen NV, and Aertssen Terrassements SA v VSB Machineverhuur BV, Van Sommeren Bestrating BV, and Jos van Sommeren* [2015] EU:C:2015:722.
[9] *Obala* (n 1).
[10] Opinion of AG Bobek in *Obala* (n 5) paras 37-73. Van Calster also expresses surprise at the absence of consensus despite numerous cases. As he points out, 'the divergent emphasis by different chambers of the Court has not helped' – Geert Van Calster, 'Groundhog day, but with Unicorns. Bobek AG in Obala v NLB i.a. on "civil and commercial"' (*Gavc Law*, 1 December 2020) <https://gavclaw.com/2020/12/01/groundhog-day-but-with-unicorns-bobek-ag-in-obala-v-nlb-i-a-on-civil-and-commercial/> accessed 01 March 2024.
[11] Opinion of AG Bobek in *Obala* (n 5), para 81.
[12] *Obala* (n 1).
[13] ibid.
[14] Case C-579/17 *BUAK Bauarbeiter-Urlaubs- u. Abfertigungskasse v Gradbeništvo Korana d.o.o.* [2019] EU:C:2019:162.
[15] Case C-551/15 *Pula Parking d.o.o. v Sven Klaus Tederahn* [2017] EU:C:2017:193.

generates uncertainty due to the CJEU's application of different analytical methods, the discussion now advances towards studying the concepts central to this research.

2 THE CONCEPTS OF 'MATTERS RELATING TO A CONTRACT' AND 'MATTERS RELATING TO TORT, DELICT OR QUASI-DELICT' AS DICHOTOMY

The concepts at play here hold independent significance within the framework of Regulation No 1215/2012 which means that CJEU scrutinizes their fundamental principles and objectives along with the aim of the Regulation. The CJEU's rationale behind establishing autonomous definitions for concepts within this specific Regulation is to guarantee uniform enforcement throughout the European Union.[16]

The term 'matters relating to tort, delict or quasi-delict' is defined by its distinction from the domain encompassed by 'matters relating to a contract'.[17] From the perspective of the CJEU, the first term encompasses a wide range of actions aimed at establishing a defendant's liability, arising from obligations not rooted in a voluntarily assumed legal commitment between parties. Conversely, contractual matters revolve around obligations voluntarily undertaken by one party toward another.

Different legal precedents are presented here to illustrate the various elements considered by the Court when dealing with cases involving contract, tort, delict and quasi-delict. These examples serve to demonstrate the nuanced factors taken into account by the Court within this legal landscape. However, it is important to note that they do not adhere to a specific pattern; instead, the Court approaches each case individually for resolution.

2.1 CORRELATION BETWEEN PRE-EXISTING RELATIONSHIPS AND ASSUMED CONTRACTUAL OBLIGATIONS

In the *Kerr* case,[18] the legal dispute revolves around dues payment in a homeowners' community. This issue can be seen as either a result of a voluntary agreement or as a sign of a mandatory relationship. Previous case law such as *Martin Peters Bauunternehmung GmbH*,[19] *Powell Duffryn*[20] and *Engler*,[21] focused on the duties of members in their respective associations. The Court established that upon joining an association, individuals commit to certain obligations, which includes the acceptance of decisions made by the association's leaders. Essentially, when someone becomes a member, they accept a set of rights and responsibilities, including the duty to follow the association's decisions – similar to entering a contractual agreement where both parties have agreed-upon roles and obligations.

Expanding on that logic, in the *Kerr*[22] case, the Court concluded that, even if owners' communities were imposed by legal requirements or if board resolutions were passed without

16 *Obala* (n 1), para 82.
17 ibid, para 83.
18 Case C-25/18 *Bryan Andrew Kerr v Pavlo Postnov, and Natalia Postnova* [2019] EU:C:2019:376.
19 Case C-34/82 *Martin Peters Bauunternehmung GmbH v Zuid Nederlandse Aannemers Vereniging* [2019] EU:C:1983:87.
20 Case C-214/89 *Powell Duffryn plc v Wolfgang Petereit* [1992] EU:C:1992:115.
21 Case C-27/02 *Petra Engler v Janus Versand GmbH* [2005] EU:C:2005:33.
22 *Kerr* (n 18).

a property owner's involvement or against their disagreement, the act of acquiring a residence – typically seen as a voluntary choice – automatically involves accepting associated responsibilities. These responsibilities include adhering to the regulations of an owners' community and the implicit assumption of resolutions approved by the collective decisions of the property owners' general assembly.

2.2 ENFORCING OBLIGATIONS: LEGAL IMPOSITIONS IN THE LITIGATED RELATIONSHIPS

Conversely, there are cases such as the *Austro-Mechana*[23] and *Ordre des avocats du barreau de Dinant*.[24] These cases shed light on instances where the Court opted against characterizing payment obligations as contractual in nature due to their *ex lege* origins. Specifically, the *Austro-Mechana*[25] case questioned whether compensation payments arising from the distribution of copyrighted materials be treated as part of a contractual agreement. Here, Austro-Mechana, an Austrian copyright-collecting society, is responsible for collecting fair compensation for authors due to unauthorized private reproductions of their protected works, as outlined in Section 42(b) of the UrhG.[26] Notably, the CJEU determined that the compensation stipulated by Austro-Mechana was not the result of a voluntary agreement with Amazon. Austro-Mechana's claim did not challenge Amazon's distribution of recording media in Austria; rather, it focused on Amazon's failure to meet the specified compensation obligation.

Just as associates comply with board decisions or property owners adhere to board resolutions, lawyers are aware that they may be required to regularly pay fees as directed by their governing board. However, the CJEU ruled that despite the legal obligation for registration, there's no fee component in the law. Therefore, while the mandatory requirement for registration is legally binding and necessary for practicing law, any board decision mandating payment cannot be considered as having been willingly accepted.

2.3 DIFFERENTIATING BETWEEN THE AFOREMENTIONED CASES

When examining the aforementioned case law, it is challenging to determine why the legally mandated relational obligation in the *Ordre des avocats du barreau de Dinant*[27] case outweighs the voluntary choice to become a lawyer.[28] Consider the installation of an elevator in a building: while not legally required, the owners' board has the power to make such decisions. Even if someone casts a dissenting vote against it, they are still bound to comply, as it is seen as a

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[23] Case C-572/14 *Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte GmbH v Amazon EU Sàrl, Amazon Services Europe Sàrl, Amazon.de GmbH, Amazon Logistik GmbH, and Amazon Media Sàrl* [2016] EU:C:2016:286.

[24] Case C-421/18 *Ordre des avocats du barreau de Dinant v JN* [2019] EU:C:2019:1053.

[25] *Austro-Mechana* (n 23).

[26] Law on copyright (*Urheberrechtgesetz*) of 9 April 1936, Federal Law Gazette (*BGBl*) No 111/1936 (AUST).

[27] *Ordre des avocats du barreau de Dinant* (n 24).

