

COMMON MARKET LAW REVIEW

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Aims

The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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EDITORIAL COMMENTS

Theresa's travelling circus: A very British entertainment trips its way from Florence to Brussels

The Brexit circus continues to rattle along its merry way. And to be fair: it is producing some passable jokes. “An Englishman, a Scotsman and an Irishman walk into a bar. The Englishman wants to go. So they all have to leave.” ““How many Brexiters does it take to change a lightbulb?’ ‘Hold it right there! – we never said there were actually going to be any lightbulbs!’”¹ But squeezed between the daily schedule of lame comedy routines, fantasy trade negotiations and imperial battle scene re-enactments, there are also some more sombre moments of reflection – when the main protagonists seem to grasp, however fleetingly, the true profundity of the consequences of the choices they are making.

One such moment centred on Prime Minister Theresa May's speech in Florence on 22 September 2017, which was widely billed as a serious attempt to break the apparent deadlock then surrounding the UK-EU withdrawal negotiations.² Certainly, both Michel Barnier and Donald Tusk have publicly welcomed its constructive tone and claimed that May's intervention injected fresh impetus into the ongoing “first phase” talks concerning the priority separation issues arising from the UK's fast-approaching departure from the Union.³

However, whatever impetus May could generate was clearly not enough to make any decisive breakthrough in either the fourth or fifth round of negotiations in Brussels.⁴ Inevitably, therefore, nor was it able to persuade the European Parliament, the Commission negotiator, or the European Council itself, that sufficient progress had been achieved so as to justify proceeding in

1. Borrowed and adapted shamelessly from <www.indy100.com/article/here-are-our-favourite-jokes-about-brex-it-because-everyone-really-just-needs-to-laugh—W1EBv521SW>.

2. Available at <www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-co-operation-and-partnership-between-the-uk-and-the-eu>.

3. E.g. Barnier, Statement of 22 Sept. 2017 available at <europa.eu/rapid/press-release_STATEMENT-17-3427_en.htm>; Tusk, Remarks of 26 Sept. 2017 available at <www.consilium.europa.eu/en/press/press-releases/2017/09/26-tusk-remarks-may-london/>.

4. E.g. see Barnier, Statements of 28 Sept. 2017, available at <europa.eu/rapid/press-release_SPEECH-17-3547_en.htm>, and 12 Oct. 2017, available at <europa.eu/rapid/press-release_STATEMENT-17-3921_en.htm>.

parallel to the “second phase” talks – as so desperately desired by the UK Government – on preliminary and preparatory discussions about a potential future relationship in fields such as trade, security and defence.⁵ And all that despite some last minute diplomatic acrobatics from May and from David Davis (Secretary of State for Exiting the European Union).⁶ Instead, the UK will have to console itself with the EU27’s decision to do the obvious – to begin their own internal preparatory deliberations about what a future partnership with the UK might look like – and seek now to make better progress on the key separation issues, with a view to securing a more favourable outcome at the next high-level review, due to take place at the European Council meeting in December 2017.⁷

Moreover, May’s own efforts to set a more positive tone for these difficult and sensitive negotiations are constantly undermined by the deep divisions among her Conservative Party colleagues and the consistent tendency, if not systematic tactic, to throw the blame for every conceivable setback or obstacle – no matter how obvious, inevitable or self-inflicted – upon the EU. It was entirely predictable that Foreign Secretary Johnson would continue to question and undermine May’s authority.⁸ Nor was it much of a surprise to hear International Trade Secretary Fox, who had recently claimed that UK-EU trade negotiations should be “the easiest in human history”,⁹ suggest that the main obstacle to their success was “the European elite [wanting] to punish Britain for having the audacity to use [its] legal rights to leave the European Union”.¹⁰ How dare the democratically elected leaders of 27 sovereign European States comply with the UK’s own demand to be treated, no longer as a valued member of their close community of nations, but simply in accordance with the ordinary principles and realities of international law and relations!

Perhaps more unexpected and certainly more disappointing is to hear even supposedly more reasonable ministers such as Chancellor Hammond

5. See European Parliament, Resolution on the state of play of negotiations with the United Kingdom (3 Oct. 2017); Barnier, Statement of 12 Oct. 2017, cited previous footnote; European Council, Article 50 TEU Conclusions (20 Oct. 2017).

6. To see the fruits of such labour, consider e.g. the Joint Statement by Jean-Claude Juncker and Theresa May of 16 Oct. 2017, available at <europa.eu/rapid/press-release_STATEMENT-17-3969_en.htm>.

7. European Council, Article 50 TEU Conclusions, cited *supra* note 5, para 3.

8. For a few typical examples, consider e.g. <www.theguardian.com/politics/2017/sep/26/boris-johnson-theresa-may-brex-it-freedom-movement-transitional-period-florence>; <www.theguardian.com/politics/2017/sep/27/boris-johnson-defies-pms-brex-it-strategy-with-call-for-short-transition-period>.

9. See <www.theguardian.com/politics/2017/jul/20/liam-fox-uk-eu-trade-deal-after-brex-it-easiest-human-history>.

10. See <www.theguardian.com/politics/2017/oct/22/britain-not-bluffing-on-no-deal-brex-it-says-liam-fox>.

referring to the EU as “the enemy” of the UK.¹¹ Nor can it help matters when the UK’s lead negotiator suggests, in Parliament, that the deliberate tactic of the EU27 is simply to manipulate the timing of the withdrawal talks so as to squeeze as much money as they possibly can from the UK.¹² Such inconsistency and malignancy at the very centre of government does little to build the sense of mutual respect and trust which is crucial to the success of any major international negotiation – a lesson that “Global Britain” may yet regret not having learned more quickly and more effectively as it prepares to make its own way in the big wide world.

That said: the Florence speech certainly merits closer inspection, since it contains some revealing insights into the UK Government position as well as certain new ideas which look set to feature prominently in the forthcoming negotiations – including ideas about which EU legal scholars should have much to contribute.

An admission of strategic failure – judged by the UK’s very own standards

First and foremost, the Florence speech was an implicit admission of failure: the clear and profound failure of the UK Government’s core negotiating strategy, judged by nothing other than that Government’s very own White Paper from February 2017.¹³ Thus, the UK concedes that the timing and sequence of negotiations lies entirely within the gift of the EU27: the UK does not hold all the cards after all.¹⁴ May admits that there is no prospect whatsoever of reaching a comprehensive package covering both withdrawal terms and future relationship, as the Government has consistently proposed, within the ludicrously short period of the next 12 months. And although May still employs the language of an “implementation period”, it is clear that this now means something very different from what was intended in the February White Paper: this is no longer about the careful phasing in of a new partnership agreement that has already been finalized; it is about begging for more time while the UK tries to prevent a disruptive and damaging exit for

11. See <www.independent.co.uk/news/uk/politics/brexit-philip-hammond-eu-enemy-europe-tory-government-chancellor-negotiations-latest-a7999121.html>.

12. See <hansard.digiminster.com/Commons/2017-10-17/debates/33F0A459-B60E-41EF-931F-51756CFFAF94/EUExitNegotiations#contribution-0BEABEDE-8ED2-4CFF-AB97-52F142570F21> at Column 736–737.

13. HM Government, *The United Kingdom’s exit from and new partnership with the European Union* (Cm 9417).

14. Something which should have been clear, as if it were not so already, from the very opening of the negotiations: see Terms of Reference for the Article 50 TEU negotiations as agreed on 19 June 2017, available at <ec.europa.eu/commission/sites/beta-political/files/eu-uk-art-50-terms-reference_agreed_amends_en.pdf>.

which it is evidently ill-prepared. To that extent, the Florence speech should of course be welcomed: it marks a first attempt to recalibrate the UK's negotiating strategy along more realistic lines.

Modest but insufficient progress on the priority "first phase" separation issues

Secondly, however, on the key separation issues which are currently the focus of the "first phase" negotiations in Brussels, the Florence speech said relatively little – and subsequent events do not seem to have moved the situation on much further either.

On the question of Northern Ireland, May said nothing new in Florence. The negotiations themselves continue to make progress, but mostly at a relatively high level of abstraction: for example, when it comes to agreeing the overarching principles and objectives that should underpin the parties' approach to safeguarding the Good Friday peace settlement and to maintaining the Common Travel Area between the UK and Ireland.¹⁵ But on the most legally and logistically difficult question – the impact of UK departure from the Customs Union upon the land border between Northern Ireland and the Republic – the EU continues to await more credible detailed proposals from the UK side.¹⁶ And indeed: aside from some novel technical revolution capable of transforming customs cooperation across the globe, it remains difficult to see how May intends to fulfil her stated objective of avoiding *any* physical infrastructure at the border, while still respecting the legitimate fiscal and regulatory interests of the distinct customs territories that will lie on each side of that frontier.

On the treatment of current migrant EU27 and UK citizens, May made an explicit attempt in Florence to break the ongoing deadlock – followed up by her "personal letter" to EU27 nationals living in the UK, on the eve of the European Council meeting in October 2017.¹⁷ But let's recall that May already spent many months, before handing in the UK's formal notification of withdrawal, claiming that she wanted to safeguard existing citizens' rights – and suggesting it was only the obstruction of certain other countries which prevented a quick deal from being reached.¹⁸ Yet when the EU made its offer

15. As acknowledged by the European Council, Article 50 TEU Conclusions, cited *supra* note 5, para 1.

16. As opposed to the proposals contained in the UK's Position Paper on Northern Ireland and Ireland (August 2017).

17. Available via <www.gov.uk/government/news/pms-open-letter-to-eu-citizens-in-the-uk>.

18. E.g. as in HM Government, Paper cited *supra* note 13.

to guarantee fully the status and rights of current migrant citizens,¹⁹ the UK responded with a proposal that fell far short of that standard in a whole variety of respects.²⁰ Now May has said it again in Florence: she wants migrant citizens to carry on living their lives as before. But there was little concrete in her speech to bridge the gaps that continue to separate the UK and EU positions: even after the fifth round of negotiations, differences remain concerning tricky issues such as future rights to family reunification, the exportation of certain social security benefits, the additional administrative procedures which EU27 citizens will be expected to undergo within the UK, the precise legal status that any agreement on citizens' rights will eventually enjoy under UK law and, of course, the applicable governance structures – including not least the appropriate role of the Court of Justice.²¹

On this last point: the UK continues to insist that withdrawal will mean the end for any direct jurisdiction by the Court within or over the UK. In Florence, May instead suggested that the UK courts should nevertheless be able to take into account ECJ rulings, so as to help ensure the consistent interpretation of any withdrawal agreement provisions concerning citizens' rights which derive from EU law. That suggestion has been hailed in some quarters as if it were a significant concession – yet it barely goes further (if at all) beyond the general principle of judicial interpretation which had already been suggested by the UK Government in the European Union (Withdrawal) Bill currently working its way through Parliament.²² After all, under the Bill, the UK courts would basically be obliged to treat pre-withdrawal EU case law as if it still enjoyed the same precedential status as judgments of the UK Supreme Court,²³ and while the UK courts would no longer be strictly bound by any post-withdrawal EU case law, they would still be entitled to have regard to any new ECJ judgments if they were to consider it appropriate to do so.²⁴ What precisely is the UK Government offering, whether in the Florence speech or

19. Commission, Position Paper on Essential Principles on Citizens' Rights (12 June 2017).

20. UK Government, Safeguarding the position of EU citizens living in the UK and UK nationals living in the EU (June 2017).

21. See Joint Technical Note on citizens' rights after fourth round of UK-EU negotiations (28 Sept. 2017), available at <ec.europa.eu/commission/publications/joint-technical-note-eu-uk-position-citizens-rights-after-fourth-round-negotiations_en>; read together with Barnier, Statement of 12 Oct. 2017, cited *supra* note 5.

22. We refer here to the text as proposed on 13 July 2017, but given the huge number of proposed amendments by MPs, as well as the opposition of the devolved authorities in Scotland and Wales, it is anticipated that the Bill will only be adopted (if at all) in a substantially revised form.

23. Though with certain limitations, e.g. as regards case law which refers to the Charter of Fundamental Rights (see Clause 5 of the Bill); or as regards the general principles of Union law (see Schedule 1 to the Bill).

24. See Clause 6 of the European Union (Withdrawal) Bill.

since then, that would add up to a stronger guarantee for citizens' rights than the general approach the UK proposes to adopt for itself in any case?

On the vexed question of the UK's financial settlement: the Florence speech did make some real progress, insofar as May explicitly promises that the UK will honour the commitments it undertook as a Member State and pay its fair share for future cooperation programmes. That should give some useful political impetus to the negotiations, which now need to agree a precise methodology for calculating the financial settlement, paving the way to reach some provisional sum, that can then be adjusted in light of the overall withdrawal agreement.

However, the domestic UK politics surrounding any "divorce bill" are now so poisoned as to make the situation critical. The UK Government is patently reluctant to put any firm negotiating position down on paper, in detail and in public – even though the lack of any such concrete proposals from the UK side is evidently to blame for holding up serious progress. Surely May needs to learn an important lesson which her predecessors singularly failed to grasp until it was too late: the ideological Europhobes in her party (and beyond) are not interested in compromise and they will never be satisfied by any deal she might strike. On the contrary, they are looking for any excuse to derail the entire process – and in the question of money, they believe they have found the perfect issue to stir up the sort of populist resentment they need to exploit as fuel for their own political ends. One can only hope that May has some reserves of determination left to resist them.

So: we have concrete but insufficient progress on the priority "first phase" withdrawal issues. And as anyone who follows the two sides' position papers will already know: from contracts for the supply of nuclear materials, to the handling of pending applications for intellectual property protection, and questions about the storage and handling of personal data – the range of additional issues that still need to be discussed and settled is mind-boggling.²⁵

A bespoke, unique, unprecedented future relationship... yes, but what is it you actually want?

Thirdly, the Florence speech addressed the UK's vision of its future relationship with the EU. Here, May was quite right to contradict some of the consistent propaganda used by many of the leading Leave campaigners to mislead and confuse UK citizens: for example, the idea that membership of the European Economic Area can offer all the benefits without suffering any

25. Consider the Commission position papers already available via ec.europa.eu/commission/brexit-negotiations_en.

of the burdens (when the reality is that it would mean the UK transforming itself, in a most perverse manner, from leading rule-maker to passive rule-taker);²⁶ or the lie that the Single Market is no better than other international trade agreements (when the reality is that even a relatively advanced trade deal, like that between the EU and Canada, is but a pale shadow of the Single Market itself).

Instead, the Florence speech reaffirms the Government's aspiration that the UK wants its own bespoke, unique and unprecedented relationship. Fair enough: wouldn't anyone? The problem is that (besides emphasizing repeatedly the centrality of future cooperation specifically in the fields of trade and security) the UK has still given almost no palpable indication of what this would actually mean and how it might really operate. On its face, May seeks explicitly to stamp out the Boris Johnston conceit-deceit that the UK can somehow have its cake and eat it. But upon closer inspection, this still feels like exactly what the UK is asking for: little need change in our mutual relations, indeed cooperation can become even closer than it is today, but without the UK having to play by the same rules or be bound by the same obligations as anyone else. And that fantastical delusion is evident not just in the Florence speech: the same is true for most of the "future partnership" papers published by the UK Government over the past several months.²⁷ The basic message in each case feels the same: we are leaving, but the benefits of membership are so great that we do not want or cannot afford to lose them, so please can you (the EU) come up with some creative and innovative ways for the UK to leave, but still keep all those benefits? Be warned: history will judge you harshly if you fail! Such an approach might play well to a domestic audience, not least in creating useful foreign scapegoats for when things do not go quite as the UK Government might have envisaged. But in the real world of international law and relations, it is simply not a credible or sustainable position.

Transitional arrangements: a question not just of politics but also of law

Fourthly, we come to an element of the Florence speech that is genuinely a new and significant departure in UK Government policy: May's reconstituted

26. A point already made, e.g. in HM Government, *Alternatives to Membership: Possible Models for the United Kingdom Outside the European Union* (March 2016), pp. 16–21.

27. E.g. Future Partnership Papers on future customs arrangements (Aug. 2017); enforcement and dispute resolution (Aug. 2017); the exchange and protection of personal data (Aug. 2017); providing a cross-border civil judicial cooperation framework (Aug. 2017); collaboration on science and innovation (Sept. 2017); foreign policy, defence and development (Sept. 2017); security, law enforcement and criminal justice (Sept. 2017).

proposal for an implementation period between the date of UK withdrawal and the birth of a new future partnership with the EU. To be clear: the UK is not asking for a prolongation of formal EU membership through the mechanism/s explicitly provided for under Article 50 TEU; the UK has also ceased pretending that its implementation period should merely entail the phased entry into force of a (non-existent) final deal. Instead, May is suggesting that the withdrawal agreement – in addition to dealing with current migrant citizens, Northern Ireland and the divorce finances etc. – should provide for a post-withdrawal transitional period of around two years, so as (put bluntly) to cushion the UK from the worst effects of the abrupt departure which is otherwise heading its way.

But it remains difficult to pin down precisely what the UK has in mind here. For example: what would be the scope of any transitional arrangement? As usual, even in this context, May mentions only trade and security. Is this meant to imply that any deal should not be designed to cover continued cooperation also in other fields, such as the environment or scientific research? We might like to assume that May indeed envisaged a somewhat broader scope of continuation for EU law in relation to the UK – but the issue awaits significant clarification from London. In any event, the Florence speech also explicitly suggested some important deviations from the status quo: for example, the ability for the UK to ignore the Union's exclusive competences in the field of external relations, so as to enter into formal trade negotiations with third countries, even if the entry into force of any such new deals would be delayed until the UK's transitional period with the EU had expired. Perhaps more importantly, May has since clarified – in a statement to the House of Commons on 9 October 2017 – that although EU nationals might continue to arrive in the UK during any transitional period, they would have to be registered and would become subject to a new (albeit as-yet-undefined) UK immigration regime, rather than benefiting from any continuation of the EU's rules on the free movement of persons.²⁸

Or again: what would be the basis for continued cooperation? May suggests that the EU's current rules and regulations should provide the framework for her transitional period. But would that include, for example, a clear obligation for the UK also to amend its domestic legislation to fit with any future changes to EU law which might be agreed during the transitional period? And as we all know: cooperation is not built merely on rules and regulations; it is also built on a complex network of institutions and processes – political, administrative and judicial – which make the whole system work in practice. So: what governance and enforcement structures does the UK have in mind? May

28. Available at <www.gov.uk/government/speeches/pm-statement-on-leaving-the-eu-9-oct-2017>.

recognizes there would be no more seats at the top table at the European Council, or in the Council, and no more MEPs in the European Parliament. But otherwise, the Florence speech gives little away, beyond suggesting that the role of the Court of Justice could be replaced with some new dispute settlement mechanism (albeit again of an undefined nature) sooner rather than later.

In any case, knowing more precisely what the UK has in mind would only amount to the first step. The next question is: would the EU be prepared to accept the UK's proposals, at a political level, bearing in mind the guidelines laid down by the European Council in April 2017?²⁹ For example, although it is clear that the primary driver for a transitional period on the UK side is the dawning realization within Government of the woeful state of their own withdrawal preparations, the EU27 guidelines make clear that the test for any transitional period begins with whether it would be in the *Union's* own interests to have one. Moreover, the EU27 have indicated that a transitional period only makes sense if it is leading from one state of being (EU membership) to a reasonably clear, even if not yet fully crystallized, vision of some alternative destination (the future third country relationship). As we have seen, the UK has still not proposed an alternative destination at anything other than the very highest level of abstraction.