[28] In fact, in Case C-421/18 *Ordre des avocats du barreau de Dinant v JN* [2019] EU:C:2019:644, Opinion of AG Saugmandsgaard Øe, the Advocate General considered that lawyers willingly choose their profession. Drawing an analogy to associates assuming board decisions as part of their membership obligations or owners complying with proprietors' board resolutions, lawyers are aware that they may need to periodically pay fees, in consonance with the authority of bar's governing board.

contractual obligation. However, in the *Obala*[29] judgment, the party making the claim had no opportunity for active involvement in the decision-making process. For instance, when someone rents a vehicle, they are aware of legal requirements like paying circulation tax or periodic technical inspections. It is worth noting that the *Obala*[30] case is not delving into the enforcement of a law to which the principle 'ignorance of the law excuses no one' (*ignorantia juris non excusat*) would apply. If this is regarded as law enforcement, the case may not fall within the scope of civil or commercial matters. In accordance with the referenced legal precedents, entering into a contract with someone ought to be a voluntary choice rather than an imposition. If it is deemed an imposition, a freely made decision must have occurred at some point, similar to the process of purchasing a house. Yet, when we travel within the EU, it might seem that, under the principle of free movement of persons, there is generally unrestricted access to public parking spaces. This is not to suggest that governments lack the power to impose restrictions. However, such regulation is considered an exception, making it challenging to establish a connection between the free action of renting a car and the expectation, at the time of contracting, that they will be parking in a specific area where a government has decided to impose restrictions. In other words, it is puzzling how the imposition of a fee for utilizing public parking spaces can be regarded as a freely chosen legal association. It seems that the CJEU handles such issues on a case-by-case basis, posing a challenge in offering readers a definitive definition.

3 THE EXCEPTION OF ARTICLE 24(1): RIGHTS *IN REM* OVER IMMOVABLE PROPERTY AND TENANCIES INVOLVING IMMOVABLE PROPERTY

Article 24(1) of the Brussels I Recast Regulation delineates an exclusive jurisdiction that precludes the application of alternative legal venues. Given its exceptional nature, applying it demands caution,[31] respecting its intended objective: a deeper understanding of the complexities – factual, legal, and customary – relevant to a specific immovable property.[32] Therefore, this provision fundamentally relies on the idea of proximity, establishing that the court in the Member State where property sits holds the most comprehensive understanding of the case. It is worth noting that this Article distinguishes between rights *in rem* over immovable property and tenancy agreements involving immovable property.[33]

The Croatian court, in pursuit of clarifying the potential nature of the parking agreement, submitted this preliminary inquiry specifically addressing contracts related to the

[29] *Obala* (n 1).
[30] *Obala* (n 1).
[31] ibid, para 76.
[32] ibid, para 77. In order to gain enhanced insight into the pursued objectives and the developmental trajectory of this specific concept, vid. Iván Heredia Cervantes, 'Artículo 24.1' in Pedro Pérez-Llorca (dir), *Comentario al Reglamento (UE) nº 1215/2012 relativo a la competencia judicial internacional, el reconocimiento y la ejecución de resoluciones judiciales en materia civil y mercantil (Reglamento Bruselas I refundido)* (Aranzadi 2016) 507-512.
[33] In this regard, in Case C-8/98 *Dansommer A/S v Andreas Götz* [2000] EU:C:2000:45, the Court determined that the matter at hand did not revolve around rights *in rem*, but instead hinged upon a contractual arrangement concerning the leasing of immovable property. In the words of the Court, 'Article 16(1) [of Brussels Convention] applies to any proceedings concerning rights and obligations arising under an agreement for the letting of immovable property, irrespective of whether the action is based on a right in rem or on a right in personam (Lieber, paragraphs 10, 13 and 20)' (para 23).

leasing of immovable property. In prior jurisprudence,[34] when dealing with tenancy of immovable properties, the CJEU established that any legal dispute arising from obligations and rights stemming from a tenancy agreement concerning an immovable property falls within the purview of Article 24(1), regardless of the specific type of legal action employed in the case at hand. This exception was foreseen due to the intricate relationship between the landlord and lessee, and its impact to the commitments towards neighbours, property maintenance, tax payments, and eventual property restitution at the lease's end.[35]

Conversely, to understand what a dispute over rights *in rem* (i.e. property rights, easements and securities) tied to immovable property is, cases like *Reitbauer and others*[36] can be used to illustrate readers. Here, a contractor sued a married couple trying to avoid a debt by auctioning a property where the husband had a security right within the renovated property in which the contractor had been involved. This case dealt with property rights and the utilization of a legal remedy to prevent fraudulent activities in aim of evading the creditor (often referred to as *actio pauliana*), rather than tenancy rights. Similarly, the *Schmidt*[37] case deliberated on annulling a real estate donation.

Notably, the *MC*[38] order delineated roles in litigation, differentiating between lessor-lessee and buyer-seller relationships. While the case did not pertain to the leasing of immovable property, the CJEU, in determining that the relationship in question was characterized as a purchase rather than a lease, defined the conceptual contours of a tenancy contract as stipulated by the Brussels I Recast Regulation. This holds significance because, as elucidated, Article 24(1) delineates two distinct scenarios for its application: one concerning rights *in rem*, where the fundamental nature of the action must be scrutinized regardless of the type of right over immovable properties, and a second scenario specifically addressing tenancy agreements involving immovable property, where the crux lies in the nature of the contract, irrespective of the action pleaded by the plaintiff.

In the *Obala* judgment, the CJEU chose not to adopt Article 24(1), citing that the action did not concern the use conditions of immovable property.[39] However, its prior jurisprudence makes clear that, under this provision, any kind of rights could be actioned if the case was on a lease agreement of an immovable. Upon reviewing this judgment, one could infer that the CJEU may have restricted any future litigation related to tenancy contracts solely to matters concerning the conditions of property use.

In conclusion, Article 24(1) represents a jurisdictional exception in the realm of immovable properties, distinguishing between rights *in rem* and disputes stemming from tenancy agreements. The section addressing rights *in rem* specifically pertains to actions linked to the immovable rights. On the other side, concerning tenancy agreements, it encompasses a broad spectrum of disputes related to the agreement itself, regardless of whether they concern the conditions of enjoyment. Thus, actions *in rem* focus solely on the immovable property itself, impacting its rights or status. On the other hand, actions based on the tenancy

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[34] ibid para 23, and Case C-292/93 *Norbert Lieber v Willi S. Göbel, Siegrid Göbel* [1994] EU:C:1994:241.
[35] *Obala* (n 1), para 78.
[36] Case C–722/17 *Norbert Reitbauer, Dolinschek GmbH, B.T.S. Trendfloor Raumausstattungs-GmbH, Elektrounternehmen K. Maschke GmbH, Klaus Egger, and Architekt DI Klaus Egger Ziviltechniker GmbH v Enrico Casamassima* [2019] EU:C:2019:577.
[37] Case C-417/15 *Wolfgang Schmidt v Christiane Schmidt* [2016] EU:C:2016:881.
[38] Case C-827/18 *MC v ND* [2019] EU:C:2019:416. It is only available in German and French.
[39] *Obala* (n 1), para 79. The Court applied the definition of lease of an imovable used in *MC* order (n 38).

agreement can influence both the immovable property itself and the tenant as an individual.

4 THE POSITIVE ACTS UNDERTAKEN BY A COMPANY THAT MAKES THE ACTIVITY BE CLASSIFIED AS SERVICE

Once parties are bound by a contract, the Brussels I Recast Regulation establishes a structured hierarchy for jurisdiction. Article 24 designates the primary jurisdiction, but, in the absence of such jurisdiction, Articles 25 and 26 govern jurisdictional matters based on the contract's terms. Parties can stipulate their preferred jurisdiction within the agreement. If these articles do not apply, two options remain. Article 4 permits legal action in the defendant's domicile, and Article 7 introduces a special forum based on the contract's nature. The plaintiff holds the choice between these options.[40] This section examines Article 7.