In addition, the April 2017 guidelines state that any transitional agreement must involve a balance of rights and obligations, respect the integrity of the Single Market and, if based on a prolongation of Union law, incorporate the Union's existing instruments and structures – be they regulatory, budgetary, supervisory, judicial or related to other means of enforcement. That will focus attention on any UK demands to exempt itself from certain existing fields of cooperation or constraints on its freedom of action; and also raise sensitive questions (for example) about the continuing enforcement powers of the Commission and the full jurisdiction of the Court of Justice. Certainly, the European Parliament has already expressed the view that any transitional period should be based on the continuation of the whole *acquis communautaire*, thus precluding the UK from imposing (for example) any new conditions on the free movement of persons.³⁰ That already seems to put the two sides on a direct collision course for any future transition negotiations.

All of which leads on to a question of at least equal importance: will it be possible to square the UK's proposals with the EU position, not just politically but also legally? After all, the European Council's guidelines from April 2017

29. European Council, Guidelines following the United Kingdom's notification under Article 50 TEU (29 April 2017).

30. European Parliament, Resolution cited *supra* note 5.

explicitly provide that any transitional arrangements should be considered only to the extent that they are “legally possible”...³¹

In principle, Article 50 TEU provides that the Treaties shall cease to apply to the UK upon its withdrawal. On its face, that suggests any transitional arrangement cannot be based upon a direct prolongation of the application of the Treaties, to a territory that has become a third country, just as if it were still a Member State. The withdrawal agreement would instead have to provide for the construction of a parallel system of cooperation which seeks (as far as possible) to replicate the rules, rights and obligations provided for under the Treaties (if only for a fixed period of time) in the entirely different context of international relations between the Union and its Member States (on the one hand) and a third country (on the other hand).

In that regard, it is true that the Council has endorsed the view that Article 50 TEU gives the Union an exceptional power to negotiate the terms of withdrawal – exceptional at least to the extent that it empowers the Union alone to reach agreement with the UK, on behalf of the remaining Member States, even as regards issues which would normally be seen as falling within national competence – thus seeking to avoid any possibility of the withdrawal agreement being treated as a mixed one, requiring individual national ratifications, in addition to the Union level endorsement explicitly provided for under Article 50 TEU itself.³² Yet even an exceptional power cannot be unlimited – particularly when it comes to assessing the substantive scope and contents of any withdrawal agreement for their compatibility with the Treaties. After all, any EU constitutional lawyer would expect the withdrawal agreement – transitional provisions included – to respect the fundamental principles and parameters laid down in the Treaties when it comes to defining the nature and limits of the Union’s own competences.

That task should be relatively easy in those situations where continued UK participation in particular EU policies or measures would anyhow be possible in accordance with the avenues already open to third countries under the relevant instruments of primary or secondary Union law (e.g. the award of equivalence / adequacy decisions in fields such as financial services or data protection); or would at least lie within the Union’s gift to offer any third country in accordance with the standard competence principles governing external relations as provided for under the Treaties (such as the possibility for third country courts to seek binding interpretative guidance from the Court of

31. See para 6 of the Guidelines cited *supra* note 29.

32. Council, Decision authorizing the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union together with Annex containing Negotiating Directives (22 May 2017).

Justice through their own preliminary reference-style procedure).³³ But beyond that: what if the UK were to ask for special privileges that would not normally be open to any third country under the standard framework of Union law? Consider, for example, the entirely plausible prospect of a request by the UK (post-withdrawal, for a transitional period) that its authorities may continue to participate in Union level networks or agencies – whether for the exchange of information, the allocation of jurisdiction, the mutual recognition of standards, or the enforcement of decisions – where membership and its attendant benefits are reserved for the Member States alone?

For those purposes, the mere fact that Article 50 TEU has been recognized as an exceptional competence, specifically insofar as it allows the Union alone to finalize an agreement covering issues that also fall within Member State power, appears entirely irrelevant. After all, the Member States could not use their ordinary national competences to change the system or content of the Union's own competences as laid down under the Treaties, so their consent (express or implied) to the possibility of sole Union external action even as regards matters that would normally be considered to fall within national competences, within the specific context of withdrawal, cannot have any effect on the substantive scope or content of the Union's own powers as regards matters falling within the Union's own regulatory fields of responsibility.

So the prospect of an ambitious and far-reaching transitional deal could pose not only difficult political questions, but also important legal challenges: just *how* exceptional can the Article 50 TEU competence *really* be? One can already hear the calls for clarification by the Court of Justice – albeit tempered by the realization that judicial action could be difficult to square with the strict process now unfolding pursuant to Article 50 TEU... Certainly, for reasons of law as much as of politics, including constitutional principles as well as technical detail, negotiating a sophisticated transitional regime could well involve many of the same tricky questions and potential obstacles as the final future relationship itself.

In any case, we should also bear in mind other potential limits to the effect or utility of any EU-UK transitional arrangements. For example, it seems difficult to understand how a transitional deal which is clearly based on the transformation of the UK into a third country could – in and of itself – help solve the excruciatingly complex problems surrounding the UK's future status in relation to existing international agreements contracted either by the

33. In accordance with the case law on the autonomy of Union law, e.g. Opinion 1/91, *EEA Agreement*, EU:C:1991:490; Opinion 1/92, *EEA Agreement II*, EU:C:1992:189; Opinion 1/00, *European Common Aviation Area*, EU:C:2002:231; Opinion 1/09, *European and Community Patents Court*, EU:C:2011:123.

EU or by the EU acting together with its Member States. At best, the prospect of transitional provisions might influence the immediate political environment in which a hefty programme of case-by-case legal analysis and diplomatic negotiation must now be undertaken.

And for our finale: juggling with fire while blindfolded on a trapeze over a crocodile pit...

To conclude: May's Florence speech represents a modest step towards the real world after over a year of living in a parallel universe. But as events continue to demonstrate with almost painful clarity, the underlying problems in the UK position remain the same: a deeply divided country, with a deeply divided government, as yet lacking any credible plan for dealing with the situation, with the Article 50 TEU clock continuing to tick.

Events may yet take a(n even more) dramatic turn. The degree to which the UK (on the one side) is a hostage to its own ideological red lines and Europhobic bogeymen, while the EU27 (on the other side) are determined to stick to their phased approach to progressing the negotiations, has already substantially raised the prospects either of the talks failing to proceed beyond a minimal technical agreement covering basic separation issues; or of negotiations simply breaking down altogether, thus forcing each side to face the ensuing storm as best they can on a unilateral basis. In that regard, it is interesting to note that proposed amendments to the European Union (Withdrawal) Bill might well see the UK Parliament seeking to reserve to itself an express power to veto withdrawal, if the Government fails either to negotiate an acceptable deal or to bring back any agreement at all.³⁴ That would in turn raise the question: does the UK feel sufficiently constitutionally at ease with itself to change its mind through parliamentary legislation alone; or would the impact of the 2016 referendum remain such that only a reversal of public opinion as expressed in a second plebiscite would feel politically legitimate? And if the UK did eventually change its mind, that would of course only lead to more questions – not least whether the EU27 would by then even be prepared to accept such a change of heart; if indeed the rest of the EU is legally entitled to have any say at all, over what might well be seen (and again, tested before the Court of Justice) as the rightful prerogative of a withdrawing State unilaterally to rescind its own Article 50 TEU notification.

But for now: the Brexit circus continues to rattle along its merry way. And its most bizarre joke? It is the clowns who are asking to see magic conjuring

34. Available via services.parliament.uk/bills/2017-19/europeanunionwithdrawal/documents.html.

tricks from their bemused spectators – the same spectators who never even wanted to watch this grotesque carnival in the first place. Oh, those British – so *drôles*...

THE AUTONOMY OF THE EU LEGAL ORDER IN THE ECJ'S EXTERNAL RELATIONS CASE LAW: FROM THE "ESSENTIAL" TO THE "SPECIFIC CHARACTERISTICS" OF THE UNION AND BACK AGAIN

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Abstract

Notwithstanding the abundant literature on the external dimension of EU autonomy, the meaning of the term still appears "nebulous". The purpose of this article is to shed light on its elements through a close examination of the expressions that accompany the notion of "autonomy" in the ECJ's case law, such as "very foundations", "very nature", "essential characteristics" and "specific characteristics" of the EU and EU law. It will be shown that autonomy is closely intertwined with the notions of "essential characteristics" and the "very foundations" of the EU legal order and that, accordingly, only an impact on those elements undermines its autonomy. Nevertheless, in Opinion 2/13, the Court applied such a broad interpretation of its previous case law on autonomy as to leave unsettled the identification of its limits. Autonomy still remains, in sum, partially "nebulous".

1. Introduction

Much has already been said about the autonomy of the European Union legal order in relation to international law. The academic debate encompasses the detailed analysis of the requirements that an international agreement has to possess in order for it to pass the test of the Court of Justice of the European Union as well as the constitutional nature of the Union. Notwithstanding the abundant literature, the meaning of the term autonomy still appears "nebulous". By reading on the subject, the impression sometimes emerges that autonomy is perceived as a notion that the ECJ may use as it pleases in order to protect the EU legal order as much as possible so to safeguard its own prerogatives from external influences. The obvious consequence of this

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reading of the ECJ's case law is that the Court may stretch this term to the point of extending it arbitrarily.

The purpose of the present article is to contribute to the debate by identifying the meaning of "EU autonomy" through its elements. The analysis will necessarily require a close examination of the ECJ's case law in EU external relations law. Against the silence of the EU Treaties on autonomy,¹ in fact, the ECJ held that "it is for the Court to ensure respect for the autonomy of the European Union legal order thus created by the Treaties".² In particular, attention will be paid to the expressions that, in the ECJ's case law, accompany the notion of "autonomy", such as "very foundations", "very nature", "essential characteristics" and "specific characteristics" of the EU and EU law. It will be proved that autonomy is strictly intertwined with the notions of "essential characteristics" and the "very foundations" of the EU legal order and that, accordingly, only an impact on those Union elements undermines its autonomy. The fact that in Opinion 2/13 a switch took place from the requirement of "essential" characteristics of the EU to "specific" characteristics of the EU and EU law, as Protocol No. 8 TEU requires, caused an extension of the meaning of autonomy and, accordingly, of its application. It will therefore be inferred that, in the future, the correct test that the Court will apply to assess whether EU autonomy has been undermined, is that of "essential" and "very foundations" in line with its previous case law. Notwithstanding this, it will also be emphasized that in Opinion 2/13, the Court applied with respect to two aspects such a broad interpretation of its previous case law as to leave unsettled the identification of its limits. In sum, autonomy still remains partly "nebulous".

The ECJ's rulings where the Court *expressly* mentioned the term "autonomy" are distinguished into four groups in order to better emphasize similarities and differences amongst the cases under consideration.³ First of

1. The EU Treaties are silent on the notion of autonomy, while those provisions dealing with international law are not sufficient to clarify what autonomy is. See e.g. Arts. 3(5), 21(1) and (2)(b) TEU, and Art. 216(2) TFEU.

2. Opinion 1/09, *European and Community Patents Court*, EU:C:2011:123, para 67; see also Opinion 1/91, *European Economic Area (I)*, EU:C:1991:490, para 35.

3. To the author's knowledge, the only exception is Case C-28/12, *Commission v. Council*, EU:C:2015:282, where the notion of autonomy was mentioned and the Court recalled that "the founding treaties of the EU, unlike ordinary international treaties, established a new legal order", para 39, to essentially underline that "the rules regarding the manner in which the EU institutions arrive at their decisions are laid down in the Treaties and are not at the disposal of the Member States or of the institutions themselves", para 42. The issue at stake was whether the Council and the Representatives of the Governments of the Member States of the EU could *jointly* adopt decisions in the procedure for concluding international agreements as established under Art. 218 TFEU. Unlike the Court, the Advocate General in Case C-28/12 (EU:C:2015:43) rightly recalled the principle of the organizational autonomy of the

all, the ruling where the Court first explained the notion of autonomy as the safeguard of the “essential elements” of the EU legal order to protect, in particular, the role of the then Community’s institutions in pursuing its “common action” and in ensuring a balanced relationships between the Member States⁴ is mentioned (section 2). The second group is composed of those cases where the issue at stake mainly – but not only – concerned an international dispute settlement mechanism whose competence could potentially interfere with the power of the ECJ in particular, and the functioning of the EU institutional structure more generally. This group of cases is composed of some Opinions and one judgment. In the latter, the *MOX Plant* case,⁵ the ECJ had to establish whether it had exclusive jurisdiction over a dispute between two Member States, while in the Opinions the Court was requested to assess whether a draft agreement was compatible with the EU Treaties under Article 218(11) TFEU⁶ (section 3). The well-known *Kadi* case⁷ constitutes the third category. This time, the autonomy of the EU legal order was not potentially undermined by a draft agreement or a competing international dispute settlement mechanism, but rather by the alleged immunity from jurisdiction of an EU regulation implementing UN Security Council resolutions (section 4). For the purpose of the analysis, the mentioned groups of rulings will be examined separately, following a chronological order. The only exception to this is Opinion 2/13,⁸ to single out that, in the ECJ’s case law, a shift took place from the “essential” to the “specific characteristics” of the EU and EU law (section 5). Finally, before drawing some conclusions on what EU autonomy and its elements are (section 7), their implications on those current draft agreements containing a chapter on investor-state dispute settlement (ISDS) mechanisms, namely the EU Free Trade Agreements (hereafter “FTAs”), will be investigated (section 6).

institutions, according to which these “are free to determine precisely how their work is to be organized”, para 30. The A.G. held that the institutions’ autonomy has to be exercised in the respect of the other institutions’ competence, under Art. 13(2) TEU, implying their independence from Member States, paras. 54–57.

4. Opinion 1/76, *European laying-up fund for inland waterway vessels*, EU:C:1977:63.

5. Case C-459/03, *Commission v. Ireland*, EU:C:2006:345.

6. Opinion 1/91, *EEA (I)* and Opinion 1/92, *EEA (II)* EU:C:1992:189; Opinion 2/94, *ECHR (I)*, EU:C:1996:140; Opinion 1/00, *European Common Aviation Area*, EU:C:2002:231; Opinion 1/09, *Community Patents Court*.

7. Joined Cases C-402 & C-415/05 P, *Yassin Abdullah Kadi, and Al Barakaat International Foundation v. Council*, EU:C:2008:461.

8. Opinion 2/13, *ECHR*, EU:C:2014:2454; and on the Community accession to the ECHR, see Opinion 2/94, *ECHR (I)*.

2. Setting the scene on the notion of autonomy as the safeguard of the “essential elements” and “very concepts” of the then Community’s legal order: Opinion 1/76

Opinion 1/76, to the knowledge of the author, is the first ruling where the ECJ referred to autonomy to conclude that an international agreement was not compatible with the then EEC Treaty.⁹ The treaty under consideration in Opinion 1/76 was the draft agreement establishing a European Laying-Up Fund for Inland Waterway Vessels, amongst the European Communities, six of its Member States, and Switzerland.¹⁰ The fund was meant to be composed of a Supervisory Board, a Board of Management, and a special Tribunal. Before the ECJ, there were three key issues: the legal basis for the conclusion of the agreement by the Community and the reasons for the participation of some Member States; the participation of the Community institutions in the organs to be set up under the draft agreement; and the power and composition of the Tribunal *vis-à-vis* the ECJ. For the purpose of the present analysis, the second one is relevant.

On the participation of the Commission, the Court held that the provisions of the draft agreement “call[ed] in question the power of the institutions of the Community and, moreover, alter[ed] in a manner inconsistent with the Treaty the relationships between Member States within the context of the Community”.¹¹ Two factors were particularly critical: the substitution, in the organs of the fund, of “several” Member States in place of the Community and its institutions in a field falling under a common policy; the alteration, as a result of this substitution, of the relationship between the Member States, contrary to the requirement that Community objectives must be pursued

9. For comments on Opinion 1/76, *Laying-Up Fund*, see Bour, “L’avis rendu par la Cour de Justice des Communautés Européennes sur l’Accord relatif à l’institution d’un Fonds européen d’immobilisation de la navigation intérieure (1/76) d’un point de vue rhénan”, (1992) *European Transport Law*, 746–758; Radicati Di Brozolo, “La funzione consultiva della Corte comunitaria in materia di relazioni esterne”, (1979) *Rivista di diritto internazionale*, 116–124; Philip, “A propos de l’avis 1/76 de la Cour de justice des Communautés européennes: Réflexions concernant le champ de la compétence externe de la Communauté”, (1978) *Revue du Marché Commun*, 55–62; Weis, “Le rapport entre l’accord relatif à l’institution d’un fonds européen d’immobilisation de la navigation intérieure et la Convention révisée pour la navigation du Rhin du 17 octobre 1868”, 20 *German Yearbook of International Law* (1977), 306–336; Hardy, “Opinion 1/76 of the Court of Justice: The Rhine Case and the Treaty-making powers of the Community”, 14 *CML Rev.* (1977), 561–600.

10. Its aim was to establish an international organization whose purpose was to provide shippers using the Rhine basin with financial compensation for withdrawing their vessels from the market so as to improve the inland waterway at times of overcapacity.

11. Opinion 1/76, para 10.

through “common action” by its institutions.¹² The ECJ concluded that the draft agreement under consideration, “constitutes both a surrender of *the independence of action of the Community* [‘l’autonomie d’action de la Communauté’ in the French version] in its external relations and a change in the *internal constitution of the Community* by the alteration of *essential elements of the Community structure* as regards both the prerogatives of the institutions and the position of the Member States vis-à-vis one another”.¹³ In sum, the draft agreement in point produced results that “are incompatible with the requirements implied by the *very concepts of the Community* [‘les notions mêmes de Communauté’, in the French version] and its common policy”.¹⁴ The Court further observed that “the structure thereby given to the Supervisory Board and the arrangement of the decision-making procedure within that organ are not compatible with the requirements of *unity and solidarity*”.¹⁵

Opinion 1/76 is not only relevant for its outcome but, most importantly for the purpose of our analysis, it is an exemplificative case for the understanding of autonomy. In this ruling, it is, in fact, possible to identify some features that will characterize the subsequent case law on the “external” dimension of autonomy: the ECJ declared the proposed draft agreement incompatible with the EC Treaty in order to protect the autonomy of the then Community and referred to the “essential elements of the Community structure” as well as to the requirements of its “unity” and “solidarity”. What the notion of autonomy aimed at safeguarding was not the role of the Commission as such, but rather the “essential” elements of the *structural* dimension of the EU legal order. Independence of action of the Union *vis-à-vis* its Member States, and unity and solidarity of the Union could only be achieved through the “common action” of its institution whose independence may not be compromised.¹⁶ In this sense, the role of the Commission was instrumental to that purpose. In other words, the fact that there exists a common policy requires that the EU institution is able to act so as to also guarantee the indispensable aspects of the Union.¹⁷

12. *Ibid.*, para 11. By “common action” the Court meant “Community action”, not merely “coordinated” or “agreed” action.

13. *Ibid.*, para 12 (emphasis added).

14. *Ibid.*, para 8 (emphasis added).

15. *Ibid.*, para 12 (emphasis added).

16. On the relationship between autonomy and unity of the EU legal order, see in particular Jääskinen, “The exclusive jurisdiction of the ECJ and the unity of the EU legal order”, in Cremona, Thies, Wessel (Eds.), *The European Union and International Dispute Settlement* (Hart Publishing, 2017).

17. For a different reading of Opinion 1/76, see Azoulai, “The many visions of Europe: Insights from the reasoning of the European Court of Justice in external relations law”, in Cremona and Thies (Eds.), *The European Court of Justice and External Relations Law*.

Whereas Opinion 1/76 is the earliest ruling on “external” autonomy, the use of these terms, in reality, was not new in the ECJ’s case law. The Court, in fact, had already referred to these expressions in its early and very well-known case law on the “internal” dimension of autonomy, namely the seminal cases of *Van Gend & Loos* and *Costa v. ENEL*,¹⁸ where it defined the relationship between the EU and its Member States through the principles of direct effect and supremacy.¹⁹ The notions of unity and solidarity, which were not new either as these were already introduced in *ERTA* in 1971 and, at greater length, in Opinion 1/75,²⁰ are part of the EU structural principles. Cremona defines them as “the principles which have been drawn from the Treaties and elaborated by the Court to establish this institutional space [within which policy may be formed, in which the different actors understand and work within their respective roles]”.²¹ Cremona further distinguishes the EU structural principles, in “relational” principles – that “govern the relationships between actors or legal subjects (not norms)”, such as, Member State-Member State, Member State-institutions, inter-institutional relations, and EU institutions-individuals/third countries/international organizations – and “systemic” principles, that are “concerned with the operation of the system as

Constitutional Challenges (Hart Publishing, 2014), pp. 170–172 and 180. The author, after recalling that the concept of autonomy in its internal sphere “is generally understood as meaning that the EC/EU law locates its sources of validity within itself and is endowed with its own force”, outlines that “autonomy, in the external context, means something rather more basic. It simply refers to independence of action, not a new concept in the Court’s jurisprudence”. The author further distinguishes between independence of action, meaning that the Union is a distinct external actor with its own capacity to act, and the institutional relations between the EU actors, such as the relations between the Union and the Member States, the mutual relations between the Member States, and the relations between the Court and the EU Member States domestic courts, that autonomy aims at safeguarding.

18. Case 26/62, *Van Gen den Loos*, EU:C:1963:1; Case 6/64, *Costa v. Enel*, EU:C:1964:66.

19. Drawing the difference between the “internal” and “external” dimension of autonomy goes beyond the purpose of this contribution. On the former, see e.g. Ruiz, Sinclair and Rosen (Eds.), *Revisiting Van Gend en Loos* (Société de législation comparée, 2014); Tizzano, Kokott and Prechal (Eds.), *50th anniversary of the judgment in Van Gend en Loos, 1963–2013, Actes du Colloque, Luxembourg, 13 mai 2013* (Office des publications de l’Union européenne, 2013); Micklitz, *The European Court of Justice and the Autonomy of the Member States* (Intersentia, 2012); Barents, *The Autonomy of Community Law* (Kluwer, 2004); De Witte, “Direct effect, supremacy and the nature of the legal order”, in Craig and de Búrca (Eds.), *The Evolution of EU Law* (OUP, 1999), pp. 177–213; and the debate between Schilling, “The autonomy of the Community legal order”, (1996) *Harv. Int’l L.J.*, 389–409 and Weiler and Haltern, “The autonomy of the Community legal order: Through the looking glass”, (1996) *Harv. Int’l L.J.*, 411–448.

20. Case 22/70, *Commission v. Council (ERTA)*, EU:C:1971:32; Opinion 1/75, EU:C:1975:145.

21. Cremona, “Structural principles and their role in EU external relations law”, Cremona (Ed.), *Structural Principles in EU External Relations Law* (Hart Publishing, forthcoming).

a whole, with building the EU's identity as a coherent, effective and autonomous actor in the world".²²

3. The relationship between the EU judicial system and international dispute settlement mechanisms through the lens of autonomy

3.1. *The protection of the ECJ's prerogatives as the "very foundations" of the then Community's legal order: Opinions 1/91 and 1/92*

Whereas in Opinion 1/76 the Court only partly touched upon its potential relationship with the envisaged Tribunal,²³ its prerogatives *vis-à-vis* the courts proposed under the draft agreements of the European Economic Area (hereafter "EEA") were the key issue of Opinions 1/91 and 1/92.²⁴ Both rulings concerned the establishment of a dynamic and homogenous European Economic Area between, on the one side, the States members of the European Free Trade Association (hereafter "EFTA"),²⁵ and on the other, the then European Community and its Member States. The purpose of the EEA Agreement was to extend to the EEA the rules on the EC internal market, laid down under the EEC Treaties, and future Community law in the fields covered by the Agreement. In particular, the aim of homogeneity in the interpretation and application of the law in the EEA would have implied the use of provisions which are textually identical to the corresponding provisions of Community law and the establishment of a judicial system.

22. Ibid.

23. The Fund Tribunal was to be composed of 7 members, one judge being appointed by Switzerland and the other 6 by "all the other Contracting Parties". These 6 judges would have been nominated by the ECJ itself from amongst its members. The ECJ ruled against such an arrangement concluding that "the Fund Tribunal could only be established . . . on condition that judges belonging to the Court of Justice were not called upon to serve on it", (Opinion 1/76, para 22). The ECJ raised concerns, in particular, on the impartiality of those 6 members of Court required to sit on the Fund Tribunal, as they "might be prejudicing their position as regards questions which might come before the Court of Justice of the Community after being brought before the Fund Tribunal and vice versa. The arrangement suggested might conflict with the obligation on the judges to give a completely impartial ruling on contentious questions when they come before the Court" (Opinion 1/76, para 22). See Opinion 1/76, paras. 17–22, specifically paras. 19–20.

24. For comments on Opinions 1/91 and 1/92, see Brandtner, "The 'drama' of the EEA: Comments on Opinions 1/91 and 1/92", 3 EJIL (1992), 300–328; Schermers, annotation of Opinion 1/91 and Opinion 1/92, 29 CML Rev. (1992), 991–1009; Barents, "The Court of Justice and the EEA Agreement", (1992) *Rivista di diritto europeo*, 751–767.

25. The current EFTA States are Iceland, Liechtenstein, Norway and Switzerland. Switzerland is not a party to the EEA Agreement.

In Opinion 1/91, the Court identified three aspects of the proposed judicial system, composed of an EEA Court and an EEA Court of First Instance, that were not compatible with the EEC Treaty.²⁶ First of all, the EEA Court would have the jurisdiction to interpret the expression “Contracting Party” under the EEA Agreement, which could refer to the Community, or the Member States, or the Community and the Member States. According to the ECJ, the fact that the EEA Court would have to rule on the respective competences of the Community and the Member States “[was] likely adversely to affect the allocation of responsibilities defined in the Treaties and, hence, the *autonomy of the Community legal order*, respect for which must be assured by the Court of Justice pursuant to Article 164 of the EEC Treaty.²⁷ This exclusive jurisdiction of the Court of Justice is confirmed by Article 219 of the EEC Treaty (current Article 344 TFEU)”.²⁸ Secondly, the EEA Court would have been under the obligation to interpret the provisions of the agreement in light of the case law of the ECJ delivered prior to the date of signature of the agreement, while it would no longer have such a duty for decisions subsequent to that. The ECJ noted that the EEA Court, in pursuing the agreement’s objective of ensuring homogeneity, would have determined not only the interpretation of the rules of the agreement but also those of Community law. The ECJ concluded that “it follows that in so far as it conditions the future interpretation of the Community rules on free movement and competition the machinery of courts provided for in the agreement conflicts with Article 164 of the EEC Treaty and, more generally, with the *very foundations of the Community*”.²⁹

Thirdly, the EEA Agreement foresaw that an EFTA State court or tribunal could, if it considered that necessary, ask the ECJ to rule on the interpretation of provisions of the agreement that were identical to those of the Community Treaties. While the Court held that the EEC Treaty did not prevent an international agreement from conferring on the ECJ jurisdiction to interpret the provisions of such an agreement for the purposes of its application in non-member countries, it deemed “unacceptable” that its answers were “to be

26. The ECJ further noted that the threat to the Community was not reduced by the arrangements relating to the composition of the EEA Court, which was to be composed of judges of the ECJ. On the contrary, according to the ECJ, in light of the difference between the EEA and the EEC Treaty, “it will be very difficult, if not impossible, for those judges [who are members of the EEA Court], when sitting in the Court of Justice, to tackle questions with completely open minds where they have taken part in determining those questions as members of the EEA Court” (Opinion 1/91, paras. 47 and 51–52).

27. Art. 164 EEC (French version): “La Cour de Justice assure le respect du droit dans l’interprétation et l’application du présent Traité”.

28. Opinion 1/91, para 35. On Art. 344 TFEU, see *infra* section 3.3.

29. *Ibid.*, para 46.

purely advisory and without any binding effects”.³⁰ This was so since “such a situation would change the nature of the function of the Court of Justice as it is conceived by the EEC Treaty, namely that of a court whose judgments are binding. Even in the very specific case of Article 228, the Opinion given by the Court of Justice has the binding effect stipulated in that article”.³¹

As is well known, the EEA Agreement was amended so as to take account of the ECJ’s findings in Opinion 1/91.³² The compatibility of the new agreement with the EEC Treaties was assessed in Opinion 1/92, where the Court concluded that the previous incompatibilities had been removed. In fact, the proposed EEA Court was substituted by an EFTA Court, that is, a jurisdiction to be established under a separate agreement to be concluded only amongst the EFTA States. Its competence is limited to those States and it does not have personal or functional links with the Court of Justice.³³ An interpretation that the ECJ may be asked to deliver by an EFTA State court and by the Contracting Parties in the course of dispute settlement procedure is binding, and no longer purely advisory. The Court, moreover, specified that the powers conferred on the Joint Committee to settle any dispute brought before it by the Community or an EFTA State on the interpretation or application of the agreement “do not call in question the binding nature of the Court’s case law or the autonomy of the Community legal order”.³⁴ As for the objective of preserving the homogenous interpretation of the agreement, in particular, the Joint Committee was to keep under constant review the development of the case law of the ECJ and of the EFTA Court. Finally, the ECJ was no longer required to pay due account to decisions of other courts.

Interestingly, when commenting on Opinion 1/91, Brandtner noted that “the Court could have discovered, in Article 164 EEC³⁵ a ‘higher’ norm of Community law, part of the Community’s very foundations”.³⁶ In light of the limited case law available, the author rightly kept the question open, stating that “the accuracy of this reading and its consequences must be left to further judicial developments”.³⁷ On the whole, it is uncontroversial that these two Opinions are strongly protective of the ECJ’s competences, and are only the start of a series of rulings where the Court prevented any possible future

30. Ibid., para 46 (emphasis added).

31. Ibid., para 61.

32. Ibid., para 17.

33. Ibid., para 13.

34. Ibid., para 29.

35. See *supra* note 27.

36. Brandtner, op. cit. *supra* note 24. Brandtner further observed that “In some of these fields, ‘higher’ levels of primary Community law may be evolving, possibly laying the bases for a future *verfassungsrechtliche Grundordnung*”, at 329.

37. Ibid., p. 315.

conflict with competing international courts and tribunals. This attitude of the ECJ towards international jurisdictions is behind De Witte's legitimate question on "whether the Court might have been acting 'selfishly'".³⁸ The relevance of these two Opinions, however, should not *only* be limited to their *practical* implications for the relationship between the ECJ and other international courts or tribunals. Indeed, the ECJ's notion of autonomy contributes to better understanding some features of primary EU law. Autonomy appears to protect not, as a whole, the structural framework of the Union's legal order as conceived in the EU Treaties, but rather certain of its elements. By applying the notion of autonomy, the Court is able to act as a gatekeeper with regard to "external" influences balancing, on a case-by-case basis, the principle that EU international agreements must comply with the EU treaties (Art. 218(11) TFEU) with the fact that the Union enters into agreements which require changes to EU law (Art. 216(2) TFEU).

3.2. *ECJ's lessons learnt: Opinion 1/00*

In 2002 the ECJ delivered Opinion 1/00, as yet the only case amongst those on the external dimension of autonomy where a draft agreement was declared compatible with the EU Treaties without modifications being necessary.³⁹ It seems, in fact, that the negotiator of the draft agreement in question was able to properly follow the lessons on autonomy that the Court taught in its previous case law.

Opinion 1/00 concerned the draft agreement on a European Common Aviation Area (hereafter "ECAA Agreement") which, like the EEA Agreement, is one of those treaties whose purpose is to extend part of the *acquis communautaire* to third States.⁴⁰ In Opinion 1/00, the Court was called upon to establish whether the ECAA Agreement, particularly its system of legal supervision, was compatible with the EC Treaty. The ECAA, in reality, is the only agreement amongst those assessed within the ECJ's Opinions that

38. De Witte, "A selfish Court? The Court of Justice and the design of International Dispute Settlement beyond the European Union", in Cremona and Thies, *op. cit. supra* note 17, pp. 33–46, p. 34. On the relationship between the ECJ and international jurisdictions, see generally Bronckers, "The relationship of the EC Courts with other international tribunals: Non-committal, respectful or submissive?", 44 CML Rev. (2007), 601–627.

39. On Opinion 1/00, see, in particular, Piazza, "Il parere della Corte di giustizia sull'istituzione di uno spazio aereo comune europeo", (2004) *Dir. Un. Eur.*, 445–454; Castillo de la Torre, annotation of Opinion 1/00, 39 CML Rev. (2002), 1373–1393.

40. More specifically, the purpose of the ECAA agreement is "the creation of a European Common Aviation Area . . . based on free market access, freedom of establishment, equal conditions of competition and common rules – including in the safety and environment areas", Art. 1 ECAA; its Contracting Parties are the then European Community, its then Associate Countries, Norway and Iceland.

does not foresee the establishment of an international court or tribunal or accession to one. Rather, it assigned the competence to solve disputes and ensure uniform interpretation of the agreement to the Joint Committee, a body composed of representatives of the Contracting Parties.

The Court concluded that “although the proposed ECAA Agreement affects the powers of the Community institutions, it does not alter the *essential character of those powers* and, accordingly, does not undermine the *autonomy of the Community legal order*”.⁴¹ This is so for the mechanisms ensuring uniform interpretation of the rules of the ECAA Agreement as well as for those that resolve disputes. As for the division of competences between the Community and the Member States, since the ECAA Agreement, unlike the EEA draft agreement in Opinion 1/91, was not a mixed agreement the issue of potentially affecting their allocation of powers did not arise.⁴² The essential character of the ECJ’s power was safeguarded as the ECAA Joint Committee’s decisions are to be in conformity with the ECJ case law;⁴³ and in case of preliminary rulings requested from the ECJ by the Joint Committee or the national courts of the Contracting Parties,⁴⁴ the Court’s decisions are binding.⁴⁵

As for uniform interpretation, the provisions of the EC Treaty continue to be “interpreted autonomously”⁴⁶ and therefore, potential divergences in interpretation of the rules of the ECAA Agreement between the Community and the States Parties would not have any impact on the Community legal order.⁴⁷

Opinion 1/00 certainly has the merit of shedding light on what autonomy, as applied *so far* by the ECJ, concretely requires in order for an international agreement to be compatible with the EU judicial system.⁴⁸ Nevertheless, the international agreements under consideration in these cases – the EEA and

41. Opinion 1/00, para 21 (emphasis added).

42. *Ibid.*, paras. 15–17.

43. *Ibid.*, paras. 34–40.

44. Art. 23(2) ECAA and Protocol IV; Art. 27(3) ECAA.

45. Opinion 1/00, paras. 23–26 and 30–33.

46. *Ibid.*, para 41.

47. *Ibid.*, paras. 41–44.

48. As summarized by Castillo de la Torre, *op. cit. supra* note 36, at 1377: “For the [ECJ] the preservation of the autonomy of the Community legal order requires two things: (a) that the *essential character of the powers of the Community and its institutions* as conceived in the Treaty remain unaltered; (b) that the procedures for ensuring the uniform interpretation of the rules of the ECAA Agreement and for resolving disputes will *not* have the effect of *binding the Community and its institutions*, in the exercise of their internal powers, *to a particular interpretation* of the rules of Community law referred to in that agreement” (emphasis added).

ECAA Agreements – belong to a specific category of treaties: that is, agreements whose specific purpose is to extend the EU *acquis communautaire* to third parties and, consequently, the uniform interpretation of the rules of the ECAA Agreement is ensured by foreseeing specific provisions. As for the application of autonomy to other international agreements, the question remains still open as to “where to draw the line between minor adaptations and essential changes, and consequently, where to set the limits of the penetration of international law into ‘domestic’ Community law”.⁴⁹ Autonomy, in fact, in its nebulous formulation, cannot be stretched indefinitely; its requirements should rather be set clearly.

From an “internal” Union perspective, the notion of autonomy, as mentioned, seems to entail important implications for a better understanding of the EU Treaties as the Union constitution. Like Brandtner, commenting on Opinions 1/91 and 1/92, and noting that “the Court could have discovered, in Article 164 EEC a ‘higher’ norm of Community law, part of the Community’s very foundations”, Castillo de la Torre, in his analysis of Opinion 1/00, observed that “the definition of such ‘foundations’ has another legal dimension, probably more important in the long term, which is the definition of ‘supra constitutionality’, a hierarchy among the rules of primary law”.⁵⁰ In the academic debate, in sum, the perception is progressively emerging that a hierarchy may exist amongst primary EU law rules.

3.3. *Re-asserting the exclusive jurisdiction of the EU judicial system in the interpretation and application of EU law: MOX Plant and Opinion 1/09*

A few years after Opinion 1/00 was delivered, the debate on autonomy re-emerged in the *MOX Plant* case, which unlike the above-mentioned decisions, arose from infringement proceedings brought by the Commission against a Member State. This is, as mentioned above, one of the relevant ECJ judgments on “external” autonomy together with *Kadi*. This time, the question was whether the ECJ had exclusive jurisdiction to interpret and apply EU law in a dispute involving the Union’s Member States, and if so, whether proceedings before another international tribunal undermined the autonomy of the EU legal order in this respect.

49. Ibid., 1380.

50. Ibid., 1381. The author rightly observes that “in EC law not all conflicts between norms are contrary to the system because some derive from the inherent openness of the Community legal system. Some will be more important than others”, 1380.