Article 7(1)(a) outlines that the suitable forum depends on where the obligation was fulfilled, but Article 7(1)(b) takes precedence in situations involving goods or services by specifying the exact location of performance, overriding the criterion in 7(1)(a).[41] Consequently, courts must ascertain the actual location or intended place of service provision. This determination involves examining the terms laid out in the agreement to establish the relevant location for fulfilling the obligations.[42]

The term 'services' under the Brussels I Recast Regulation implies that the supplier engages in an activity in exchange for compensation. However, it is crucial that this activity involves proactive actions rather than mere inaction or omissions.[43] To illustrate, the *Falco Privatstiftung*[44] case resolved a preliminary ruling of the Higher Regional Court of Vienna in relation to a claim involving royalties derived from the sales of video recordings originating from concerts. The involved parties comprised an intellectual property right holder and another entity aspiring to utilize said right through a licensing agreement. The Vienna Court sought clarification on whether this arrangement amounted to a contract encompassing the provision of services by the licensor. For the CJEU, in a contract where the owner of an

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[40] See Juliana Rodríguez Rodrigo, 'Reglamento 1215/2012: foro de sumisión del artículo 25 y foro especial por razón de la materia del artículo 7.1, en relación a un contrato verbal de concesión mercantil internacional. comentario a la Sentencia del Tribunal de Justicia de la Unión Europea, 8 marzo 2018, Saey Home, c-64/17' (2018) 10(2) Cuadernos de Derecho Transnacional 906, 908.

[41] *Obala* (n 1), para 92.

[42] The distinction between Articles 25 and 26 versus Article 7(1) lies in their treatment of contractual terms determining the location chosen by parties for legal proceedings. Articles 25 and 26 impose stricter formal requirements as they pertain to a specific clause wherein parties explicitly select the litigation venue. Conversely, Article 7(1) focuses on studying the place of contract performance rather than the chosen litigation venue. In the case C-106/95 *Mainschiffahrts-Genossenschaft eG (MSG) v Les Gravières Rhénanes SARL* [1997] EU:C:1997:70, which revolved around a verbal agreement on the place of performance and its validity, the CJEU ruled that the purported place of performance didn't align with the actual object of the contract. Essentially, one party sought to create a forum clause without meeting all the requirements outlined in Articles 25 and 26. This doctrine aims to prevent the fraudulent manipulation of legal provisions aimed at creating ambiguity between the place designated for litigation and the genuine location of contract performance. It emphasizes that while Articles 25 and 26 focus on the explicit choice of litigation venue, Article 7(1) concentrates on the true place of contractual performance. For additional details, please refer to the accompanying article Jonatan Echebarría Fernández, 'Jurisdiction and applicable law to contracts for the sale of goods and the provision of services including the carriage of goods by sea and other means of transport in the European Union' (2019) 11(2) Cuadernos de Derecho Transnacional 58, 63.

[43] *Obala* (n 1) para 94.

[44] Case C-533/07 *Falco Privatstiftung, and Thomas Rabitsch v Gisela Weller-Lindhorst* [2009] EU:C:2009:257, paras 30-31.

intellectual property right grants his contractual partner the use of that right in return for remuneration, it cannot be inferred that there is an active activity.[45] The owner only refrains from challenging the partner's use of the copyrighted material.

Conversely, in the *Obala*[46] case, the CJEU asserted that Obala's responsibility for managing public parking facilities involved distinct activities like defining parking spaces along roads and collecting parking fees. The Court considered actions related to space delineation and fee collection as integral components of the services provided by Obala.

This statement in the *Obala*[47] case presents an unexpected proposition, especially in light of paragraph 37 of the *Falco Privatstiftung*[48] case. This paragraph underscores the need for a strict interpretation of rules governing specialized jurisdiction, as they deviate from the principle that jurisdiction primarily depends on the defendant's domicile in many scenarios.

In the context of public parking spaces managed by Obala, it is important to recognize that this arrangement involves not just a single contract between Obala and the user but two distinct agreements: one is the public administration's license for exploitation obtained by Obala, and the other is the user-specific utilization contract. If the concept of 'services' is narrowed down to only cover interactions stemming from the Obala-user contract, it becomes clear that it primarily involves granting usage rights in exchange of a payment. On the other hand, activities like establishing, marking, and managing parking spaces fall within the realm of the public license for exploitation or, at the very least, contribute to the operational functionality. This can be compared with the pursuit of a debtor's claim, which is seen as an inherent part of the business operation that initially led to the debt. According to the European Commission, simply providing parking space on its own holds a marginal character that does not fully qualify as a genuine 'service'.[49]

In conclusion, the Brussels I Recast Regulation meticulously establishes a structured hierarchy for determining jurisdiction, prioritizing Article 24 as the primary jurisdictional basis. When Article 24 is not applicable, general jurisdiction based on the defendant's domicile comes into play, complemented by specific jurisdiction outlined in Article 7.

The Regulation defines 'services' as involving active engagements for compensation, emphasizing proactive actions over mere inaction or omissions. *Falco Privatstiftung*[50] case clarifies that granting usage rights in exchange for remuneration, without proactive activity, does not constitute a service provision. However, the *Obala*[51] case expands the scope by recognizing actions like defining parking spaces and collecting fees as integral components of the services provided. Arguably, the distinction between inherent operational actions and the core provision of services remains a pivotal yet intricate aspect, influencing the determination of jurisdiction and contractual obligations under the Brussels I Recast Regulation.

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[45] As articulated by the CJEU in *Falco Privatstiftung* (n 44), para 31, '[…] the owner of an intellectual property right does not perform any service in granting a right to use that property and undertakes merely to permit the licensee to exploit that right freely'.
[46] *Obala* (n 1).
[47] *Obala* (n 1), para 95.
[48] *Falco Privatstiftung* (n 44).
[49] *Obala* (n 5), Opinion of AG Bobek, para 118.
[50] *Falco Privatstiftung* (n 44).
[51] *Obala* (n 1).

5 CONCLUSIONS

The *Obala*[52] case has instigated significant modifications in the paradigm for appraising the distinction between 'contract matters' versus 'tort, delict, or quasi-delict matters', actions concerning 'tenancy agreements for immovable property' versus 'rights *in rem*', and the inclusion of 'services provision' within the Brussels I Recast Regulation's ambit. An issue has also been identified in analysing the scope of 'civil and commercial matters'. While there may not be a significant alteration to the term itself, the approach of the Court is notable. Given its relevance to the application of the Regulation, it is essential to conduct a thorough examination thereof.

It is important to note that this Regulation holds immense significance within the European Union due to its role in providing clear guidelines for determining jurisdiction in cross-border civil and commercial cases. It also establishes frameworks for recognizing and enforcing judgments across EU member states, thereby reducing legal uncertainties and streamlining legal procedures. In light of its extensive scope, the *Obala*[53] case provides an opportunity to analyse the four crucial sets of concepts previously mentioned, which focus on delineating the structured hierarchy established by the Brussels I Recast Regulation, especially when parties are bound by a contract – a prevalent scenario in commerce.

In the conceptualization of 'civil and commercial matters', the Court of Justice of the European Union has made efforts to impart a uniform construal thereof. Nonetheless, AG Bobek has suggested that there exist two, if not three, divergent approaches in the different Chambers of the Court to the elucidation of the concept.[54] It is pertinent to note that the CJEU has not explicitly delineated this classification, but an examination of prior jurisprudence reveals the pattern indicated by the AG. Furthermore, within the context of the *Obala*[55] case, it is evident that legal operators offering their opinions exhibit varied approaches and yield different outcomes,[56] all grounded in the accepted methodologies of the CJEU. As Van Calster has stated, the lack of consensus, even considering the numerous cases the Court has ruled, is, to say the least, unexpected.[57]

Once the case falls within the purview of the Brussels I Recast Regulation, it becomes imperative to delve into the various jurisdictions provided by this Regulation. Initially, it must be asked whether the case falls within the realm of contractual matters or pertains to tort, delict or quasi-delict. Traditionally, the Court has approached this by scrutinizing the freedom to establish agreements from which legal actions arise. However, in the *Obala*[58] case, a departure from this conventional methodology was notable, as the Court chose to presume this freedom to contract and forego its exhaustive examination, instead assuming a direct analysis of the tacit contract between NLB Leasing and the municipal agent.