*MOX Plant*⁵¹ originated in a dispute between Ireland and the UK over the operation of a Mixed Oxide (MOX) Plant in Sellafield, in the North West of England, on the coast of the Irish Sea. Before an arbitral tribunal established under the UNCLOS (hereafter “UNCLOS Arbitral Tribunal”), Ireland claimed that the UK had violated some UNCLOS provisions. In the *MOX Plant* case before the ECJ, the issue at stake was whether Ireland, by instituting proceedings against the UK under UNCLOS, failed to fulfil its obligations under the EU Treaties.⁵² The Court, after ruling that the matters covered by the UNCLOS provisions before the arbitral tribunal are “very largely regulated by Community measures”,⁵³ held that Article 344 TFEU confirms its exclusive jurisdiction⁵⁴ since it provides that “Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein”. Moreover, the fact that the Member States presented Community measures “not only as relevant for the purpose of clarifying the meaning of the general provisions of the Convention in issue in the dispute but also as rules of international law to be applied by the Arbitral Tribunal⁵⁵ . . . involve[d] a manifest risk that the jurisdictional order laid down in the Treaties and, consequently, the *autonomy of the Community legal system* may be adversely affected”.⁵⁶

The *MOX Plant* case, raising a new question as compared with the previous case law, allows an understanding of the EU judicial system’s autonomy beyond the specific cases of agreements replicating primary EU law. In fact, whereas Opinions 1/91, 1/92 and 1/00 seemed to bind the risk of undermining autonomy to those cases where there is an overlapping between international treaty provisions and EU Treaties, in the *MOX Plant* case the notion is extended to secondary EU law. That means that should any EU law norm be the applicable law before an international jurisdiction in charge of solving a dispute between EU Member States, EU autonomy is undermined. In the

51. For comments, see Schrijver, annotation of Case C-459/03, *Commission v. Ireland (MOX Plant)*, 47 CML Rev. (2010), 863–878; Lavranos, “Protecting its exclusive jurisdiction: the *MOX Plant* Judgment of the ECJ”, 5 *The Law and Practice of International Courts and Tribunals* (2006), 479–493.

52. The *MOX Plant* case was brought before different jurisdictions, precisely, the OSPAR Arbitral Tribunal, ITLOS, UNCLOS Arbitral Tribunal, and the ECJ. On the *MOX Plant* saga, see for all Churchill, “*MOX Plant* arbitration and cases”, *Max Planck Encyclopedia of Public International Law* (OUP, 2007).

53. Case C-459/03, *Commission v. Ireland (MOX Plant)*, EU:C:2006:345, para 110.

54. *Ibid.*, para 123.

55. *Ibid.*, para 149.

56. *Ibid.*, para 154 (emphasis added). A.G. Maduro, in his Opinion in *MOX Plant*, (EU:C:2006:42) did not refer to any expressions that usually accompany the assessment on autonomy, such as “very foundations”, and he only mentioned autonomy to recall that “the Court’s exclusive jurisdiction in disputes between Member States concerning Community law is a means of preserving the autonomy of the Community legal order”, para 10.

academic debate on *MOX Plant*, it was observed that the notion of autonomy seems broader than the Court's previous decisions, as it extends from primary to secondary EU law.⁵⁷ In reality, what is to be emphasized is that the underlying rationale of the ECJ's reasoning did not change: the Court's main concern is to ensure *consistency* and *uniformity* of Community law – both primary and secondary – in all EU Member States,⁵⁸ as an inevitable result it also protects its own prerogatives.

The risk of the autonomy of the EU legal order being undermined where EU law is (or could be) the applicable law before an international jurisdiction also emerged in Opinion 1/09. This Opinion concerned the draft agreement to establish a European and Community Patents Court (hereafter "ECPC"), whose envisaged Contracting Parties were the Member States, the European Union and third countries which are parties to the European Patent Convention.⁵⁹ The proposed draft agreement would have had a drastic impact on the judicial system as far as Community Patents law is concerned. In fact, "Community law on the Community Patent and national law of the contracting states implementing Community law" were amongst the applicable laws of the ECPC.⁶⁰ The role of the national courts, differently, was

57. See van Rossem, "Pushing limits: The principle of autonomy in the external relations case law of the European Court of Justice", in Happold, Andenas, Pantaleo and Contartese (Eds.), *The European Union as an Actor in International Economic Law* (Asser Press/Springer, forthcoming); and Chamon, "Judicial politics under Article 344 TFEU and what it could mean for judicial dialogue", *Geneva Jean Monnet Working Paper* 17/2016, 1–26, pp. 11–12, available at <www.ceje.ch/fr/recherche/jean-monnet-working-papers/working-papers-2016/judicial-politics-under-article-344-tfeu-and-what-it-could-mean-judicial-dialogue/>.

58. Lavranos, "The *MOX Plant* and *Ijzeren Rijn* disputes: Which court is the supreme arbiter?", 19 LJIL (2006), 234–235.

59. On Opinion 1/09, see in particular, Alberti, "Il parere della Corte di giustizia sul Tribunale dei brevetti europeo e comunitario", (2012) *Dir. Un. Eur.*, 367–396; Baratta, "National courts as 'guardians' and 'ordinary courts' of EU law: Opinion 1/09 of the ECJ", 38 LIEI (2011), 297–320; Rosas, "The National judge as EU judge: Opinion 1/09", in Cardonnel, Rosas, Wahl (Eds.), *Constitutionalising the EU Judicial System. Essays in Honour of Pernilla Lindh* (Hart Publishing, 2012), pp. 105–121; Lock, "Taking national courts more seriously? Comment on Opinion 1/09", 36 *EL Rev.* 2011, 576–588; Adam, "Le mécanisme préjudiciel, limite fonctionnelle à la compétence externe de l'Union. Note sur l'avis 1/09 de la Cour de justice", CDE (2011), 277–303; Baudenbacher, "The EFTA Court remains the only Non-EU-Member States Court: Observation on Opinion 1/09 (Opinion delivered pursuant to Article 218(11) TFEU on the Agreement on the European and Community Patents Court, ECJ (Full Court), Opinion of 8 Mar. 2011, Avis 1/09)", 7/8 *European Law Reporter* (2011), 236–242; Koutrakos, "The European Court of Justice as the guardian of national courts – or not?", 36 *EL Rev.* (2011), 319–320; Poore, "The European Union patent system: Off course or on the rocks?", 33 *European Intellectual Property Review* (2011), 409–412.

60. Art. 14(a) of the draft agreement.

limited to actions which did not come within the exclusive jurisdiction of the ECPC.⁶¹

This case, in short, needs to be distinguished from *MOX Plant* as well as from the previous Opinions on the compatibility of the EEA and ECAA Agreements with the EU Treaties even if in all these cases a non-EU body could apply, directly or indirectly, EU law. Whereas in *MOX Plant* the ECJ relied on Article 344 TFEU, in Opinion 1/09 that provision did not apply since the disputes would have involved individuals and did not concern EU Member States.⁶² Unlike Opinions 1/91, 1/92 and 1/00, the draft agreement at issue did not aim at extending the *acquis communautaire* to third parties, but at establishing an international court with exclusive jurisdiction on Community patent law. As Rosas put it, Opinion 1/09 raised a *new* question, which was: “could the EU and its Member States in this way ‘delegate’ or ‘outsource’ judicial functions to an international organization which otherwise would have been dealt with by the Courts of the Member States, or possibly by a new Union court set up under the provisions of the Treaties?”⁶³

In Opinion 1/09, the Court, just as it did previously, strongly protected the EU judicial system. This time, however, the emphasis was on the role of the EU Member States’ domestic courts in the Union legal order and on their relationship with the ECJ. More specifically, the ECJ underlined that the task of *both* national courts and the Court of Justice is to ensure that “in the interpretation and application of the Treaties the law is observed”,⁶⁴ as well as to “ensure judicial protection of an individual’s rights under that law”.⁶⁵ Furthermore, it outlined that, within the EU judicial system, the preliminary ruling procedure under Article 267 TFEU plays a fundamental role as it “establishes between the Court of Justice and the national courts *direct cooperation* as part of which the latter are *closely involved* in the *correct application and uniform interpretation of European Union law* and also in the protection of individual rights conferred by that legal order”.⁶⁶ The features of the ECJ together with the EU domestic courts make the EU judiciary, as a whole, a complete system of legal remedies and procedures. Importantly, that a Member State is obliged to make good damage caused to individuals as a

61. Art. 15 of the draft agreement.

62. As for the application of Art. 344 TFEU, the ECJ clarified that whereas the Draft agreement grants to the PC competence only to *disputes between individuals* in the field of patents, “that article merely *prohibits Member States* from submitting a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties” (Opinion 1/09, para 63) (emphasis added).

63. Rosas, op. cit. *supra* note 59, p. 109.

64. Opinion 1/09, para 69.

65. *Ibid.*, paras. 68–69.

66. *Ibid.*, para 84 (emphasis added).

result of breaches of EU law by a domestic court and that a case can be brought before the ECJ where EU law is infringed by a national court are amongst the judicial guarantees that are part of the EU legal system.⁶⁷

As a consequence, according to the ECJ, the fact that the ECPC would deprive EU Member States' national courts of their competence to interpret and apply EU law, and it would become "the sole court able to communicate" with the ECJ⁶⁸ is not compatible with the EU Treaties. The EU Member States, accordingly, cannot outsource the jurisdiction to resolve patent-related disputes to such an international court.⁶⁹ The conclusion of the ECJ is that the envisaged agreement "would alter *the essential character* of the powers which the Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the *very nature of European Union law*".⁷⁰

Once again, autonomy is applied to protect an aspect of the EU institutional architecture that is identified as "essential" and, accordingly, indispensable for maintaining the "very nature" of EU law.⁷¹ As a consequence of the Court's

67. Ibid., paras. 86–87.

68. Ibid., para 79. Although under the EU treaty, the ECJ, unlike the EU Member States' domestic courts, does not have jurisdiction to rule on direct actions between individuals in the field of patents, the Draft agreement in point foresaw a preliminary reference mechanism from the ECPC to the ECJ. According to the Court, however, such a mechanism is not sufficient to remedy the shortcoming of the proposed judicial system. For an analysis of the EU international agreements that foresee a referral procedure from international courts and tribunals to the ECJ, see Contartese, "The procedures of prior involvement and referral to the ECJ as means for judicial dialogue between the Luxembourg Court and international jurisdictions", *Geneva Jean Monnet Working Papers*, 27/2016, 1–30, available at <www.ceje.ch/fr/recherche/jean-monnet-working-papers/working-papers-2016/>.

69. Ibid., para 80.

70. Ibid., para 89 (emphasis added). For the use of these expressions, see also para 85: "It follows from all of the foregoing that the tasks attributed to the national courts and to the Court of Justice respectively are *indispensable* to the preservation of the *very nature* of the law established by the Treaties" (emphasis added).

71. For the purpose of the present analysis, it is also important to point out that the Advocates General, in their statement of position to Opinion 1/09, also concluded that the draft agreement was not compatible with the EU Treaties. However, they did so on different grounds from the Court and, most importantly, without referring to autonomy throughout their assessment – except for recalling the protection of the autonomy of the Union's legal system (para 77) – or to expressions such as "very foundations". Their conclusion was that (para 123): "The guarantees contained in the draft agreement with a view to ensuring the full application and observance of the pre-eminence of Union law by the PC are insufficient (see points 78 to 93 of this position). The remedies available in the event of the PC's infringement of Union law and in the event of non-observance of its obligation to effect a preliminary reference pursuant to Article 48(1) of the draft agreement are insufficient (see points 104 to 115 of this position). The linguistic system faced by the central division of the PC may affect the rights of defence (see points 121 and 122 of this position). The draft agreement, read in the light of all the measures contemplated concerning patents, does not satisfy the requirement of ensuring effective judicial

finding, a new agreement was negotiated leading to the establishment of a Unified Patents Court, in 2013, whose Contracting Parties are exclusively EU Member States.⁷²

4. The “very foundations” of the EU legal order in *Kadi I*

The *Kadi* saga is very well known and hardly needs introduction. The matter at stake was whether or not an EU Regulation implementing a UN Security Council Resolution on individuals suspected of international terrorism enjoyed immunity from the ECJ’s jurisdiction. The cases, inevitably, raised key issues on the relationship between the EU and the UN as well as between the fight against international terrorism and fundamental rights protection.⁷³ For the purpose of the analysis, it is relevant to emphasize that in *Kadi I*, in

control and a correct and uniform application of Union law in administrative proceedings concerning the granting of Community patents (see points 68 to 75 of this position)”. For a comment on the Statement of Position by the Advocates General, see Tilmann, “Comments on the Statement of Position by the Advocates General regarding requested Opinion 1/09 of the Council on the European Patent and Community Patent Court”, *Festschrift 50 Jahre Bundespatentgericht* (Ed. Carl Heymanns Verlag, 2011), pp. 931–943; Bonadio, “ECJ Advocate General rejects EU patent litigation scheme”, 5 *Journal of Intellectual Property Law & Practice* (2012), 826–827.

72. Although the new Treaty, following the example of the Benelux Court, defines the Unified Patents Court as “a court common to the Contracting Member States and . . . part of their judicial system, . . . as any national court” (Art. 21), it is still questionable whether it correctly falls under the requirements of Art. 267 TFEU. The compatibility of the Unified Patent Court with the EU Treaties was challenged by Spain, in Case C-146/13, *Spain v. Parliament and Council*, EU:C:2015:298, where it requested the annulment of Regulation (EU) 1257/2012 of the European Parliament and of the Council implementing enhanced cooperation in the area of the creation of unitary patent protection, O.J. 2012, L 361/1. Spain specifically contended that the Agreement on a Unified Patent Court undermined the autonomy of the EU legal order, as there would not be substantial differences between the Unified Patent Court and the Patent Court arguing that: “First, the Unified Patent Court does not form part of the institutional and judicial system of the European Union. Secondly, the UPC Agreement does not lay down any guarantees for the preservation of EU law”, paras. 89–90. The ECJ rejected this part of the plea as inadmissible recalling that “in an action brought under Art. 263 TFEU, the Court does not have jurisdiction to rule on the lawfulness of an international agreement concluded by Member States”, para 101. For a critical analysis of the Unified Patent Court, see Alberti, “When judicial dialogue needs strong institutional commitments: The peculiar case of the creation of the Unified Patent Court”, *Geneva Jean Monnet Working Paper*, 15/2016, 1–34, available at <www.ceje.ch/fr/recherche/jean-monnet-working-papers/working-papers-2016/when-judicial-dialogue-needs-strong-institutional-commitments-peculiar-case-creation-unified-patent-court/>.

73. The term “*Kadi I*” here refers to Joined Cases C-402 & 415/05 P, *Kadi and Al Barakaat v. Council and Commission*, while “*Kadi II*” is used for Joined Cases C-584, 593 & 595/10 P, *Commission, United Kingdom and Council v. Kadi*, EU:C:2013:518. The judgments of the GC will not be part of the present analysis.

2008, the Court applied the same expression as in the judgments and Opinions mentioned above. It held, indeed, that no challenge is permitted “to the principles that form part of the *very foundations of the Community legal order*”.⁷⁴

It is quite surprising that the literature on the *Kadi* saga, albeit extremely abundant, has paid marginal attention to this expression.⁷⁵ Generally, in the academic debate, the importance of fundamental rights in *Kadi I* is strongly emphasized.⁷⁶ It seems to suggest that, unlike the previous decisions, where “very foundations of the Union legal order” clearly refers to the institutional framework *solely*, in *Kadi I*, a second element has enlarged such a notion.⁷⁷ In other words, this not only contains the Court’s competence in reviewing the lawfulness of EU acts, but also fundamental rights. Is this conclusion correct?

74. Joined Cases C-402 & 415/05 P, *Kadi I*, para 304 (emphasis added).

75. See e.g. De Burca, “The European Court of Justice and the international legal order after *Kadi*”, 51 Harv. Int’l L.J. (2010), 1–49; Gattini, annotation of *Kadi I*, 46 CML Rev (2009) 213–239; Kunoy and Dawes, “Plate tectonics in Luxembourg: The *ménage à trois* between EC law, international law and the European Convention on Human Rights following the UN sanctions cases”, 46 CML Rev. (2009), 73–104; Halberstam and Stein, “The United Nations, the European Union, and the King of Sweden: Economic sanctions and individual rights in a plural world order”, 46 CML Rev. (2009), 13–72; Schrijver and Van den Herik, “Eroding the primacy of the UN system of collective security: The judgment of the European Court of Justice in the case of *Kadi and Al Barakaat*”, 5 *International Organizations Law Review* (2008), 329–338; Cardwell, French and White, “European Court of Justice, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission* (Joined Cases C-402/05 P & C-415/05 P) Judgment of 3 September 2008”, 58 ICLQ (2008), 229–240. See also the collected chapters in Avbelj, Fontanelli, Martinico (Eds.), *Kadi on Trial: A Multifaceted Analysis of the Kadi Trial* (Routledge, 2014); and Cremona, Francioni, and Poli, *Challenging EU counter-terrorism measures through the courts* (EUI working papers, 2009/10).

76. See, in particular, De Sena and Vitucci, “The European Courts and the Security Council: Between Dédoublement Fonctionnel and balancing of values”, 20 EJIL (2009), 193–228, and the debate related to this contribution. A.G. Wathelet, as well, is amongst those who provide an interpretation of *Kadi I* in terms of fundamental rights. In a case concerning the Brussels I Regulation, he held that the regulation in point “[does not form] part of the foundations of the public policy of the European Union comparable to those of which the Court spoke in paragraph 304 of its judgment in *Kadi and Al Barakaat International Foundation v. Council and Commission*”, (Opinion in Case C-536/13, “*Gazprom*” OAO, EU:C:2014:2414, para 181). The A.G. explains that “the Brussels I Regulation, its provisions on the allocation of jurisdiction between the courts of the Member States and its interpretative principles such as mutual trust between the courts of the Member States do not compare with respect for fundamental rights, breach of which would shake the *very foundations* on which the EU legal order rests” (emphasis added).

77. See e.g. Lavranos, “Protecting European law from international law”, 15 EFA Rev. (2010), 265–282, 271, who, relaying on the *Kadi I* wording, concludes that the list of elements of “very foundations . . . is a mixed bag” that encompasses “allocation of powers fixed by the EC Treaties; autonomy of the Community legal system; exclusive jurisdiction of the ECJ conferred on it by Arts. 220, 292 EC (Art. 19 consolidated version TEU, Art. 344 TFEU); judicial review of EC acts in the light of fundamental freedoms; protection of fundamental rights. In addition, the ECJ also referred – apparently as a distinctive group of elements – to the

The fact that the role fundamental rights play within the Union order and the Court's competence are considered together may suggest that the notion of "very foundations" refers to both.⁷⁸ In reality, the issue at stake, despite the emphasis on fundamental rights, remains the jurisdiction of the ECJ and the alleged immunity of the EU measures under consideration from such a review. This emerges in those passages where the Court recalls the notion of "very foundations" referring to the judicial review of the internal lawfulness of the contested regulation,⁷⁹ and to "the protection of fundamental rights, *including the review by the Community judicature* of the lawfulness of Community measures as regards their consistency with those fundamental rights".⁸⁰

In *Kadi I*, one may further observe that the emphasis of the Court on the notion of "very foundations" was certainly excessive, probably even more than was necessary in the context of the judgment. Three times, in fact, the ECJ mentioned the notion of "very foundations" to, in essence, recall its competence to review EU measures in light of fundamental rights.⁸¹ In conclusion, what is at stake is not fundamental rights *as such*, "which are an integral part of the general principles of European Union law",⁸² but rather the *judicial protection* of fundamental rights, that is, the competence of the Court in pursuing that purpose. In sum, although the notion of "very foundations" in *Kadi I* enhances the Court's jurisdiction through the emphasis on the protection of fundamental rights, the ECJ's concern, once again, is the *structural* dimension of the EU legal order, rather than its substantive law. This reading of "very foundations" finds confirmation in the *Kadi II* judgment, where the ECJ, while silent on this notion, observed that no immunity from jurisdiction can be afforded to the contested regulation for various reasons that are "essentially, bound up with the constitutional guarantee which is exercised, in a Union based on the rule of law ..., *by judicial review* of the lawfulness of all European Union measures, including those which, as in the

following principles that are common to the EC/EU Member States (Art. 6 consolidated version TEU): liberty; democracy; respect for human rights and fundamental freedoms; and rule of law".

78. See, in particular, *Kadi I* paras. 281–285 and 303.

79. *Ibid.*, para 290. As was the case for the Advocates' General positions in Opinion 1/09 and Case C-459/03, *MOX Plant*, A.G. Maduro in his Opinion to *Kadi I* referred neither to autonomy – except for recalling "the landmark ruling in *Van Gend en Loos*, in which the Court affirmed the autonomy of the Community legal order", para 21 – nor mentioned the "very foundations" of the EU when assessing whether the contested regulation should have been annulled.

80. I *Kadi I*, *ibid.*, para 304 (emphasis added).

81. See *Ibid.*, paras. 282, 290 and 304.

82. Joined Cases C-584/10 P, C-593/10 P & C-595/10 P, *Kadi II*, para 67.

present case, implement an international law measure, in the light of the fundamental rights guaranteed by the European Union”.⁸³

4.1. *Autonomy and its implication on the relationship between primary EU norms*

In *Kadi I*, the Court also explains that autonomy foresees no derogations as “Article 307 EC [now Art. 351 TFEU] may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order”.⁸⁴ Against this background, what do autonomy and “very foundations” imply, in *Kadi I*, for the relationship between primary EU norms? In this regard, Lavranos pointed out that “there exists something more fundamental than primary EC law.... In other words, the ECJ outlined that there is a ‘core’ of Community law that contains such fundamental values that . . . it is questionable whether the ‘masters of the Treaties’ are not allowed to modify it”.⁸⁵ Eckes who, emphasizing the role of fundamental rights in the ECJ’s above-cited passage, stated that the Court “introduced the ‘foundations of the Community legal order’ expressed in Article 6 TEU as a new layer of law that is hierarchically superior to the rules expressed in the Treaties”.⁸⁶ The author defines it as a form of “super-supreme law”.⁸⁷ Ziegler also observes that the ECJ “seems to hint at a hierarchy within EC primary law [drawing a distinction] between, on the one hand, restrictions of the Common Market in exceptional circumstances which are permitted under Articles 307 and 297 EC ...”; and, on the other, restrictions of EC law which would amount to “any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Articles 6(1) EU as a foundation of the Union”.⁸⁸

Although at first glance, the notion of autonomy may suggest that there exists a “super-category” of primary EU law rules in need of protection, it is, however, to be emphasized that autonomy rather concerns a *particular* category of norms, that is, the EU *structural* principles. For the purpose of our analysis, what emerged in light of the ECJ’s case law is that autonomy aims at protecting those *structural* principles of the EU legal order that are *vital* for the very functioning of the Union as such. Amongst the indispensable aspects to

83. *Ibid.*, para 66 (emphasis added).

84. *Ibid.*, para 304.

85. Lavranos, *op. cit. supra* note 77, at 269.

86. Eckes, “Protecting supremacy from external influences: A precondition for a European constitutional legal order?”, 18 *ELJ* (2012), 230–250, p. 247.

87. *Ibid.*, p. 241.

88. Ziegler, “Strengthening the rule of law, but fragmenting international law: The *Kadi* Decision of the ECJ from the perspective of human rights”, 9 *H.R.L. Rev.* (2009), p. 297.

be safeguarded, there can be listed: uniform and consistent interpretation and application of EU law; the division of competences between the EU and its Member States; unity; solidarity; and the judicial protection of fundamental rights. The “essential character of the powers conferred on the [Union] institutions by the Treaty”⁸⁹ lies, accordingly, in what is needed to protect those indispensable aspects.

5. From the “essential” to the “specific” characteristics of the EU legal order: Opinion 2/13

The most recent statement on the external dimension of autonomy is Opinion 2/13, where the Court, after Opinion 2/94,⁹⁰ once again dealt with EU accession to the ECHR. As is very well known, the EU and the ECHR enjoy a special relationship for historical reasons as well as strong legal ties.⁹¹ The fact that, for the EU, the ECHR is unlike any other international agreement was already emphasized, in 1996, by the ECJ itself in Opinion 2/94, where it held that the European Community had no competence to accede to the Convention and that a Treaty amendment would be necessary. The ECJ specifically pointed out: “Accession to the Convention would . . . entail a

89. Opinion 1/92, paras. 32 and 41; and Opinion 1/00, paras. 20–21.

90. In Opinion 2/94, the ECJ was required to assess whether the accession of the EC to the ECHR was compatible with the EC Treaty, including the judicial system and the autonomy of the Community legal order (para 9). The Court established that the request for an Opinion was admissible only in the part concerning the competence of the Community to conclude the envisaged agreement, while, in the absence of detailed information on the envisaged agreement, it was not in a position to give its opinion on the question of the compatibility of the agreement with the Treaty (paras. 1–22). As is very well known, as for the EC’s competence, the Court concluded that the then Community had no competence to accede (paras. 34–36). For the purpose of the present analysis, it is interesting to note that some legal scholars read Opinion 2/94 as the ECJ’s protection of its own prerogatives. In this respect, see, in particular, Gaja, “Opinion 2/94, accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms”, 33 CML Rev. (1996), 973–989; Rossi, “Il parere 2/94 sull’adesione della CE alla Convenzione europea dei diritti dell’uomo”, (1996) Dir. Un. Eur., 839–861; Wachsmann, “L’avis 2/94 de la Cour de justice relatif à l’adhésion de la Communauté européenne à la Convention de sauvegarde des droits de l’homme et des libertés fondamentales”, RTDE (1996), 467–491.

91. All EU Member States are contracting parties to the ECHR (28 countries out of 47); informal meetings periodically take place between the two European courts; judges in EU Member States as well as the ECJ refer to the ECtHR’s case law for the interpretation of European human rights; and Art. 52(3) of the Charter of Fundamental Rights of the EU (hereafter “EU Charter”) formally enhances this relationship by providing that “in so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention”. See, for all, Lock, *The European Court of Justice and International Courts* (OUP, 2015), 167–217.

substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order”.⁹² Against this background, it comes as no surprise that Opinion 2/13 received much attention in academic debate,⁹³ and the rejection, on ten grounds,⁹⁴ of the long-awaited draft EU accession agreement was highly criticized.

As a starting point of the analysis, it must be underlined that, even if EU accession to the ECHR is an obligation,⁹⁵ the draft agreement had to be specifically assessed in light of the requirements laid down under Article 6(2) TEU and Protocol No. 8 of the EU Treaties. Article 6(2) TEU establishes, in general terms, that accession to the ECHR “shall not affect the Union’s

92. Opinion 2/94, para 35.

93. The literature on Opinion 2/13 is extremely abundant. See e.g. special issue 16/1 *German Law Journal* (2015); the contributions in 51 CDE (2015) by Jacqu , “Pride and/or prejudice? Les lectures possibles de l’avis 2/13 de la Cour de justice”, 19–45; Pernice, “L’adh sion de l’Union europ enne   la Convention europ enne des droits de l’homme est suspendue”, 47–72; Dubout, “Une question de confiance: nature juridique de l’Union europ enne et adh sion   la Convention europ enne des droits de l’homme”, 73–112. Also Lock, “The future of the European Union’s accession to the European Convention on Human Rights after Opinion 2/13: Is it still possible and is it still desirable?”, 11 *EUConst* (2015), 239–273; Vezzani, “L’autonomia dell’ordinamento giuridico dell’Unione europea. Riflessioni all’indomani del Parere 2/13 della Corte di Giustizia”, (2016) *Rivista di diritto internazionale*, 68–116; de Witte and Imamovi , “Opinion 2/13 on accession to the ECHR: Defending the EU legal order against a foreign human rights court”, 40 *EL Rev.* (2015), 683–705; Isiksel, “European exceptionalism and the EU’s accession to the ECHR”, 27 *EJIL* (2016), 565–589; Pirker and Reitemeyer, “Between discursive and exclusive autonomy: Opinion 2/13, the protection of fundamental rights and the autonomy of EU law”, 17 *CYELS* (2015), 168–188.

94. Peers, “The EU’s accession to the ECHR: The dream becomes a nightmare”, 16 *GLJ* (2015), 213–222, at 217, summarizes the 10 required amendments as follows: “(1) Ensuring Art. 53 ECHR does not give authorization for Member States to have higher human rights standards than the EU Charter, where the EU has fully harmonized the law; (2) Specifying that accession cannot impact upon the rule of mutual trust in JHA matters; (3) Ensuring that any use of Protocol 16 ECHR by national courts cannot undermine the EU preliminary ruling system, presumably by ruling out the use of Protocol 16 where EU law issues are involved; (4) Specifying expressly that Member States cannot bring disputes connected with EU law before the ECtHR; (5) Ensuring that, in the co-respondent system, the ECtHR’s assessment of admissibility does not extend to the power to interpret EU law; (6) Guaranteeing that the joint responsibility of the EU and its Member States for ECHR breaches cannot impinge upon Member State reservations to the Convention; (7) Preventing the ECtHR from allocating responsibility for ECHR breaches as between the EU and its Member States; (8) Ensuring that only the EU institutions can rule on whether the ECJ has already dealt with an issue; (9) Providing that the ECJ should be allowed to rule on the interpretation, not just the validity, of EU law, during the ‘prior involvement’ procedure; and (10) Curtailing the role of the ECtHR to rule on EU foreign policy matters”.

95. Art. 6(2) TEU: “The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms”.

competences as defined in the Treaties”. Protocol No. 8 provides that the accession agreement must make provision “for preserving *the specific characteristics of the Union and Union law*”,⁹⁶ regarding, in particular, “(a) the specific arrangements for the Union’s possible participation in the control bodies of the European Convention; (b) the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate”.⁹⁷ It makes further detailed provisions. Amongst the EU law aspects that the agreement may not affect, it lists the competences of the Union, the powers of the institutions, the situation of Member States in relation to the ECHR, and Article 344 TFEU.⁹⁸ The Declaration on Article 6(2) TEU re-affirms that during the accession process the specific features of EU law have to be preserved.⁹⁹

Accordingly, in Opinion 2/13, the Court focused on whether the draft agreement affects *the specific characteristics of the EU and EU law*, rather than its *essential* elements.¹⁰⁰ With regard to the difference between “specific” and “essential”, even if neither Protocol No. 8 nor the ECJ explain what “specific” means, that the two terms are not synonymous is uncontroversial. In light of their literal meaning, one can infer that what is specific is not necessarily also “essential”. Some characteristics of the EU legal order, in other words, may be specific without enjoying the status of “essential”. Conversely, as emerged in the previous sections, the essential characteristics are intertwined with the “very foundations” as their purpose is to safeguard the proper functioning of the EU legal order in terms of unity, uniformity, solidarity and – in *Kadi I* – the judicial protection of fundamental rights.

96. Protocol No. 8, Art. 1 (emphasis added).

97. Ibid.

98. Ibid., Arts 2 and 3.

99. Declaration on Art. 6(2) TEU: “The Conference agrees that the Union’s accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms should be arranged in such a way as to preserve the *specific features of Union law*. In this connection, the Conference notes the existence of a regular dialogue between the Court of Justice of the European Union and the European Court of Human Rights; such dialogue could be reinforced when the Union accedes to that Convention” (emphasis added).

100. Neither the EU Treaties nor Protocol No. 8 expressly mention autonomy. Nevertheless, the Court constantly recalled this notion in the course of its analysis. In particular, its purpose was: “(i) to ascertain whether the agreement envisaged is liable adversely to affect the specific characteristics of EU law just outlined and, as the Commission itself has emphasized, the autonomy of EU law in the interpretation and application of fundamental rights, as recognized by EU law and notably by the Charter, and (ii) to consider whether the institutional and procedural machinery envisaged by that agreement ensures that the conditions in the Treaties for the EU’s accession to the ECHR are complied with” (Opinion 2/13, para 178).

In Opinion 2/13, in identifying the Union's specific characteristics, the Court, in essence, recalled what the EU and EU law are in broad terms. It explained that these characteristics encompass those relating to the constitutional structure of the EU, its institutional framework, the principles of conferral of powers, autonomy and primacy.¹⁰¹ As Jacqu e rightly observed, these elements are all that is normally found in any EU law text book.¹⁰² Nevertheless, for the purpose of our analysis, it needs to be emphasized that, in Opinion 2/13, the difference between "essential" and "specific" characteristics did not disappear. The Court, in fact, after listing the specific characteristics of EU and EU law, further clarified that

"To these must be added the specific characteristics arising from *the very nature of EU law*. In particular, as the Court of Justice has noted many times, EU law is characterized by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States . . . , and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves".¹⁰³

The Court later referred to the "specific characteristics arising from the very nature of EU law" as "essential characteristics of EU law".¹⁰⁴ A question, consequently, inevitably arises in this respect: would the assessment of the draft EU accession agreement be different if the "essential characteristics/very foundations" test was applied, rather than the "specific characteristics" test? Answering this question is extremely challenging since, whereas in some cases, the notion of "very foundations" is explicitly stated by the Court itself, in other issues, the distinction between "essential" and "specific" is blurred. The following section will be an attempt to tentatively address this question.

101. Opinion 2/13, para 165.

102. Jacqu e, *op. cit. supra* note 93, 31–32, observes that "des  lments qui constituent la sp cificit  de l'Union et qui sont rappelés dans l'avis . . . constituent un r sum  de tout ce que l'on a trouv  d velopp  dans un manuel de droit de l'Union: respect de la structure constitutionnelle, r partition des comp tences bas e sur le principe d'attribution, autonomie et primaut  du droit de l'Union . . . le tout garanti par un syst me juridictionnel dans lequel le renvoi pr judiciel occupe une place centrale".

103. Opinion 2/13, para 166.

104. *Ibid.*, para 167. In the words of the ECJ: "these *essential characteristics of EU law* have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Art. 1 TEU, in a 'process of creating an ever closer union among the peoples of Europe'" (emphasis added).

5.1. *Preserving the proper functioning of the EU judicial system in Opinion 2/13: From Article 344 TFEU to the co-respondent and prior involvement procedures...*

As emerged in the ECJ's previous case law, some aspects of the EU judicial system are part of the essential characteristics of the EU legal order that the notion of autonomy protects. In Opinion 2/13, safeguarding the prerogatives of the ECJ *vis-à-vis* the ECtHR was at the heart of the Court's analysis. The need to protect Article 344 TFEU, to set up *ad hoc* mechanisms – the co-respondent and prior involvement procedures –, and to regulate the dialogue between the ECJ and the ECtHR, are all expressions of the existing tensions between the two European Courts. However, whereas some of these concerns appear justified in light of the previous ECJ case law, other issues go beyond what EU autonomy would require.

To start with, the assessment of the compatibility of a draft agreement with Article 344 TFEU is a striking example of an “essential” norm of the EU Treaties that amounts to the “very nature” of EU law.¹⁰⁵ In Opinion 2/13, the ECJ concluded that the draft agreement failed to properly safeguard the provision in point as it did not rule out the possibility that, where EU law is at issue, the EU or its Member States might submit an inter-State application between themselves to the ECtHR under Article 33 ECHR;¹⁰⁶ this conclusion is likely to be read in the sense that Article 33, conversely, would still apply to disputes between EU Member States which do *not* concern EU law. As noted earlier, Protocol No. 8 provides that Article 344 TFEU has to be protected; this was also held in the *MOX Plant* case. From this perspective, therefore, the need to safeguard Article 344 TFEU is nothing new in the debate on the autonomy of the EU legal order.¹⁰⁷ Indeed, disconnection clauses preventing the application of international agreements amongst EU Member States in

105. *Ibid.*, para 201, where the previous rulings are recalled.

106. The Court furthermore ruled that the arrangement envisaged under Art. 5 of the draft agreement was not sufficient to bar the EU and its Member State from bringing an application under Art. 33 ECHR. This provision, in the Court's reading, would have only limited the scope of the obligation under Art. 55 ECHR, according to which the contracting parties are not allowed to bring a dispute concerning the ECHR to any other dispute settlement bodies. Unlike the ECJ, A.G. Kokott (View, EU:C:2014:2475, paras. 107–120) emphasized that the explanatory report clarifies that “Article 55 [ECHR] does not prevent the operation of the rule set out in Article 344 TFEU”, and, from an EU law perspective, considered the possibility of conducting infringement proceedings (Arts. 258 TFEU to 260 TFEU) “sufficient to safeguard the practical effectiveness of Article 344 TFEU”.

107. In this sense, see Chamon, *op. cit. supra* note 54. *Contra*, see Johansen, “The reinterpretation of TFEU Article 344 in *Opinion 2/13* and its potential consequences”, 16 *GLJ* (2015), 169–178, who concluded that the Court, in *Opinion 2/13*, reinterpreted Art. 344 TFEU in a stricter manner than in Case C-459/03, *MOX Plant*. Eeckhout, “*Opinion 2/13* on EU accession to the ECHR and judicial dialogue: Autonomy or autarky”, 38 *Fordham International*

favour of EU law have already been inserted in several treaties.¹⁰⁸ Probably if someone is to be blamed for the obstacles in the way of EU accession to the ECHR, on this point, it should be the negotiator.

As for the *ad hoc* procedures foreseen under the draft EU accession agreement, the Court held the co-respondent and prior involvement mechanisms to be partially unsatisfactory¹⁰⁹ even if they were specifically created in order to accommodate the *sui generis* nature of the EU legal order.¹¹⁰ As is well known, under the co-respondent mechanism, the EU and its Member States are allowed, under certain circumstances, to both become parties to proceedings instituted against only one of them.¹¹¹ This mechanism was born, on one hand, from the need “to avoid gaps in participation, accountability and enforceability in the Convention system” due to EU accession, and on the other hand, to ensure that “individual applications are correctly addressed to Member States and/or the Union, as appropriate”, as required under Article 1(b) of Protocol No. 8. The prior involvement procedure enables the ECJ to assess the compatibility of the provisions of EU law with the ECHR rights, if it has not yet done so.¹¹² Assessing compatibility, the Draft Explanatory Report clarified, means “to rule on the validity of a legal provision contained in acts of the EU institutions, bodies, offices or agencies, or on the interpretation of a provision of the TEU, the TFEU or of any other provision having the same legal value pursuant to those instruments”.¹¹³ The purpose of the prior involvement is twofold. From an ECHR perspective, it is linked to respect for the subsidiary nature of the control mechanism under the

Law Journal (2015), 955–992, pp. 972–979, is also particularly critical of the required arrangement in light of Art. 344 TFEU.

108. On disconnection clauses, see Cremona, “Disconnection clauses in EU law and practice”, in Hillion and Koutrakos (Eds.), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing, 2010), 160–186; Dawar, “Disconnection clauses: An inevitable symptom of regionalism?” (Online Proceedings of the Society of International Economic Law Working Paper No. 2010/11, 2010), available at <www.papers.ssrn.com/sol3/papers.cfm?abstract_id=1632433>; Smrkolj, “The use of the ‘disconnection clause’ in international treaties: What does it tell us about the EC/EU as an actor in the sphere of public international law?” (May 14, 2008), available at <www.papers.ssrn.com/sol3/papers.cfm?abstract_id=1133002>.