The mere publication of general terms and conditions should not be regarded as irrefutable evidence of a freely entered agreement concerning parking in the designated area.

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[52] ibid.
[53] *Obala* (n 1).
[54] *Obala* (n 5), Opinion of AG Bobek, paras 73-76.
[55] *Obala* (n 1).
[56] (n 5), Opinion of AG Bobek, paras 73-78.
[57] Van Calster (n 10).
[58] *Obala* (n 1).

The user, foremost, needs to be aware that they are parking within a restricted zone – without being bound by the principle 'ignorance of the law excuses no one', as it is a private case, not a law enforcement matter – and secondly, needs to comprehend the associated terms and conditions. Unfortunately, this crucial aspect has been omitted from the Court's deliberations.

Furthermore, by reintroducing the omitted step typically undertaken by the Court, two distinct categories of jurisprudence can be discerned. One underscores the significance of the freedom exercised in the antecedent decision to enter into the litigious agreement. An example could be when an individual willingly purchases a property and thereby voluntarily assumes the obligations associated with participation in an owners' community. The other category is related to scenarios wherein, despite the voluntary nature of the initial decision, there is a lack of freedom in consenting the contract that precipitates the dispute since it is a consequence of a relationship imposed by law. A pertinent illustration of the latter can be found in instances where individuals are compelled to join a bar association as a prerequisite for becoming a lawyer. Applying this analytical framework, it can be inferred that NLB Leasing did not genuinely and voluntarily accept the terms of the relationship with Obala, since it is a relationship imposed by law and there may be a presumption of free parking as part of the fundamental right of free movement.

Nevertheless, since the Court posits the existence of a tacit agreement between the parties, it proceeds to study the exceptional jurisdiction outlined in Article 24(1), which presents two options for application: cases concerning rights *in rem* over immovable property and cases pertaining to tenancies of immovable property. The CJEU tends to adopt a literal interpretation of these provisions. Hence, first it becomes imperative to study whether the subject matter of the case involves an immovable property. Subsequently, the emphasis shifts towards examining the nature of the contract. If it is a lease, Article 24(1) applies, courtesy of its second provision, regardless of the type of legal action pursued. However, if it involves a different type of contract, the analysis centres on the impact of the action on rights associated with the property itself – such as property rights, usufruct, mortgages, etc. Only in instances where these rights are affected will the Article be applicable under its first provision. The Court determined that Obala did not enter into a tenancy agreement for the parking area with NLB Leasing, a point which appears correct. However, it resolves the dispute by asserting that the legal action does not concern the conditions of use of an immovable property. This stance appears to be contentious as, up until now, the court consistently held that any controversy regarding a tenancy of immovable property falls under Article 24(1), no matter the legal action used in the legal proceeding. Therefore, it remains uncertain whether this ruling alters the Court's established precedents.

Finally, this article culminates in the application of Article 7 when the exception in Article 24(1) does not apply, specifically focusing on contracts of goods purchase or service provision. The term 'service' has undergone modulation in jurisprudence because some businesses do not engage in active actions. Take, for instance, an author who permits the reproduction of their art. The act involves granting permission and receiving remuneration, without any active involvement beyond that. For the CJEU, this does not constitute a provision of services as the licensor merely grants permission without actively providing a

service. However, in the *Obala*[59] case, the CJEU established that the responsibility of managing a payable public parking area involves specific activities like defining parking spaces along roads and collecting parking fees. The Court deems actions related to space delineation and fee collection as integral components of the services provided by Obala. This interpretation seems to deviate from the previous doctrine established in the *Falco Privatstiftung*[60] case since the user-specific utilization contract consisted solely of granting usage rights of the floor in exchange for payment. Defining parking spaces and collecting fees appear to be part of a pre-existing contract with the city government or, at the very least, the operational function of the business.

As evident, these terms are complex and form the cornerstone of this legislation. The objective of this article has been to reduce certain doubts and underscore the complexities inherent in this Regulation.

[59] *Obala* (n 1).
[60] *Falco Privatstiftung* (n 44).

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FISHING RIGHTS PROCEDURE AT THE EUROPEAN COURT OF HUMAN RIGHTS: *SPASOV V ROMANIA* (2022)

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In recent years, it has increasingly been recognized that work at sea often raises questions concerning the protection of human rights. This is also the case in the context of fishing. While human rights issues on commercial fishing vessels are gaining attention, fishing activities of individuals and small crews are also connected to human rights—for example, regarding the implementation of fisheries policies. In December 2022, the European Court of Human Rights (ECtHR) ruled in the case of a fisherman from Bulgaria who had worked in Romania's Exclusive Economic Zone (EEZ) in the Black Sea. Bulgaria and Romania are both members of the European Union (EU), and the EU's Common Fisheries Policy (CFP) applied to the applicant's work. He alleged that Romania implemented the CFP incorrectly and, in doing so, violated his human rights. This article analyzes the case of Spasov v Romania, which, as of late 2023, is available on the ECtHR's website in French. The core issues of the case are placed in the context of the CFP and the relationship between the EU and the ECHR. It will be shown that the ECHR remains a potent tool for the protection of human rights at sea as well, including in the EEZ, where the coastal State exercises jurisdiction within the meaning of Article 1 ECHR.

1 INTRODUCTION

European Union (EU) law creates direct rights for EU citizens and obligations for States. This is also the case in the context of the EU's Common Fisheries Policy (CFP). In a 2022 case, *Spasov v Romania*,[1] the European Court of Human Rights (ECtHR) ruled on the human rights implications of improper implementation of the CFP by Romania with regard to a citizen of Bulgaria who was engaged in fishing activities in the Black Sea. The ECtHR in particular had to answer the question of whether an incorrect implementation of the CFP resulted in a violation of the applicant's rights under Article 6(1) of the European Convention on Human Rights[2] (ECHR) and Article 1 of the (first) Protocol to the ECHR,[3] which protect,

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[1] *Spasov v Romania* App no 27122/14 (ECtHR, 6 December 2022) para 5.

[2] Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 4 November 1950, entered into force 3 September 1953, ETS no 5 (ECHR) <https://rm.coe.int/1680a2353d>, consolidated version available at <https://www.echr.coe.int/documents/convention_eng.pdf> accessed 4 December 2023.

[3] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol 11, adopted 20 March 1952, entered into force in the amended version with the entry into force of Protocol 11, European Treaty Series no 155, 1 November 1998, ETS no 9 <https://www.echr.coe.int/documents/d/echr/Library_Collection_P1postP11_ETS009E_ENG> accessed 4 December 2023 (hereinafter: ECHR-P1).

respectively, the right to a fair trial and the enjoyment of one's possessions.

In this article, the interlinkages between human rights and fishing law are outlined. Using the aforementioned judgment of December 2022 as an example,[4] it is shown that human rights continue to play an important role in maritime activities.

The authors acknowledge that most readers will be well-versed in the European system of human rights protection. However, because of the interlinkages between human rights and fishing law, the analysis of this case is also of interest to a different readership: experts in law of the sea. It is, therefore, appropriate to briefly present the European Convention on Human Rights, the European Court of Human Rights, and their interactions with the European Union.