109. A.G. Kokott concluded, as did the Court, that amendments to the draft agreement were necessary with respect to some features of the prior involvement and co-respondent mechanisms. See, in particular, paras. 121–135, 172–179, 208–212, 180–184 and 229–236 of the View.

110. For the steps that led to the codification of the two mechanisms, see Anrò, *L’adesione dell’Unione Europea alla CEDU. L’evoluzione dei sistemi di tutela dei diritti fondamentali in Europa* (Giuffrè Editore, 2015), pp. 198–245; Gragl, *The Accession of the European Union to the European Convention on Human Rights* (Hart Publishing, 2014), pp. 138–173 and 209–256.

111. See Art. 3 draft accession agreement.

112. See *ibid.*, para 6.

113. Draft Explanatory Report, para 66.

ECHR;¹¹⁴ from an EU law perspective, it is necessary to ensure the proper functioning of the judicial system of the EU, in the sense that “without such a preliminary ruling, the [ECtHR] would be required to adjudicate on the conformity of an EU act with human rights, without the ECJ having had the opportunity to do so, by ruling on, as the case may be, the validity of a provision of secondary law or the interpretation of a provision of primary law”.¹¹⁵ The two mechanisms are intertwined as the prior involvement procedure is triggered when the Union has the status of co-respondent.¹¹⁶

The reason for introducing the co-respondent mechanism,¹¹⁷ as mentioned above, was to ensure that a single application could be correctly addressed to Member States and/or the EU *as appropriate*. However, to what exactly does “appropriate” refer? If this latter term is interpreted as meaning “appropriate under EU law” – namely “the rules of EU law concerning the division of powers between the EU and its Member States and the criteria governing the attributability of an act or omission that may constitute a violation of the ECHR”¹¹⁸ –, the ECJ is correct¹¹⁹ in concluding that the ECtHR should be prevented from assessing whether the conditions for triggering the co-respondent mechanism as well as the requirements for application of a joint responsibility rule are met.¹²⁰ The Draft Explanatory Report, differently, left “the last word” to the ECtHR, suggesting that “as appropriate” requires

114. Opinion 2/13, para 19.

115. Draft Explanatory Report, para 65.

116. Ibid.

117. For a detailed analysis of the co-respondent mechanism, see Contartese and Pantaleo, EU autonomy and the determination of the respondent party: Proceduralisation as a possible way-out?”, in Neframi and Gatti (Eds.), *Constitutional Issues of EU External Relations* (Nomos, forthcoming).

118. Opinion 2/13, para 221.

119. Nevertheless, it being controversial whether the division of competence is (or should be) amongst the criteria to identify the proper respondent and to attribute international responsibility to the EU and its Member States, the Court’s conclusion that “such a review [by the ECtHR] would be liable to interfere with the division of powers between the EU and its Member States” (Opinion 2/13, para 224) is to be criticized. For a critical analysis of the relationship between responsibility and division of powers in Opinion 2/13, see also Eeckhout, op. cit. *supra* note 107, at 979–985, who concluded that “for the ECJ to gloss over this debate and assume that responsibility and division of competences are one and the same is not an example of proper judicial reasoning”.

120. For the sake of completeness, it should be recalled that the ECJ also identified a third shortcoming of the co-respondent mechanism, viz. the current arrangements do not prevent a Member State from being held responsible, together with the EU, for the violation of a provision of the ECHR where it made a reservation. This issue is less relevant for the purpose of the present analysis, as it does not concern the EU legal system but rather the EU Member States; moreover, it can be easily fixed (Opinion 2/13, paras. 226–228).

that the ECHR regime's rules on the attribution of international responsibility are also taken into consideration. From an ECHR perspective, as the present author has demonstrated elsewhere, the required amendments would certainly distort the role of the ECtHR. Indeed, the latter would be prevented from applying its own rules on the attribution of international responsibility so that its competence would be limited to merely declaring whether the ECHR was breached. A question inevitably arises as to whether the protection of EU autonomy should be stretched to this point.¹²¹

Bearing in mind that the aim of prior involvement is also to ensure the proper functioning of the EU's judicial system, it is hard to understand the reason why the draft EU accession agreement limited the ECJ's competence to rule on the validity of EU norms and the interpretation of EU primary law, excluding the interpretation of EU secondary law. Jacqué, interestingly, has observed that what the draft explanatory report "maladroitement" endeavoured to state is that the ECJ can only assess the interpretation of primary law and not its validity, while as for secondary law, it has the power to rule on its validity – but that cannot rule out its interpretation, as this is substantively the same as assessment of its validity.¹²² A second shortcoming of the prior involvement procedure, according to the ECJ, was the absence of a provision excluding the possibility that the ECtHR would be permitted to rule on whether the ECJ has already given a ruling on the same question of law as that at issue in the proceedings before the ECtHR. Assessing whether such a ruling was already given or not should be resolved only by the competent EU institution: otherwise "to permit the ECtHR to rule on such a question would be tantamount to conferring on it jurisdiction to interpret the case law of the Court of Justice".¹²³ Whether or not the ECJ was excessively "strict" or "trustless", this second amendment to the prior involvement procedure aims at simply strengthening the "internal" nature of a procedure engendered for that purpose.

On the whole, if one agrees with the Court that the two mechanisms are necessary in light of the ECJ's case law on autonomy – as the EU Member States and the other institutions did¹²⁴ – then it is correct to conclude that the

121. Contartese and Pantaleo, *op. cit. supra* note 117.

122. Jacqué, *op. cit. supra* note 93, at 38: "Ce qu'a voulu maladroitement dire le rapport est que, s'agissant du droit primaire, la Cour ne peut intervenir que par la voie de l'interprétation puisqu'elle ne peut apprécier sa validité. Par contre, s'agissant du droit dérivé, elle retrouve le droit de juger de sa validité, ce qui ne peut exclure l'interprétation puisque celle-ci est consubstantielle à l'appréciation de la validité."

123. Opinion 2/13, para 239.

124. In contrast, some legal scholars strongly criticized the prior involvement procedure, pointing out that it is justified on the basis of neither EU autonomy nor subsidiarity, and that it grants the ECJ a privileged role when compared to the constitutional courts of the other

proposed arrangements must meet all the necessary requirements. Any shortcomings, in sum, must be removed in the process of assessing their compatibility with the EU Treaties. As rightly pointed out in the academic debate, what is striking in certain passages of Opinion 2/13 is the Court's manner of expressing itself, rather than its underlying reasoning.¹²⁵

5.1.1. ... to Protocol 16 ECHR and to CFSP matters?

The need to safeguard the proper functioning of the EU judicial system is also at stake in the analysis of Protocol No. 16. The Court, in fact, considered the potential impact of this Protocol on EU autonomy, even though the draft agreement did not foresee EU accession to Protocol 16.¹²⁶ Under Protocol 16, the highest courts and tribunals of the Member States may request that the ECtHR give advisory opinions on the ECHR. The legal problem identified here by the ECJ relates to preliminary rulings under Article 267 TFEU, since these could be “circumvented” by the EU Member States.¹²⁷ According to the Court, the envisaged agreement “[b]y failing to make any provision in respect of the relationship between the mechanism established by Protocol No. 16 and the preliminary ruling procedure” could affect EU autonomy.¹²⁸ In sum, the ECJ was not satisfied with the silence of the draft agreement on Protocol 16, and expressed the need for an *ad hoc* provision. As mentioned above, the “direct coordination” between the ECJ and the EU domestic courts was defined by the Court as a “keystone” of the EU judicial system. With this in mind, is the ECJ's concern about Protocol 16 justified? The situation caused by this Protocol would re-propose what led to the establishment of the prior involvement of the ECJ: granting the ECJ the possibility to rule on the interpretation of EU law before the ECtHR. Just as with the co-respondent mechanism, Protocol 16 “could trigger the procedure for the prior involvement of the Court of Justice”,¹²⁹ as the Court recognized. After all, the

Contracting Parties. See, *inter alia*, Torres Pérez, “Too many voices? The prior involvement of the Court of Justice of the European Union”, in Kosta et al. (Eds.), *The EU Accession to the ECHR* (Hart Publishing, 2014), pp. 29–44; Vezzani, “The EU and its Member States before the Strasbourg Court: A critical appraisal of the co-respondent mechanism”, in Repetto (Ed.), *The Constitutional Relevance of the ECHR in Domestic and European Law. An Italian Perspective* (Intersentia, 2013), pp. 232–235; Gaja, “Accession to the ECHR”, in Biondi, Eeckhout and Ripley (Eds.), *EU after Lisbon* (Oxford, 2011), pp. 180–194; Jacqué, “The accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms”, 48 CML Rev. (2011), 995–1023.

125. In this sense, see Jacqué, *op. cit. supra* note 93, p. 38: “Ce qui frappe, c'est moins l'argument justifié au fond que la manière dont il est exprimé.”

126. Opinion 2/13, paras. 196–200.

127. *Ibid.*, paras. 176 and 198.

128. *Ibid.*, para 199.

129. *Ibid.*, para 198.

prior involvement finds one of its justifications in the opportunity of the ECJ to rule on EU law when Article 267 TFEU has not been triggered. The two situations – the co-respondent mechanism and Protocol 16 – therefore, would require the same legal guarantees in order to safeguard the “essential” elements of the EU legal order through the protection of its judicial system.¹³⁰ Accordingly, the ECJ requirement to include a specific provision in respect of the relationship between the mechanism under Protocol 16 and the preliminary ruling under Article 267 TFEU is not justified.

As for the relationship between the two European Courts in the EU “second pillar”, the ECJ observed that, according to the draft EU accession agreement, the ECtHR would have the jurisdiction to rule on the compatibility with the ECHR of certain acts, actions or omissions in the context of CFSP, while its own competence is limited to monitoring compliance with Article 40 TEU and to review the legality of certain decisions under Article 275 TFEU.¹³¹ The ECJ rejected such an arrangement and, referring to Opinion 1/09 in particular, concluded that “jurisdiction to carry out a judicial review of acts, actions or omissions on the part of the EU, including in the light of fundamental rights, cannot be conferred exclusively on an international court which is outside the institutional and judicial framework of the EU”.¹³² Conversely, Advocate General Kokott held that “the principle of the autonomy of EU law does not preclude the EU from recognizing the jurisdiction of an international court whose jurisdiction in a particular field — in this case the field of the common foreign and security policy — extends further than that of the EU institution which is the Court of Justice of the EU”.¹³³ The Advocate General’s reasoning is rightly based on the fact that the authors of the Treaty of Lisbon relied on national courts and tribunals for the protection of the legal system in the second pillar. Accordingly, “it is for those national courts and tribunals to penalize any violations of the ECHR in connection with the CFSP and to help to implement the ECHR (second subparagraph of Art. 19(1) TEU, in conjunction with Art. 274 TFEU), unless the Courts of the EU, exceptionally, have jurisdiction pursuant to the second paragraph of Article 275 TFEU”.¹³⁴

130. In this sense, see also View of A.G. Kokott in Opinion 2/13, paras. 136–142. According to Jacqué, *op. cit. supra* note 93, at 26: “La seule manière d’éviter cette situation aurait été, soit d’exclure dans l’accord d’adhésion l’application du protocole no 16 pour les questions qui présentent un lien avec le droit de l’Union, soit de prévoir expressément l’implication préalable de la Cour dans de tels cas.”

131. On the ECJ’s competence in CFSP matters, see Eckes, “Common foreign and security policy: the consequences of the Court’s extended jurisdiction”, 22 *ELJ* (2016), 492–518; Hillion, “A powerless Court? The European Court of Justice and the common foreign and security policy”, in Cremona and Thies, *op. cit. supra* note 17, pp. 47–70.

132. Opinion 2/13, para 256.

133. View of A.G. Kokott in Opinion 2/13, para 191.

134. *Ibid.*, para 195.

The conclusion of the Court, in fact, cannot find its justification in light of Opinion 1/09. As the present author has emphasized elsewhere, the circumstances of Opinion 1/09 need to be distinguished from those in Opinion 2/13.¹³⁵ The European and Community Patents Court, in fact, was supposed to be the only (international) jurisdiction competent to rule on the then Community patents law – depriving not only the Union’s domestic judges but also the ECJ of this role. Differently, for CFSP, domestic courts are still competent to apply it, while the review on the legality of the CFSP by the ECJ is limited because the EU Treaties – rather than an international agreement – so provide. As emphasized, autonomy does not aim at protecting the functioning of the EU institutions or their relationship as such, rather it safeguards what is “essential” within the EU legal order. In the specific case of CFSP, the uniform and consistent application of EU law, at least with regard to the human rights standards, can be ensured by an external court, that is, the ECtHR. Probably, as Halberstam observes, the concern of the ECJ stems from the fact that, under the draft EU accession agreement, “Strasbourg would effectively have become the European Union’s constitutional court” should EU Member States have perceived an ECtHR ruling “as a final decision on the legality of the action under EU law”.¹³⁶ If this is the rationale behind the ECJ’s conclusion, the Court should have clearly stated it rather than referring to its own previous Opinion. CFSP matters raise, in fact, a *new* challenge to EU autonomy compared to Opinion 1/09, but the Court missed an opportunity to clarify what exactly this was.

In brief, the ECJ, requiring the insertion of *ad hoc provisions* for the mechanism established under Protocol 16 and for CFSP matters, went beyond what EU autonomy requires so far. For the purpose of this contribution, it is to be emphasized that the Court applied an erroneously broad interpretation of EU autonomy, whereas assessing whether the “essential” elements of the EU legal order were undermined would have produced a different outcome.

5.2. *Coordination between Article 53 ECHR and Article 53 EU Charter, and the mutual trust principle: Recalling the structural dimension of autonomy*

It has emerged so far that Opinion 2/13, except as regards Protocol 16 ECHR and CFSP matters, did not depart significantly from the ECJ’s previous case law on autonomy. This implies that it is the “essential” characteristics of the

135. Contartese, op. cit. *supra* note 68. In this sense, see also Jacqué, op. cit. *supra* note 93, pp. 40–42.

136. Halberstam, “‘It’s the autonomy, stupid!’ A modest defence of Opinion 2/13 on EU accession to the ECHR, and the way forward”, 16 GLJ (2015), 105–146, 142.

EU legal order that some of the rejected arrangements are likely to affect, even if the Court referred to them as “specific”. Attention will now focus on the mutual trust principle and the coordination between Article 53 ECHR and Article 53 EU Charter, which according to the ECJ required *ad hoc* provisions that the draft EU accession agreement failed to foresee. In particular, would the structural dimension of autonomy, as explained in this contribution, add clarifying elements to the analysis?

On the principle of mutual trust, requiring EU Member States to presume that fundamental rights are observed by the other Member States,¹³⁷ the Court held that this has to be respected, as the opposite would “disregard the *intrinsic nature* of the EU”¹³⁸ given that the relations between Member States “as regards the matters covered by the transfer of powers from the Member States to the EU are governed by EU law to the exclusion, if EU law so requires, of any other law”.¹³⁹ Nevertheless, the Court also added that derogations are permissible “in exceptional circumstances”.¹⁴⁰ It should be emphasized that the EU accession to the ECHR would precisely impact on those “exceptional circumstances”, whereas it would not undermine the structural principle of mutual trust as such. What is called into question is, in fact, the relationship between the *substantive* criteria – those identified by the ECJ and those recognized by the ECtHR – that amount to the status of derogations. If derogations are permitted under certain circumstances, one may wonder why accession to the ECHR should not be amongst those exceptions in light of pursuing EU integration into the European human rights system as an objective. Accordingly, the ECJ, if called upon to assess whether EU law is undermined, should balance the need to respect the primacy of substantive EU law with the objective of pursuing accession to the ECHR. In this balancing exercise, the ECJ should take into consideration not only the “specific” characteristics of the EU legal order, but also the intrinsic nature of the ECHR, in order not to make the accession process meaningless. Eeckhout interestingly asks what, from the perspective of autonomy, the relationship is between mutual trust and the protection of fundamental rights, as both are “specific characteristics” of EU law.¹⁴¹ Advocate General Kokott also spoke in terms of “a careful balance between those fundamental rights and the relevant provisions of primary law”, observing that “any possible conflict between a fundamental right protected by the ECHR and a provision of EU primary law cannot be resolved by means of a mere reference to the fact that,

137. *Ibid.*, 191–195.

138. *Ibid.*, para 193 (emphasis added).

139. *Ibid.*

140. *Ibid.*, para 191.

141. Eeckhout, *op. cit. supra* note 107, at 970. On the coordination required by the Court as not necessary, see also Jacqu e, *op. cit. supra* note 93, p. 33.

in formal terms, the ECHR ranks below the founding Treaties of the EU”.¹⁴² The recent development of the ECJ’s case law on the mutual trust principle in the field of the Common European Asylum System (CEAS), in *C.K. and others*, confirms that the EU accession to the ECHR would not undermine the proper functioning of the principle of mutual trust as such.¹⁴³ It must, in fact, be recalled once again that the Court admitted that an international agreement can affect the powers of the Union institutions insofar as “it does not alter the essential character of those powers”.¹⁴⁴ On the contrary, the EU accession to the ECHR would ensure a higher functioning of the EU Member States relationship in line with the protection of fundamental rights. This is what the EU accession to the ECHR, after all, aimed to achieve.

142. View of A.G. Kokott in Opinion 2/13, para 204.

143. The tensions between the two European Courts around the principle of mutual trust mainly emerged in the field of CEAS. The ECtHR, in its seminal case: *M.S.S. v. Belgium and Greece*, Appl. No. 30696/09, judgment of 21 Jan. 2011 (for a comment, see Contartese, “The (rebuttable) presumption of the European Union Member States as ‘safe countries’ under the Dublin Regulation”, in Akrivopoulou and Garipidis (Eds.), *Human Rights and Risks in the Digital Era: Globalization and the Effects of Information Technologies* (IGI Global, 2012), 240–255), ruled, for the first time, that the presumption of EU Member States as safe countries under the Dublin Regulation has to be rebutted by the other EU Member States when an asylum seeker faces a real risk of becoming a victim of inhuman and degrading treatment under Art. 3 ECHR. Although the ECJ agreed with the ECtHR, in Joined Cases C-411 & 493/10, *N.S., M.E. and Others*, EU:C:2011:865, that there are exceptions to the application of principle of mutual trust, it introduced the “systemic deficiencies test”. The two Courts, in sum, disagreed on the circumstances that trigger such derogations, as their subsequent case law also proves (see, in particular, ECtHR, *Sharifi v. Austria*, Appl. No. 60104/08, judgment of 5 Dec. 2013; ECtHR, *Safai v. Austria*, Appl. No. 44689/09, judgment of 7 May 2014; ECtHR, *Tarakhel v. Switzerland*, Appl. No. 29217/12, judgment of 4 Nov. 2014; Case C-528/11, *Zuheyr Halaf*, EU:C:2013:342; Case C-394/12, *Shamso Abdullahi*, EU:C:2013:813). Not surprisingly, some legal scholars read the ECJ’s position on mutual trust, in Opinion 2/13, as the consequence of this tension and the related will of the ECJ to re-assert its power on the subject; see, in particular, Zimmermann, “Dublin et les deux Cours supranationales européennes: Échange constructif ou dialogue de sourds?”, *Geneva Jean Monnet Working Paper* 04/2016, 1–36, available at <www.ceje.ch/files/2714/6054/2504/Geneva_JMWP_04-Zimmermann.pdf>; Giulia, “The Dublin Regulation between Strasbourg and Luxembourg: Reshaping non-refoulement in the name of mutual trust”, (2015) *European Journal of Legal Studies*, 50–72. More recently, in Case C-578/16, *C.K. and others*, EU:C:2017:127, the ECJ mitigated these divergences holding that a transfer of asylum-seekers shall be suspended not only because of “systemic deficiencies”, but also where there exists a real risk for the individual concerned to suffer inhuman or degrading treatment under Art. 4 of the EU Charter. The CEAS, nevertheless, is not the only field of tensions on the principle of mutual trust: diverging views between the two European Courts also emerged on the recognition and enforcement of decisions in civil and commercial matters within the European judicial area; see, in this regard, ECtHR, *Avotiņš v. Latvia*, Appl. No. 17502/07, judgment of 25 Feb. 2014. For a comment, see Biagioni, “*Avotiņš v. Latvia*. The uneasy balance between mutual recognition of judgments and protection of fundamental rights”, 1 EP (2016), 579–596.