2 PROCEEDINGS BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS IN *SPASOV v ROMANIA*

2.1 THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The European Convention on Human Rights is an international treaty to which 46 European States are parties. Created within the framework of the Council of Europe (CoE) in the aftermath of World War II, the ECHR was adopted in 1950 and entered into force in 1953. Since then, the system of human rights protection that is enshrined in the ECHR and its Protocols has become the most practically relevant regional human rights system. The focus of the ECHR is on civil and political rights, and it is supplemented by a number of protocols that amend and modify the Convention. Rights that are included in the Protocols enjoy the same legal status as rights that are included in the text of the Convention itself.

2.2 THE EUROPEAN COURT OF HUMAN RIGHTS

While it is up to the States that have ratified the ECHR to implement the Convention in everyday practice, it is the ECtHR that is at the heart of the European human rights system. The ECHR applies to everybody who finds themselves within the jurisdiction of any of the States that are parties to the Convention.[5] The creation of the ECHR provided a landmark event in the history of international law as it allows individuals to sue States directly in an international court. In order to access the ECtHR, it is in principle necessary to first go through the entire national legal system of the respondent State and to exhaust all judicial remedies that are available there,[6] up to the highest courts of the land, such as supreme or constitutional courts. After that, the applicant can bring a case to the ECtHR, directly suing the State in question over alleged violations of human rights.

The decisions of the ECtHR are binding on the parties to the dispute, i.e., only *inter partes*, but all States that are parties to the ECHR have to interpret the Convention and its Protocols according to the interpretation provided by the ECtHR.[7] For this reason, following

[4] At the time of writing, end of 2023, the judgment was only available in French in the ECtHR's HUDOC database.
[5] ibid Art 1.
[6] ibid Art 35 para 1.
[7] European Court of Human Rights, 'High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration' (2012) para 10

the jurisprudence of the ECtHR is essential to ensure compliance with the ECHR and also by those States that were not involved in the case decided by the ECtHR.

In its judgments, the ECtHR finds a violation of the Convention and its Protocols – or not. What the Court provides is such a finding and possibly, in case of a violation, a ruling on compensation owed to the victim by the State that violated the Convention.[8] It is then up to the respondent State to remedy the situation that the ECtHR found to be at odds with the obligations of the State in question under the ECHR. The implementation of judgments is then supervised by the CoE's Council of Ministers. In practice, the rate of compliance with the judgments of the ECtHR is high, although the situation is not uniform among all countries.[9] As a general rule, States tend to implement judgments of the ECtHR.

2.3 THE ECHR AND THE EUROPEAN UNION

The Council of Europe is entirely independent of the EU, although both institutions share the European flag and the locations of the European Parliament, European Court of Human Rights, and the main building of the Council of Europe are very close to each other in Strasbourg, on different banks of the Ill River. Legally, the ECtHR is independent of the EU – and the EU is independent of the ECtHR. It has been discussed for a long time whether the EU should become a party to the ECHR.[10] However, EU law actually requires the European Union to become a party to the ECHR: Article 6(2) of the Treaty on European Union[11] (TEU) States that '[t]he Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the treaties'.[12] This norm is a consequence of the Treaty of Lisbon,[13] which in turn was a reaction to the failed attempt at creating a Constitution for the European Union.[14] Today, many of the ideas that were contained in the draft Constitution are included in the TEU. Article 6(1) TEU gives the Charter of Fundamental Rights the same legal force as the TEU and the Treaty on the Functioning of the European Union (TFEU),[15] creating a quasi-constitutional triad of EU law. In addition, Article 6(3) TEU states that '[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the

<https://www.echr.coe.int/documents/2012_brighton_finaldeclaration_eng.pdf> accessed 4 December 2023.

[8] ECHR (n 2) Art 41.

[9] Compliance is a particular concern with regard to Turkey and in the past was a concern with regard to the Russian Federation. The latter has been expelled from the Council of Europe in 2022 and the ECHR no longer applies to Russia, see Stefan Kirchner, 'Russia After the European Convention on Human Rights' [2022] Edilex <https://www.edilex.fi/artikkelit/26747> accessed 4 December 2023.

[10] On the legal relationship between Charter and Convention, see Stephen Brittain, 'The Relationship Between the EU Charter of Fundamental Rights and the European Convention on Human Rights: An Originalist Analysis' (2015) 11(3) European Constitutional Law Review 482.

[11] Consolidated Version of the Treaty on European Union [2012] OJ C326/13 (TEU).

[12] ibid Art 6 para 2.

[13] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/1.

[14] Draft treaty establishing a constitution for Europe [adopted but not ratified, did not enter into force] [2004] OJ C310/1.

[15] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU).

constitutional traditions common to the Member States, shall constitute general principles of the Union's law'.[16] In recent years this discussion on the potential accession of the EU to the ECHR has become less relevant, although Article 6(2) TEU is still binding law (albeit only with the wording 'shall'). The key reason for this shift was the Opinion 2/13 of the European Court of Justice (ECJ) of 18 December 2014,[17] in which the ECJ found that the accession instrument was incompatible with the TEU.

The CoE's European Court of Human Rights and the EU's European Court of Justice have found an elegant solution to this issue through a duplication of norms and a parallel interpretation of said norms: the EU has created its own Charter of Fundamental Rights.[18] Many of the rights contained therein are also protected under the ECHR and its Protocols. In order to advance the effective protection of human rights in Europe, the ECJ and the ECtHR interpret the relevant norms in parallel,[19] meaning that discrepancies between the normative contents regarding the rights that are protected both in the Charter and in the Convention are avoided. Because the same rights are protected under the ECHR and the EU Charter, it is therefore no longer necessary for the EU to become a party to the ECHR in order to ensure a level of human rights protected vis-à-vis the European Union that is 'equivalent'[20] to the protections provided by the Convention and its Protocols.

It is because of this practical identity of content between the EU Charter and ECHR that matters of EU law and its implementation on the national level are also a concern from the perspective of the ECHR. This was also the case in the situation that led to the ECtHR's judgment in *Spasov*.

3 FACTS OF THE CASE

3.1 FISHING ACTIVITIES

The applicant, Mr. Hristo Spasov, is a Bulgarian citizen who is the owner and captain of a fishing vessel registered with the Bulgarian authorities, flying the Bulgarian flag,[21] and in possession of a Bulgarian license and authorization to engage in fishing activities.[22] The fishing vessel was crewed by nine other Bulgarian citizens as well as Mr. Spasov, and operated in the European Union waters of the Black Sea.[23] On 13 April 2011, while fishing turbot at

[16] TEU (n 11) Art 6 para 3.
[17] Opinion 2/13 *Adhésion de l'Union à la CEDH* EU:C:2014:2454.
[18] Charter of Fundamental Rights of the European Union [2012] OJ C326/391.
[19] Joint Communication from Presidents Costas and Skouris (*Court of Justice of the European Union*, 24 January 2011) <https://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf> accessed 4 December 2023. See also Edita Gruodytė and Stefan Kirchner, 'The Contribution of the European Charter of Human Rights to the Right to Legal Aid' in Tanel Kerikmäe (ed), *Protecting Human Rights in the EU: Controversies and Challenges of the Charter of Fundamental Rights* (Springer 2014) 73; Edita Gruodytė and Stefan Kirchner, 'Legal Aid for Intervenors in Proceedings Before the European Court of Human Rights' (2016) 2(1) International Comparative Jurisprudence 36, 38.
[20] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* App no 45036/98 (ECtHR, 30 June 2005) para 156.
[21] *Spasov v Romania* (n 1) para 5.
[22] *Spasov v Romania* (n 1) paras 10 and 105.
[23] ibid. As per the 2002 Common Fisheries Policy, 'Community waters' ('European Union waters' now) refer to waters under the sovereignty or jurisdiction of the Member States apart from the overseas countries and territories listed in Annex II of the Treaty on the Functioning of the European Union – Council Regulation (EC) no 2371/2002 of 20 December 2002 on the Conservation and Sustainable Exploitation of Fisheries

a distance upward of 20 nautical miles (nm) from the Romanian coast, i.e., in the Romanian exclusive economic zone (EEZ), the ship was controlled by the Romanian coast guard.[24] During their control, the Romanian coast guard found onboard two dozen turbots and a fishing net which had mesh smaller than that required by Romanian law regarding turbot fishing in the Black Sea.[25] The crew lifted more nets out of the waters at the request of the coast guards.[26] The fishing vessel was then escorted to the closest Romanian port.[27]

3.2 ROMANIAN LICENSE REQUIREMENTS

At the time of the arrest, there were three pertinent pieces of Romanian legislation which were subsequently taken into account during the trials at the Court of Mangalia and then the Court of Appeal. The first was the national legislation No. 36/2002,[28] previously national legislation No. 17/1990, which entered into force on 31 January 2002. Article 1 of said legislation states that the jurisdiction over Romanian internal waters, territorial sea, contiguous zone, and exclusive economic zone should conform with the dispositions set out by the 1982 United Nations Convention on the Law of the Sea (UNCLOS).[29] According to Article 14(1) of the Romanian law No. 36/2002, Romania can ensure the optimal use of fisheries and other biological resources within its EEZ by taking technical measures or any other measure required to help with the conservation and management of the waters.[30] Competent Romanian authorities do this by setting total allowable catch quotas, using satellite observations of fishing activities, inspecting and seizing non-compliant ships, and instigating legal proceedings against offenders.[31]

The Romanian government adopted emergency ordinance No. 23/2008 concerning fishing and aquaculture activities on 10 March 2008.[32] The right to fishing in waters under Romanian jurisdiction became contingent on the procurement of a license delivered by the Romanian National Fishing and Aquaculture Agency.[33] Fishing without a license, using fishing nets with mesh that do not meet the minimum requirements, using industrial fishing equipment without authorization, and fishing with illegal equipment became legal offenses punishable with a fine or imprisonment and a temporary fishing ban.[34] Fishing vessels and

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under the Common Fisheries Policy [2002] OJ L358/59 (2002 CFP). For a more detailed discussion of the geographical scope of the European Union in the implementation of the 1982 United Nations Convention on the Law of the Sea, see Esa Paasivirta, 'The European Union and the United Nations Convention on the Law of the Sea' (2015) 38(4) Fordham International Law Journal 1045, 1068 et seq.

[24] *Spasov v Romania* (n 1) para 6.

[25] ibid.

[26] ibid.

[27] ibid para 7.

[28] Romanian National Legislation no 36/2002 of 31 January 2002 (previously national legislation no. 17/1990), on the Legal Regime of Internal Waters, Territorial Sea and Contiguous Zone of Romania in the Black Sea (reproduced in *Spasov v Romania* (n 1) para 53).

[29] ibid Art 1.

[30] ibid Art 14 para 1.

[31] ibid Art 14 para 2.

[32] Romanian Emergency Ordinance no. 23/2008 of 10 March 2008 concerning Fishing and Aquaculture Activities (in *Spasov v Romania* (n 1) paras 55-57).

[33] Romanian Emergency Ordinance no. 23/2008 (n 32) Art 16; see *Spasov v Romania* (n 1) para 56.

[34] Romanian Emergency Ordinance no. 23/2008 (n 32) Art 64 paras a, i, k and art 65 para 1b; see *Spasov v Romania* (n 1) para 57.

fishing equipment could also be seized if they were utilized in illegal fishing activities.[35]

Decree No. 36 laid down by Romania's Ministry of Agriculture on 10 February 2011, and in force at the time of the arrest, concerned the fishing of turbot in the Black Sea.[36] The possession of a Romanian fishing license obtained from the National Fishing Agency was obligatory, and the specific size of netting to be used for turbot fishing was specified.

3.3 THE APPLICANT'S CLAIMS

The overarching claim of the applicant was that Romanian courts erred in their application of European law vis-à-vis fishing rights within European waters. More specifically, the applicant claimed Romanian courts manifestly interpreted and applied the Common Fisheries Policy in an erroneous manner, which led to a violation of his right to a fair trial.[37] He also alleged that the Romanian Court infringed upon his right not to be deprived of his possessions by imposing financial sanctions upon him and prohibiting him (temporarily) from pursuing his fishing activities in Romanian waters.[38]

Based on the foregoing, it is necessary to analyze the Common Fisheries Policy and Romania's application of its domestic law and European law in this regard.

3.4 INDIVIDUAL RIGHTS UNDER THE EU'S COMMON FISHERIES POLICY (CFP)

The genesis of a common fisheries policy in Europe started in 1970.[39] Numerous developments ensued, inter alia, in 1983,[40] 1992,[41] 2002,[42] and up to the 2013 reform.[43] Considering the temporal elements of *Spasov v Romania*, and as rightly pointed out by the ECtHR,[44] the appropriate version of the Common Fisheries Policy (CFP) for this case is the Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.

As its name suggests, the 2002 CFP is a European regulation;[45] hence, it is a normative

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[35] Romanian Emergency Ordinance no. 23/2008 (n 32) Art 66; see *Spasov v Romania* (n 1) para 57.
[36] Ministry of Agriculture Decree no. 36 of 10 February 2011 regarding Turbot Fishing in the Black Sea (in *Spasov v Romania* (n 1) para 58).
[37] *Spasov v Romania* (n 1) para 75.
[38] ibid paras 100 and 103.
[39] Regulation (EEC) no 2141/70 of the Council of 20 October 1970 Laying Down a Common Structural Policy for the Fishing Industry [1970] OJ L236/1. See also Irina Popescu, 'The Common Fisheries Policy: Origins and Development' (2023) Fact Sheets on the European Union <https://www.europarl.europa.eu/erpl-app-public/factsheets/pdf/en/FTU_3.3.1.pdf> accessed 4 December 2023.
[40] Council Regulation (EEC) no 170/83 of 25 January 1983 Establishing a Community System for the Conservation and Management of Fisheries Resources [1983] OJ L24/1.
[41] Council Regulation (EEC) no 3760/92 of 20 December 1992 Establishing a Community System for Fisheries and Aquaculture [1992] OJ L389/1.
[42] 2002 CFP (n 23).
[43] Regulation (EU) no 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, Amending Council Regulation (EC) no 1954/2003 and (EC) no 1224/2009 and Repealing Council Regulations (EC) no 2371/2002 and (EC) no 639/2004 and Council Decision 2004/585/EC [2013] OJ L354/22.
[44] *Spasov v Romania* (n 1) para 67.
[45] Lorna Woods and Philippa Watson, 'Scope of the EU Treaty: Laws and Lawmaking' in Lorna Woods and Philippa Watson, *Steiner & Woods EU Law* (12th edn, Oxford University Press 2014) 63–64.

act of general application that is entirely binding and directly applicable in all Member States according to Article 288 TFEU.[46] In parallel, the principle of primacy of EU law over the municipal laws of Member States is a cornerstone of the EU legal order, which originated from case law.[47] It indicates that in case of a conflict of laws between European and domestic provisions, EU law shall prevail over domestic law.[48] Based on its case law, the ECtHR reaffirms the primacy of EU law over domestic law.[49]

In its reasoning, the ECtHR mentions Articles 1 on the scope of the CFP, 3 on definitions, 8 on Member State emergency measures, and 17 on general rules as relevant legal provisions of the 2002 CFP in this case.[50] A clear distinction emerges from these provisions between the individual rights of Member States on the one hand and the individual rights of Community fishing vessels (*i.e.*, vessels flying the flag of a Member State, registered in the European Community, and equipped for the commercial exploitation of available and accessible living marine aquatic species)[51] on the other hand.[52]