144. Opinion 1/00, para 21 (emphasis added).

As for Article 53 ECHR and Article 53 EU Charter, the Court required that the two provisions be coordinated.¹⁴⁵ Whereas Article 53 ECHR allows the parties to the Convention to provide higher standards in their national laws than those of the Convention,¹⁴⁶ Article 53 EU Charter lays down that “nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the [ECHR], and by the Member States’ constitutions”. The need for coordination stems from the ECJ’s interpretation of Article 53 EU Charter in *Melloni*,¹⁴⁷ according to which “[t]he application of national standards of protection of fundamental rights must not compromise the level of protection provided for by the Charter or the primacy, unity and effectiveness of EU law”.¹⁴⁸ One may observe that the coordination between these two provisions concerns the relationship between *substantive* norms, whereas “external” autonomy, as emphasized, has a structural dimension. True, the aim of coordinating the two provisions would also be to protect the unity of *substantive* EU law, nevertheless, it is equally feasible that “unity” can be achieved through the integration, into the Union, of *external* substantive standards of fundamental rights.¹⁴⁹ This cannot be the case for the unity of the structural dimension of the EU, which can only be ensured *internally* by its institutions. The role of Protocol No. 8 is, this time, to be called into question, as it may be the source of this approach of the ECJ in assessing the compatibility of the EU draft agreement with the EU Treaties. In fact, the Protocol, when listing what are “specific characteristics”, refers generally to both the EU and *EU law*. No doubt the *Melloni* judgment identifies a specific characteristic of EU law, but it should not prevent “external” influences from entering the EU legal order as the “essential” functioning of the Union would still be preserved.

At this stage of the analysis, a final question arises: what would happen if, in Protocol No. 8, the expression “specific characteristics of the Union and Union law” were replaced by “essential characteristics of the Union”? Most likely, life for the EU’s accession to the ECHR would not be easy either.

145. Opinion 2/13, paras. 187–190.

146. Art. 53 ECHR, “Safeguard for existing human rights...Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party”.

147. Case C-399/11, *Melloni*, EU:C:2013:107, para 60.

148. Opinion 2/13, para 188.

149. Eeckhout, “Human rights and the autonomy of EU law: Pluralism or integration?”, 66 *Current Legal Problems* (2013), 169–202.

Nevertheless, it would get rid of some arrangements, required by the ECJ – namely those concerning the principle of mutual trust and the coordination between Article 53 and Article 53 ECHR¹⁵⁰ – which appear too difficult to overcome during (potential) future negotiations.

6. Back to the “essential” characteristics of the EU legal order: Autonomy and ISDS mechanisms

Incompatibility between EU autonomy and a future (draft) international agreement may once again arise should provisions of the latter potentially undermine the essential elements of the Union legal order and its very foundations. Currently, an already intense academic debate is raising concerns with regard to the international dispute settlement provisions of the new generation of investment agreements.¹⁵¹ As is known, the EU FTAs that are

150. On the fact that some of the ECJ’s requirements are more difficult to meet than others, see, Jacqu , op. cit. *supra* note 93, 40–42, who observed that “un certain nombre de conditions peuvent ais ment  tre satisfaites sur le plan technique par une modification de l’accord. . . . Deux autres questions sont techniquement plus difficiles”; and Peers, op. cit. *supra* note 94, at 219–221, who distinguishes between two categories of the ECJ’s objections to the ECHR accession, procedural and substantive. According to the author, “the former are, for the most part, much less problematic than the latter”, except for CFSP matters. As for the need to ensure that Member States do not set higher standards within the field of EU law, and the need to protect the principle of mutual trust, according to the author, “the Treaty does not give priority to mutual trust over human rights – quite the opposite. The underlying problem with the Court’s analysis is its stress on protecting its view of the basic components of EU law, rather than the effective protection of human rights.”

151. See e.g. Gallo and Nicola, “The external dimension of EU investment law: Jurisdictional clashes and transformative adjudication”, 39 *Fordham Int. L.J.* (2016), 1081–1152; Uwera, “Investor-State Dispute Settlement (ISDS) in future EU investment-related agreements: Is the autonomy of the EU legal order an obstacle?”, 15 *The Law and Practice of International Courts and Tribunals* (2016), 102–151; Hindelang, “Repellent forces: The ECJ and Investor-State Dispute Settlement. On the ECJ’s concept of autonomy of EU law could fundamentally alter investor-State arbitration’s current DNA, or what the ECtHR, the European Patent Court, and investment tribunals in the EU-Canada Comprehensive Economic Trade Agreement (CETA) might have in common”, 53 *Arch. VR* (2015), 73; Schill, “Editorial: Opinion 2/13 – the end for dispute settlement in EU trade and investment agreements?”, 16 *The Journal of World Investment & Trade (JWIT)* (2015), 379–388; Herrmann, “The role of the Court of Justice of the European Union in the emerging EU investment policy”, 15 *JWIT* (2014), 570–584; Hindelang, “The autonomy of the European legal order. EU constitutional limits to investor-State arbitration on the basis of future EU investment-related agreements”, in Bungenberg and Herrmann (Eds.), *Common Commercial Policy after Lisbon: Special Issue* (Springer Verlag, 2013), pp. 187–198; Lavranos, “Designing an international investor-to-State arbitration system after Opinion 1/09”, in *ibid.*, pp. 199–220; Rovetta, “Investment Arbitration in the EU after Lisbon: Selected procedural and jurisdictional issues”, in *ibid.*, pp. 221–233; Burgstaller, “Investor-State arbitration in EU international investment agreements with third States”, 39 *LIEI* (2012), 207–221, pp. 216 et seq.; Schill, “Luxembourg limits: Conditions for

about to be concluded (such as those with Singapore, Vietnam and Canada) and those currently under negotiation (such as that with the USA)¹⁵² all contain a chapter on investment foreseeing an ISDS mechanism.¹⁵³ Concerns on EU autonomy were also shared by Belgium, which requested the opinion of the ECJ on the compatibility of the EU-Canada FTA Chapter on ISDS with the EU Treaties.¹⁵⁴ The Commission,¹⁵⁵ on the contrary, did not raise such a question in Opinion 2/15 relating to the recent EU FTA with Singapore.¹⁵⁶ Accordingly, the Court explicitly held that Opinion 2/15 “relates only to the nature of the competence of the European Union to sign and conclude the envisaged agreement”,¹⁵⁷ specifying that “it is entirely without prejudice to

Investor-State Dispute Settlement under future EU investment agreements”, 10 *Transnational Dispute Management* (2013), 1–17; Eilmansberger, “Bilateral investment treaties and EU law”, 46 *CML Rev* (2009), 383–429.

152. For an updated overview on the EU FTAs, see the European Commission website, available at <www.ec.europa.eu/trade/policy/countries-and-regions/agreements/index_en.htm#_other-countries>.

153. In the context of the negotiations with the USA, the Commission proposed the creation of a permanent investment court, that has already been incorporated into the FTAs with Vietnam and Canada. Notwithstanding this, this paper will use the general expression “investment tribunal” to refer to both the investment arbitral tribunal and the permanent investment court. On the Commission’s proposal for the creation of a permanent investment court, see Malmström, “Investment in TTIP and beyond – the path for reform: Enhancing the right to regulate and moving from current ad hoc arbitration towards an investment court”, Concept Paper, 5 May 2015, available at <www.trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF>; “Proposal of the European Union for Investment Protection and Resolution of Investment Disputes” (12 Nov. 2015), available at <www.trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf>. For the related academic debate, see Schill, “The European Commission’s proposal of an ‘Investment Court System’ for TTIP: Stepping stone or stumbling block for multilateralizing international investment law?”, 20 *ASIL Insights* (2016), available at <www.asil.org/insights/volume/20/issue/9/european-comm-issions-proposal-investment-court-system-ttip-stepping>; Baetens, “The European Union’s proposed investment court system: Addressing criticisms of investor-State arbitration while raising new challenges”, 43 *LIEI* (2016), 367–384; Pantaleo, “Lights and shadows of the TTIP investment court system”, *CLEER Paper Series* 2016/1, available at <www.papers.ssrn.com/sol3/papers.cfm?abstract_id=2782008>; Schwieder, “TTIP and the investment court system: A new (and improved?) paradigm for investor-State adjudication”, 55 *Columbia Journal of Transnational Law* (2016), 178–227.

154. On Belgium’s request for an Opinion of the ECJ, see <diplomatie.belgium.be/en/newsroom/news/2017/minister_reynders_submits_request_opinion_ceta>.

155. According to the Commission, “a risk of . . . incompatibility [of ISDS with the principle of autonomy of the EU legal order] would exist especially if ISDS tribunals were to interpret EU law in a manner that would be binding on the EU institutions. Since ISDS tribunals only interpret the international agreement in question and would examine EU law only as a matter of fact, one may argue that concerns related to the autonomy of EU law are unfounded”. Malmström, Concept Paper cited *supra* note 153.

156. Opinion 2/15, EU:C:2017:376.

157. Opinion 2/15, para 30.

the question whether the content of the agreement's provisions is compatible with EU law".¹⁵⁸

In order to assess whether and, if so, to what extent ISDS may undermine EU autonomy, the analysis will consider the mechanisms of the proposed dispute settlement in light of the ECJ's rulings on external autonomy examined above. More specifically, attention will be on three aspects: the division of competence between the EU and its Member States; the exclusive competence of the ECJ as to interpretation and application of EU law; and the role of the EU Member States domestic courts as "ordinary" courts within the European Union legal order.¹⁵⁹ In the course of the analysis, the focus will be on the "essential" characteristics of the EU legal order. In the absence of a protocol or any other legal text expressly referring to the need also to protect the "specific" features of the EU and EU law, the proper test is that elaborated by the Court: that is, autonomy as the safeguard of the "very foundations" and "essential" characteristics of the EU legal order.

6.1. *The division of competence between the EU and its Member States*

As noted earlier, the ECJ ruled that the division of competence between the EU and its Member States needs to be protected during the determination of the respondent party in proceedings before an international court or tribunal. It did so in Opinion 1/91, where the envisaged EEA Court was prevented from interpreting the expression "Contracting Party" within the meaning of the agreement, as this term may denote the Community, the Community and the Member States, or simply the Member States,¹⁶⁰ as well as in Opinion 2/13, where the ECtHR's review of the conditions to trigger the co-respondent

158. *Ibid.*, repeated in paras. 290 and 300.

159. This section, investigating autonomy and ISDS in future EU investment agreements, will not analyse the issue concerning Art. 344 TFEU, that may arise, specifically, in intra-EU BITs. The latter are agreements between EU Member States that are already in force, but should be ended according to the Commission and some Member States who deem them to be incompatible with the EU Treaties. See e.g. Tietje and Wackernagel, "Enforcement of intra-eu icsid awards", 16 *The Journal of World Investment & Trade* (2015), 205–247; Von Papp, "Clash of 'autonomous legal orders': Can EU Member State courts bridge the jurisdictional divide between investment tribunals and the ECJ? A plea for direct referral from investment tribunals to the ECJ", 50 *CML Rev.* (2013), 1039–1081; Hindelang, "Circumventing primacy of EU law and the ECJ's judicial monopoly by resorting to dispute resolution mechanisms provided for in inter-se Treaties? The case of intra-EU investment arbitration", 30 *LIEI* (2012), 179–206; Dimopoulos, "The validity and applicability of international investment agreements between EU member states under EU and international law", 48 *CML Rev.* (2011), 63–93; Söderlund, "Intra-EU BIT investment protection and the EC Treaty", 24 *Journal of International Arbitration* (2007), 455–468; Wehland, "Intra-EU investment agreements and arbitration: Is European Community law an obstacle?", 58 *ICLQ* (2009), 297–320.

160. Opinion 1/91, para 34.

mechanism was said to be “liable to interfere with the division of powers between the EU and its Member States”.¹⁶¹

The chapters on investment in the recent EU FTAs, whilst silent on the rules concerning the attribution of responsibility, all contain a provision titled “request for determination of the respondent”.¹⁶² The provision in point establishes that an investor of the other party, prior to the submission of their claim, must send a notice to the EU, requesting it to determine who will act as respondent in the proceedings. The notice also has to identify the treatment that allegedly breached the investor’s rights, and must be sent to the Member State concerned if the contested treatment is accorded by it. The EU has to inform the claimant within 60 days whether the EU itself or a Member State will be the respondent in the dispute.¹⁶³ While the present author has critically evaluated the provision in point for failing to clarify the criteria on the basis of which the determination in question is made,¹⁶⁴ this procedure must be appreciated from the perspective of EU autonomy. Its effect, in fact, is to “internalize” – at the EU level – the choice of the respondent so as to prevent the investor and the arbitral tribunal from passing judgement on issues of EU law relating to the division of competence between the EU and its Member States for the purpose of that determination.¹⁶⁵ However, the relevant provision also establishes that, should the Union not determine the respondent party within the time limit of 60 days, it is up to the investor to make a choice. In this scenario, the arbitral tribunal is likely to possess the competence to review the investor’s determination. It is to be noted that while the EU agreements with Canada and Singapore provide guidance to the arbitral tribunal, laying down that “(a) if the measures identified in the notice are exclusively measures of a Member State of the European Union, the Member State shall be the respondent; (b) if the measures identified in the notice include measures of the European Union, the European Union shall be the respondent”,¹⁶⁶ those with USA and Vietnam are silent on the matter. In the latter cases, the arbitral tribunal, which would likely trigger the application of the rules of general international law to identify the proper respondent, may undermine EU autonomy if, for that purpose, it also interprets Union law. All

161. Opinion 2/13, paras. 224–225.

162. Art. 8.21(1) CETA; Art. 9.15(1) EU-Singapore Agreement.

163. *Ibid.*

164. Contartese and Pantaleo, *op. cit. supra* note 117.

165. On the question of whether the investor and the arbitral tribunal would be allowed to make an independent assessment of questions relating to responsibility even when the determination of the respondent is duly and timely delivered by the EU, see Contartese and Pantaleo *ibid.*

166. Art. 8.21(4) CETA; Art. 9.15(3) EU-Singapore Agreement.

in all, in sum, the mechanism successfully protects EU autonomy insofar as the Union is efficient in identifying the proper respondent in the set time limit.

6.2. *Interpretation and application of EU law as the exclusive competence of the ECJ*

As emerged in the previous sections, the ECJ is particularly careful to protect its own competences since, in its view, the uniformity of EU law is preserved through its exclusive power to interpret and apply EU law. The Court clearly held that an international court or tribunal “must not have the effect of binding the EU and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of EU law”.¹⁶⁷ It is to be recalled, nevertheless, that the Court also stated that “the Community’s competence in the field of international relations and its capacity to conclude international agreements necessarily entails the power to submit to the decisions of a court which is created or designated by such an agreement as regards the interpretation and application of its provisions”.¹⁶⁸ If the first of the two statements is understood in absolute terms, any international court or tribunal would be prevented from applying and interpreting EU law. Conversely, if the two statements are read jointly, attention should be paid to the specific circumstances of each single case. It is in this latter sense that, in our view, the two statements should be understood. It is to be recalled, once again, that the Opinions where the ECJ expressed the first of the two statements refer to “particular” categories of agreements. Opinions 1/91 and 1/00 concerned treaties whose purpose was to export the EU *acquis* to third parties,¹⁶⁹ while Opinion 2/13 referred to the very “special” case of the ECHR.¹⁷⁰ It is crystal clear that the new generations of recent EU FTAs fall under none of these categories of agreements. Accordingly, what the Court held in those cases does not “precisely” and “directly” apply here. It is true, nevertheless, that some provisions of these treaties and EU norms are alike. Is the overlapping between these two sets of norms – those of the EU FTAs and in EU law – sufficient to trigger a justified concern for Union autonomy? In approaching this question, it is necessary to recall, once again, that the notion of autonomy is applied to protect the “essential” characteristics and “very foundations” of the EU legal order and that this is what safeguards the Union’s *uniformity, unity and solidarity*. Accordingly, the “proper” question to be asked is not

167. Opinion 2/13, para 184, and Opinion 1/91, paras. 30 to 35, and Opinion 1/00, para 13.

168. Opinion 1/91, paras. 40 and 70. Later recalled in Opinion 1/09, para 74; and Opinion 2/13, para 182.

169. See *supra* sections 3.1 and 3.2.

170. See *supra* section 5.

whether the interpretation or application of EU law by an international jurisdiction affects the competence of the EU judiciary, but rather whether this undermines the uniform application and interpretation of EU law in the Union's legal order. Following a decision of an international arbitral tribunal set up to solve a dispute between an investor and the EU and/or its Member States, this binding award must be enforced by the latter parties as required by international law. However, this decision will not bind the EU judiciary to a specific interpretation of EU law; the EU courts will, therefore, continue to interpret EU law in the context of the Union's objectives and purposes.¹⁷¹

A further argument that militates against concerns on EU autonomy, should an investment tribunal engage with EU law, is that the chapters on investment in the recent FTAs contain a safeguard provision specifying that the investment tribunal “may consider, as appropriate, the domestic law of the disputing Party *as a matter of fact*”, “shall follow the *prevailing interpretation given to the domestic law by the courts or authorities of that Party*”, and its interpretation of domestic law “shall *not be binding* upon the courts or the authorities of that Party”.¹⁷² In this regard, although the difference between exposition of the facts by an international court and tribunal, and their interpretation is “perilously indeterminate”,¹⁷³ what matters is that neither the ECJ nor the EU Member States' courts will be bound

171. It is the same ECJ that, in Opinion 1/91, while stressing that the purpose of the EEA Agreement was homogeneity in the interpretation and application of the law in the EEA, noticed that “the fact that the provisions of the agreement and the corresponding Community provisions are identically worded does not mean that they must necessarily be interpreted identically. An international treaty is to be interpreted not only on the basis of its wording, but also in the light of its objectives”, (Opinion 1/91, para 14).