The right of Member States to adopt emergency measures in regard to fisheries in waters under their sovereignty or jurisdiction is not absolute. It is subject to circumstantial and procedural elements described in Article 8 of the 2002 CFP. Paragraph 1 provides that emergency measures can only be taken 'if there is evidence of a *serious* and *unforeseen* threat to the conservation of living aquatic resources, or to the marine ecosystem *resulting from fishing activities*' (emphasis added). Moreover, such measures cannot be valid for more than three months.[53] Prior to the adoption of an emergency measure, the Member State must communicate its intention to adopt it by notifying the European Commission, other Member States, and Regional Advisory Councils established in 2004.[54]

For ten years and until 31 December 2012, Article 17(2) of the 2002 CFP allowed Member States to restrict access for fishing in their territorial seas to 'fishing vessels that traditionally fish in those waters from ports on the adjacent coast'.[55] Annex I of the 2002 CFP lists geographic areas, species, and other conditions, such as fishing seasons.[56] Romania and Bulgaria are neighboring (or adjacent) States due to their shared terrestrial and maritime

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[46] TFEU (n 15) Art 288. See also Lorna Woods and Philippa Watson, 'Principles of Direct Applicability and Direct Effects' in Lorna Woods and Philippa Watson, *Steiner & Woods EU Law* (12th edn, Oxford University Press 2014) 110.

[47] M Elvira Méndez-Pinedo, 'Constructing the Supremacy of Union Law: Classic Narrative of the ECJ and the EU Constitutional Perspective' in M Elvira Méndez-Pinedo and Ólafur Ísberg Hannesson (eds), *The Authority of European Law: Exploring Primacy of EU Law and Effect of EEA Law from European and Icelandic Perspectives* (Bókaútgáfan Codex 2012). See also Lorna Woods and Philippa Watson, 'Principle of Supremacy of EU Law' in Lorna Woods and Philippa Watson, *Steiner & Woods EU Law* (12th edn, Oxford University Press 2014) 85–104.

[48] *Spasov v Romania* (n 1) paras 59–61.

[49] ibid para 93.

[50] ibid para 67.

[51] 2002 CFP (n 23) Art 3 paras (b)–(d).

[52] Note that the 2002 CFP provides for additional rights not relevant in *Spasov v Romania* case due to the factual elements described above.

[53] 2002 CFP (n 23) Art 8 para 1.

[54] ibid Art 8 para 2. On the Regional Advisory Councils, see 2002 CFP (n 23) Arts 31–32; Council Decision 2004/585/EC of 19 July 2004 Establishing Regional Advisory Councils under the Common Fisheries Policy [2004] OJ L256/17; Ronán Long, 'The Role of Regional Advisory Councils in the European Common Fisheries Policy: Legal Constraints and Future Options' (2010) 25(3) The International Journal of Marine and Coastal Law 289.

[55] 2002 CFP (n 23) Art 17 para 2.

[56] ibid Annex I.

boundaries. However, neither of the two made use of Article 17(2).

The right to equal access for Community fishing vessels enshrined in the CFP is twofold.[57] It encompasses both access to Community waters (i.e., waters under the sovereignty or jurisdiction of the Member States apart from the overseas countries and territories listed in Annex II of the Treaty on the Functioning of the European Union)[58] and access to living aquatic resources therein subject to, inter alia, the carrying on board of a valid fishing license and other requirements.[59] Furthermore, this right functions within the logic of non-discrimination contained in the founding treaties of the European Union.[60] In the exercise of these rights, Community fishing vessels shall respect the conditions and measures implemented by Member States in accordance with the 2002 CFP.

3.5 APPLICATION OF EU LAW BY ROMANIA

During Spasov's trial in Romania, the judgments delivered by the Court of Mangalia differed greatly from the judgment made by the Court of Appeal of Constanta. The logic, argumentation, and legislation used showed two opposite approaches to the relationship between Romanian national law and EU law.

The Court of Mangalia was the first to pass judgment on 18 October 2011. The Court acquitted Spasov as he possessed all the necessary documents according to the Common Fisheries Policy.[61] In virtue of this policy, especially Article 17(1) of the 2002 CFP, there was no need for a Romanian fishing license to be authorized to fish in the EEZ.[62] The Court could not fault the defendant for the use of unauthorized equipment because there was no proof the equipment taken out of the water at the request of the coast guard belonged to the applicant, and the net found aboard fit the requirements for general industrial fishing and was only banned under Romanian law for turbot fishing.[63] Due to the conservation status of the species and the low yield, the use of such nets was not a criminal offense and thus only incurred an administrative fine. After an appeal by both parties, the tribunal of Mangalia offered the judgment of 12 February 2013 which stated that the applicable legal regime in Romania's Black Sea EEZ was the Common Fisheries Policy and reminded the parties of the 2002 CFP, which clearly expresses the principle of free access to Member States' fishing areas for all Community vessels holding a fishing license issued by a Member State.[64] Thus, access to EU Members' fishing areas beyond 12 nm from their coast was authorized for ships of Member States carrying a Member State license, and Spasov was not engaging in illegal activities as he was the owner of a Community vessel and was fishing further than 12 nm from the Romanian coast with the correct documentation.[65] Spasov was not found guilty of

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[57] ibid Art 17 para 1.
[58] ibid Art 3 para (a); TFEU (n 15) Annex II.
[59] 2002 CFP (n 23) Art 22 para 1.
[60] TEU (n 11) Art 2; TFEU (n 15) Art 18; Juliette Bouloy, 'L'Exploitation des Ressources Halieutiques (La Pêche)' in Mathias Forteau and Jean-Marc Thouvenin (eds), *Traité de Droit International de la Mer* (Éditions A Pedone 2017) 732.
[61] *Spasov v Romania* (n 1) para 17.
[62] ibid.
[63] ibid para 18.
[64] *Spasov v Romania* (n 1) paras 30–31.
[65] ibid paras 33–34.

illegal fishing, but the administrative fine remained.[66]

The Court of Mangalia took both national (Decree No. 36 of the Ministry of Agriculture) and EU law (the 2002 CFP) into consideration but acknowledged that the 2002 CFP is the legal document which should be taken into consideration for this issue, as the initial activities took place within the Romanian Black Sea EEZ, which is a part of the Community waters, and is thus under the EU legal regime.

The Court of Appeal of Constanta took a different approach to the case by contending that national regulations took precedence over EU regulations. On 21 December 2011, the Court of Appeal accepted the appeal of the prosecution on the premise that in the absence of a bilateral treaty between Romania and Bulgaria, the Court should have justified its use of Article 17(1) of the 2002 CFP over the use of national legislation and UNCLOS.[67]

The final judgment of the Court of Appeal of 2 October 2013 invalidated the first judgment of 18 October 2011, arguing that the tribunal of Mangalia had erroneously based their judgment on the EU's Common Fisheries Policy since the Romanian Black Sea EEZ was in fact under the legal regime of UNCLOS and Romanian national jurisdiction.[68] The Court reasoned that, because Romanian national legislation had established sovereign rights over this maritime area within national legislation No. 36/2002, ships flying the Bulgarian flag in the area were under Romanian jurisdiction and thus obligated to follow Romanian legislation.[69] As such, Spasov, who did not possess a Romanian fishing license, was guilty of fishing illegally. The Court also refuted the claims of legality under the 2002 CFP, as they claimed these regulations did not offer an obstacle to the Romanian legislation obligating vessels to hold a Romanian license.[70] According to the Court of Appeal, Article 17 of the 2002 CFP allowed vessels flying a Member State flag to enjoy freedom of equal access to the EU maritime resources, but that the right to fish was neither free nor unlimited.[71] They also argued that the Romanian national legislation regarding turbots met the requirements set by Article 8 of the 2002 CFP.[72] Leaning on the conclusions of the Romanian Marine Research Institute, the tribunal judged that the fishing undertaken by Spasov was poaching and that it put in danger the balance of the marine ecosystem.[73] Spasov was found guilty of illegally fishing with illegal equipment. To dissuade Spasov or others from fishing illegally in the future, he was sentenced to one year of prison with probation for infringement of Article 65(1b) of the Romanian Emergency Ordinance No 23/2008, as well as three fines totaling approximately 4.000 € for infringement of Article 64(a)(i) and (k) of the same ordinance.[74] Part of the value of his vessel was also confiscated (approximately 2.250 €) and Spasov was prohibited from fishing in the Romanian Black Sea EEZ for one year.[75]

The Court of Appeal based its final judgment on a handful of national regulations and emergency decrees instead of the 2002 CFP because of national legislation No. 36/2002,

[66] ibid.
[67] ibid para20.
[68] ibid para 37.
[69] ibid para 38.
[70] ibid para 40.
[71] ibid para 41.
[72] ibid paras 42–43.
[73] ibid paras 14–44.
[74] *Spasov v Romania* (n 1) para 45.
[75] ibid para 46.

which acknowledges the legal jurisdiction of Romania over its internal waters, territorial, sea, contiguous zone, and EEZ. As the Court of Appeal's entire argument is based on the fact that Romanian national regulations take precedence over EU regulations, their conclusions for the case noticeably conflict with the judgments made by the Court of Mangalia.

4 VIOLATION OF THE APPLICANT'S RIGHTS

4.1 PROPERTY RIGHTS IN THE EUROPEAN HUMAN RIGHTS SYSTEM

The applicant considered his right to fish to be a property or possession[76] within the meaning of Article 1 of Protocol 1 to the European Convention on Human Rights (ECHR-P1)[77] insofar as the fishing license granted by Bulgaria materializes his right.[78]

Article 1 ECHR-P1 provides extensive property rights. The norm itself refers to 'possessions'[79] and contains

> three distinct rules [:] the principle of peaceful enjoyment of property; […] the second rule [which] covers deprivation of possessions and subjects it to certain conditions [and a] third rule [which] recognizes that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose.[80]

The term 'possessions' is subject to an autonomous interpretation by the ECtHR. This means that the term has a meaning within the framework of the ECHR that is independent of the meaning of the word in national legal systems. The meaning of the term is therefore defined with regard to the European human rights system and does not depend on any national legal system. The material scope of the norm goes beyond material objects and can also include other assets as well as rights, even when those would not be considered possessions in the national law of the respondent State.[81] The right protected by Article 1 of Protocol 1 to the ECHR is far-reaching. Also, business licenses can be protected possessions within the meaning of Article 1 of Protocol 1 to the ECHR.[82] Only existing possessions are legally protected,[83] future income is only protected if it has already been earned.[84]

Human rights that are protected by the Convention and the Protocols also have a procedural dimension. The right to life requires an effective investigation into suspicious deaths, for example. The right that is protected by Article 1 of Protocol 1 to the ECHR, too, can have a procedural dimension. This means that this right needs to be taken into account in procedures, in particular in administrative procedures in domestic law.

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[76] ibid para 103. Note that the original version of the judgment refers to 'bien' in French.
[77] ECHR-P1 (n 3).
[78] *Spasov v Romania* (n 1) [10].
[79] ECHR-P1 (n 3) Art 1 para 1.
[80] *Spörrong and Lönnroth v Sweden* App nos 7151/75 and 7152/75 (ECtHR, 23 September 1982) para 61.
[81] *Depalle v France* App no 3404/02 (ECtHR, 29 March 2010) para 68.
[82] *Tre Traktörer Aktiebolag v Sweden* App no 10873/84 (ECtHR, 7 July 1989) para 53.
[83] *Marckx v Belgium* App no 6833/74 (ECtHR, 13 June 1979) para 50.
[84] *Denisov v Ukraine* App no 76639/11 (ECtHR, 25 September 2018) para 137.

4.2 VIOLATION IN *SPASOV V ROMANIA*

In the present case, the ECtHR unanimously concluded that Romania violated Article 6(1) of the ECHR on the right to a fair trial and Article 1 of Protocol 1 to the ECHR on the protection of property.[85]

The violation of the right to a fair trial of Hristo Spasov results from the denial of justice provoked by the wrongful application by Romanian courts of Romanian law to a situation patently within the scope of the 2002 CFP.[86] Wrongful because the domestic law contradicted European law, as pointed out to Romanian authorities by the European Commission.[87] It consequently led the ECtHR to conclude that the Romanian Court of Appeal manifestly erred in law and thereby breached the principle of primacy of European law over domestic law.[88]

Romania based the supplementary sanctions of a financial nature which it imposed on the applicant (*i.e.*, value confiscation and provisional prohibition of fishing in the Black Sea EEZ of Romania)[89] on Romanian legal provisions included in the emergency ordinance No. 23/2008 as required by Article 1(2) of Protocol 1 to the ECHR.[90] Nevertheless, the ECtHR explained that because the domestic legal basis was found to be contrary to the 2002 CFP (*i.e.*, EU law), Romania could not justify such sanctions on a manifest error in law.[91] The Court also reaffirmed its jurisprudence on the assimilation of licenses and other permits to operate commercial activities as property protected by Article 1 of Protocol 1 to the ECHR.[92] In this regard, it concluded that Romania failed to protect the individual rights of Hristo Spasov and did not act in the public interest.[93] Therefore, Romania violated Article 1 of Protocol 1 to the ECHR.[94]

5 CONCLUDING REMARKS

Fishing rights, like other permits,[95] can be protected under Article 1 of Protocol 1 to the European Convention on Human Rights and the very similarly worded Article 17 of the Charter of Fundamental Rights of the European Union. From the perspective of European human rights law, this finding is not surprising, but the case is notable for providing a connection between human rights and fisheries. The role of human rights in the maritime sector is an important issue that has gained more attention in recent years, for example in the context of the rights of seafarers. The fishing industry provides numerous human rights challenges,[96] many of which exceed the situation described here in terms of severity. The judgment by the European Court of Human Rights, nevertheless, is an important reminder

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[85] *Spasov v Romania* (n 1) paras 99, 120, and p 22.
[86] ibid paras 94 and 98.
[87] ibid para 95.
[88] ibid para 97.
[89] ibid para 116 mentioning paras 45 and 46 respectively.
[90] ibid para 116.
[91] ibid paras 117–118.
[92] ibid para 104.
[93] ibid para 119.
[94] ibid para 120.
[95] *Tre Traktörer Aktiebolag v Sweden* (n 82) para 53.
[96] See e.g. Stefan Kirchner, 'Human Rights and Fishing: A Multidimensional Challenge' (2019) 12(1) Baltic Journal of Law and Politics 155.

that activities at sea are neither beyond the scope of the courts nor beyond the geographical scope of human rights treaties. This is particularly the case in the framework of the European Convention on Human Rights, which applies to all situations in which a person is under the jurisdiction of one of the 46[97] States that are parties to the ECHR. The European Convention on Human Rights is part of public international law and in the case discussed here, the European Court of Human Rights once more has shown its holistic approach to human rights as part of public international law.

[97] Russia has been excluded from the Council of Europe on 16 March 2022. Consequently, the European Convention on Human Rights stopped applying to Russia six months later based on Art 58 para 3 ECHR, read in conjunction with Art 58 para 1 ECHR.

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