172. Art. 8.31(2) CETA: “The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of the disputing Party. For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of the disputing Party *as a matter of fact*. In doing so, the Tribunal shall follow the *prevailing interpretation given to the domestic law by the courts or authorities of that Party* and any meaning given to domestic law by the Tribunal shall *not be binding* upon the courts or the authorities of that Party” (emphasis added). See also Chapter II, Section 3, Art. 13(3) and (4) TTIP proposal; Chapter II, Section 3, Art. 16(2) EU-Vietnam FTA. The provision in point is, however, missing from the EU-Singapore FTA.

173. Jenks, “The interpretation and application of municipal law by the Permanent Court of International Justice”, (1938) *British Yearbook of International Law*, 67–103, at 68. See also Stoll, *L'application et l'interprétation du droit interne par les juridictions internationales* (Université Libre de Bruxelles, Institut de Sociologie, 1962). With specific regard to international investment tribunals, see Hepburn, *Domestic Law in International Investment Arbitration* (OUP, 2017), pp. 103 et seq.; and Hepburn, “Applicable law in TPP Investment Disputes”, 17 *Melbourne Journal of International Law* (2016), 1–20.

by the investment tribunal's interpretation of EU law.¹⁷⁴ In sum, it seems that this provision was carefully drafted to accommodate any possible concern on EU autonomy.

6.3. *The role of the EU Member States domestic courts as "ordinary" courts within the European Union legal order*

After concluding that the ISDS does not affect the ECJ's competence, one must further ask whether it undermines the competences of the EU Member States' courts in the interpretation and application of EU law. The decision that comes to mind is certainly Opinion 1/09, relating to the envisaged European and Community Patents Court since, here, the Court was strongly protective of their role within the Union legal order. The ECJ, in fact, defined them as "'ordinary' courts within the European Union legal order", whose competence is to implement Union law and to refer questions for a preliminary ruling to the ECJ, under Article 267 TFEU.¹⁷⁵ The Court finally concluded that "the tasks attributed to the national courts and to the Court of Justice respectively are indispensable to the preservation of the very nature of the law established by the Treaties".¹⁷⁶

In Opinion 2/15, as for the nature of the competence, the Court concluded that the Chapter on ISDS is a competence shared between the EU and the Member States given that such a regime, "remov[ing] disputes from the jurisdiction of the courts of the Member States . . . cannot, therefore, be established without the Member States' consent".¹⁷⁷ Under the EU FTA with Singapore, in fact, the domestic courts are still potentially competent to hear disputes between investors and States, but if an investor wishes to submit their claim to arbitration, they have to withdraw any pending claim.¹⁷⁸ The Court, in short, despite being silent on EU autonomy, could not refrain from observing that the ISDS mechanism under the EU FTA with Singapore is a regime that "removes disputes from the jurisdiction of the courts of the

174. For further comments on the procedural arrangements that allow the EU to safeguard its autonomy when EU law is the applicable law, see Contartese, "EU law as applicable law in international disputes and its procedural implications", in Happold et al., op. cit. *supra* note 57.

175. Opinion 1/09, para 80.

176. *Ibid.*, para 85.

177. Opinion 2/15, paras. 292–293.

178. See Art. 9.17(1)(f) EU-Singapore FTA establishing that one of the requirements for the submission of a claim to the arbitral tribunal is that the claimant "withdraws any pending claim submitted to a domestic court or tribunal concerning the same treatment as alleged to breach the provisions of Section A (Investment Protection)".

Member States”,¹⁷⁹ whereas it also specified that this is not the case under its provisions regulating the dispute settlement mechanisms between the parties, that is, the EU, its Member States and Singapore.¹⁸⁰ The fact that the Court repeated that Opinion 2/15 does not relate to questions of compatibility of the EU-Singapore FTA with the EU Treaties and, at the same time, that issues of compatibility are “entirely without prejudice” to such questions, sounds as a reminder that this matter is still open. Not surprisingly, concerns on the compatibility of the ISDS mechanisms with EU autonomy criteria with regard to the preliminary ruling procedure under the EU Treaties had already been raised in the academic debate in light of Opinion 1/09.¹⁸¹

Opinion 1/09 may be subject to two diverging readings. If it is read strictly, EU Member States domestic courts can under no circumstances be divested of their role, and accordingly the related EU FTAs ISDS provisions would be incompatible with the EU Treaties. A more accurate reading would instead focus on the differences between the European and Community Patent Court and the ISDS. From this perspective, the former judicial system would have completely outsourced the interpretation and application of EU law, whereas under the ISDS the arbitral tribunals have jurisdiction over the EU FTA only, and investors are free to bring their claim before it or an EU Member State domestic court. Nevertheless, beyond these distinctions, the key question is whether the envisaged judicial system undermines the uniform interpretation and application of EU law within the Union’s legal order, which the preliminary ruling procedure aims to safeguard. As emphasized above, autonomy does not aim at protecting the EU institutional structure as such, but rather at ensuring that its functioning is able to guarantee the “very nature” of the EU legal order. In this sense, one may note that the co-existence of two parallel legal systems – the first at the domestic level, and the second at the international level – , both competent to hear investment claims, may affect the uniform application of EU law. In fact, two similar investor claims that touch on EU law and are brought respectively before an EU Member State domestic court and an arbitration tribunal would be embedded in two different legal systems. Whereas the EU Member State domestic courts apply EU law, including the principle of primacy, and rely on the dialogue with the ECJ, the arbitral tribunals would not. The fact that the European Commission supports the establishment of an international investment court¹⁸² instead of

179. Opinion 2/15, para 292.

180. *Ibid.*, para 303.

181. See, in particular, Lavranos, *op. cit. supra* note 151, pp. 199–219 and 215–219; Hindelang, *op. cit. supra* note 151, 76–80; Schill, *op. cit. supra* note 151, 14–16; and Burgstaller, *op. cit. supra* note 151, 218–220.

182. See *supra* note 153.

investor-state arbitration does not impact on the (removed) jurisdiction of the EU Member States national courts.¹⁸³

7. Conclusions

The ECJ's case law concerning the external dimension of autonomy encompasses, as illustrated above, circumstances where draft international agreements could potentially interfere with the competence of the ECJ in particular, and the functioning of the EU institutional structure more generally, as well as the alleged immunity from jurisdiction of an EU regulation implementing UN Security Council resolutions. So what do all these cases have in common, if anything, as far as EU autonomy is concerned? First and foremost, they all concern threats to the institutional architecture of the EU legal order. Generally, in the academic debate on autonomy, much attention has been given to the ECJ's protection of its own prerogatives. This is certainly true in several instances, particularly in those involving the possible threats coming from the proposed EEA Court, the UNCLOS Arbitral Tribunal in the *MOX Plant* case, and the ECtHR. It comes as no surprise, indeed, that the ECJ's "selfishness" is rightly at the heart of the criticism of Opinion 2/13 where the ECJ has been accused of protecting its own functioning at the expense of human rights protection. Nevertheless, it would be reductive to narrow down the case law on autonomy to a sort of fortress behind which the ECJ defends itself from all other international jurisdictions. Autonomy has, in fact, been applied to protect the powers of the other Community institutions (Opinion 1/76), the relationship amongst EU Member States (Opinion 1/76 and Opinion 2/13), the respect for the division of competence between the EU and its Member States (Opinion 1/91 and Opinion 2/13), and the role of the EU Member States' national courts (Opinion 1/09). It is certainly true, nevertheless, that behind some of these concerns of the Court there hid, once again, its own prerogatives – as was the case in Opinion 1/09 – so that distinguishing the safeguarding of the ECJ's powers from that of the other EU "actors" is sometimes difficult.

The second aspect that the ECJ's rulings on external autonomy have in common is the use of the same terminology: expressions such as "very

183. See Art. 8.22 CETA: "Procedural and other requirements for the submission of a claim to the Tribunal: 1. An investor may only submit a claim pursuant to Article 8.23 if the investor: . . . (f) withdraws or discontinues any existing proceeding before a tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach referred to in its claim; and (g) waives its right to initiate any claim or proceeding before a tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach referred to in its claim".

foundations” and “essential characteristics” – with the sole exception of Opinion 2/13 – go hand in hand with autonomy. These, in brief, are nothing other than synonymous as they are part of the same notion. Why do the very foundations of the EU and its essential characteristics need to be protected? It is the same Court that explained that the institutional structure that guarantees the *unity* of the EU legal order, a *uniform* and *autonomous* interpretation of EU law, its *consistent* application, and – in the *Kadi I* case – the protection of fundamental rights has to be preserved. In this sense, protecting the autonomy of the EU legal order means keeping the EU institutional architecture as it is, while allowing the Union to pursue its objectives according to the EU Treaties. Any potential external influence to the very foundations of the Union and its essential characteristics is, accordingly, perceived as a threat.

Thirdly, in Opinion 2/13, a shift took place from the “essential” to the “specific” characteristics of the EU and EU law, causing an extension of the application of autonomy. “Specific” is, in fact, a broader term than “essential” given that not all the specific elements of the Union and EU law are also “essential”. The reason for such a switch may lie in Protocol No. 8, which expressly requires that the negotiator of the EU accession agreement puts in place *ad hoc* provisions able to protect the specific characteristics of the EU and EU law rather than the essential elements of its legal order. Protecting all the specific characteristics of the Union certainly sets higher obstacles to EU accession to the ECHR. It has also been inferred that, in future, the Court’s assessment should be based on the EU’s “essential” characteristics in line with its previous case law.

Fourthly, the implications of autonomy are decisive for the relationship between the EU and international law. In light of autonomy, the EU institutions and its Member States have no choice but to amend a draft agreement held to be incompatible with the EU Treaties. This is what happened after Opinions 1/91 and 1/09, whereas the future of the draft ECHR accession agreement is still uncertain. Another drastic solution would be to modify the EU Treaties in order to remove the said incompatibility.

After having drawn such a picture of autonomy, would it be possible to conclude that this notion is clear enough? In order to approach this question, it is necessary to recall that the Court has on several occasions also held that “an international agreement providing for . . . a system of courts is *in principle* compatible with Community law”.¹⁸⁴ If this statement is taken seriously, there must necessarily be limits to what autonomy is allowed to protect. Certainly, the meaning of EU autonomy does not extend to any structural characteristics of the EU so as to encompass its entire legal order. It

184. Opinion 1/91, paras. 40 and 70 (emphasis added); restated in Opinion 1/92, paras. 32 and 41; Opinion 1/00, para 20; Opinion 1/09, para 74; and Opinion 2/13, para 182.

should be possible to clearly distinguish between what is “essential”, from which no derogations are allowed, and what is not, and therefore open to external influences. Therefore, a further aspect of autonomy to be identified should lie in its limits: what are they? It is in the (current) impossibility to detect its limits that the ECJ’s case law reveals its ambiguity. Certain assessments of the compatibility of the draft EU accession agreement with the EU Treaties in Opinion 2/13 prove that autonomy remains a nebulous concept whose application by the ECJ is difficult to predict. It comes as no surprise that the question of whether the Union’s autonomy impacts (or may impact) on the ISDS codified under the recent EU FTAs is already producing a rich academic debate.

IN SEARCH OF TRANSPARENCY FOR EU LAW-MAKING: TRILOGUES ON THE CUSP OF DAWN

DEIRDRE CURTIN AND PÄIVI LEINO*

Abstract

Who controls the information that is part of the EU legislative processes and is the process as a whole under control? This article explores the legal framework and the applicability of that framework to evolving informal practices by the three key institutions (EP, Council, Commission) involved in the EU legislative process. Given the legislative deadlock on an updated transparency regulation, there are challenges relating to the opacity of Council and Member State positions, legal advice and the so-called four-column documents, which are used to map out progress in interinstitutional negotiations. Currently, the institutions themselves keep control and adopt the relevant rules as a matter of internal (or interinstitutional) working arrangements. We argue that when the institutions exercise legislative functions they are in fact exercising highly political functions that define the fundamental policy choices of the Union's action. This requires not only passive transparency in the form of access to documents but also proactive transparency by the institutions themselves.

1. Introduction

Managing secrecy and access to official information is an important exercise of executive power that is no less crucial in the context of the EU than that of its Member States. The EU's constitutional (and ultimately legislative) response twenty five years ago in the Treaty of Maastricht placed explicit limits on EU administrative secrecy, also in innovative ways. This catapulted the EU to the global vanguard in terms of transparency and public access to documents. The logic of transparency implies that all arms of government – the executive, the entire public administration as well as parliaments – should

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be subject to the requirement of openness or public access.¹ The deeper democratic inspiration, as put by the Court of Justice in *Turco*, of why openness and transparency are important is that of greater citizen participation and of more sustained accountability of legislative processes. This is why the concepts of openness and of transparency were included in the political system of the EU.² Democracy reaches beyond elections, to the possibility of citizens and civil society to follow discussions in real time and to debate them in an open fashion. This presumes knowledge of the choices and compromises that are being and have been made in decision-making process and the arguments raised for and against particular options.

The apex in terms of EU transparency legislation was 2001 with the adoption of the Access to Documents Regulation 1049/2001.³ Since then it has been applied, challenged and interpreted by the EU Courts. Even if commentators have pointed to, at times, a mixed judicial record,⁴ and in some regards considerable institutional resistance (for example, regarding the ECJ's rulings on legal advice),⁵ the Regulation provided an accessible tool for the public to challenge secretive administrative practices of one kind or another. Over time, various members of the public have used the Regulation as a means of challenging the increasingly political practices of the various institutions.⁶ The active engagement of the European Ombudsman provides an additional route both for individual and more systemic scrutiny, despite being dependent on the goodwill of the institutions to bring about change. Considerable progress has undoubtedly been made, also in arenas that are not strictly

1. Grønbech-Jensen, "The Scandinavian tradition of open government and the European Union: Problems of compatibility?", 5 *Journal of European Public Policy* (1998), 185–199, at 187.

2. See further, Curtin and Mendes, "Transparence et participation: des principes démocratiques pour l'administration de l'Union Européene" 137–138 *Revue Française d'Administration Publique* (2011), 101–121.

3. Regulation (EC) 1049/2001 regarding public access to European Parliament, Council and Commission documents, O.J. 2001, L 145/43.

4. Leino and Heliskoski, "Darkness at the break of noon. The case law on Regulation 1049/2001 on access to documents", 43 *CML Rev.* (2006), 735–781.

5. Curtin and Leino, "Openness, transparency and the right of access to documents in the EU. In-depth analysis", (2016) EU Working Papers RSCAS 2016/63.

6. Members of the European Parliament in particular have been active in defending what they perceive as their direct democratic prerogative and have liberally used the general public access provisions as a means of forcing the hand of their institutional counterparts (in particular the Council). See, in particular, Case T-14/98, *Hautala v. Council*, EU:T:1999:157 and the appeal in Case C-353/99 P, *Council v. Hautala*, EU:C:2001:661; Case T-84/03, *Turco v. Council*, EU:T:2004:339; Case T-529/09, *in 't Veld v. Council*, EU:T:2012:215; Case T-301/10, *in 't Veld v. Commission*, EU:T:2013:135; Case T-402/12, *Schlyter v. Commission*, EU:T:2015:209 and the appeal in C-331/15 P, *France v. Schlyter*, EU:C:2017:639, and most recently, Case T-329/17, *Heidi Hautala, Benedek Jávor, Michèle Rivasi and Bart Staes v. EFSA* (case pending), O.J. 2017, C 249/34.

administrative in nature, such as the negotiations of international agreements by the EU.⁷

But gaps have remained, especially when it comes to the way in which legislation is adopted at the European level. This is by no means a new problem from the perspective of democracy and democratic input from the different governance levels. Some national parliaments – especially the House of Lords⁸ – have long drawn attention to various EU practices that restrict access to information during the legislative process, which for them is highly problematic from the perspective of holding their own government representatives in Council to account. The paradox is that this problem seems to have intensified in recent years despite the fact that the Treaty of Lisbon aimed to make the EU more explicitly democratic and transparent and even includes a new Treaty chapter on democracy in the EU.⁹ This paper focuses on this paradox and the ways in which the three EU institutions involved in the EU legislative process – the European Parliament, the Council and the Commission – have exercised the discretion left by the current legal rules to the detriment of transparency in the legislative process.

To understand the entrenched nature of this paradox one needs to go far back to the roots of the current access to documents regime: the rules adopted in 1993 after the Treaty of Maastricht was finally ratified. At that time, the Member States “clutched at transparency as a solution without thinking through the consequences for interinstitutional relations. In advocating transparency, they inadvertently made interinstitutional reform even more pressing.”¹⁰ The nettle remains to be grasped several decades later. The Member States in particular continue to evade contentious political choices by using the mantra of efficiency in lieu of a real effort to balance genuine (and limited) needs for efficient and speedy decision-making with the democratic logic of transparency. The Member States are stuck in the previously predominant logic – that of diplomacy and of secret negotiations. The European Parliament (hereafter EP), which in its political statements argues for making all trilogue documents directly accessible on the internet,¹¹ seemingly allows itself in practice to be dominated by its legislative partner

7. See e.g. Leino, “The principle of transparency in EU external relations law – Does diplomatic secrecy stand a chance of surviving the age of Twitter?”, in Cremona (Ed.), *Structural Principles in EU External Relations Law* (Hart Publishing, forthcoming 2018).

8. See e.g. House of Lords, *Codecision and national parliamentary scrutiny*, *European Union Committee* (2011) and House of Commons, *Transparency of decision making in the Council of the European Union*, *European Scrutiny Committee*, HC 128 (2016).

9. Title II TEU.

10. Lodge, “Transparency and democratic legitimacy”, 32 *JCMS* (1994), 343–368, at 344.

11. European Parliament Resolution of 28 April 2016 on public access to documents (Rule 116(7)) for the years 2014–2015 (2015/2287(INI)), P8_TA(2016)0202, para 27.

and to accept a restrictive disclosure policy. The concepts of transparency and of efficiency are it seems warring concepts and right now in institutional practice efficiency is winning battles if not yet the war.

The challenges are not small. Who controls the information that is part of the legislative processes and is the process as a whole subject to control? At its core is the manner in which supranational institutions and their respective preparatory bodies determine, in their own internal rule-making processes and interinstitutional arrangements, the parameters of openness or secrecy in lieu of detailed and adopted secondary legislation, and how these arrangements comply with fundamental Treaty principles. This article explores in section 2 the legal framework and the applicability of that framework to evolving informal practices by the three key institutions in the EU legislative process. We present the background assumptions of the ordinary legislative procedure and the emergence of trilogues – i.e. informal tripartite meetings on legislative proposals between representatives of the Parliament, the Council and the Commission – as the main format of interinstitutional negotiations. We then present the currently applied transparency arrangements. Our main frame of reference is trilogues in the ordinary legislative procedure (Art. 294 TFEU), but this decision-making format is frequently used for breaking ground also in special legislative procedures. Prior to the interinstitutional stage, negotiations take place within each institution according to their own institutional rules.

The new Interinstitutional Agreement (IIA) on Better Regulation addresses the organization of the ordinary legislative procedure, in general, and the transparency of trilogues, in particular.¹² The subsequent joint declaration on the EU's legislative priorities for 2017¹³ identifies items of major political importance that receive priority treatment in the legislative process. According to Commission President Juncker, these are “initiatives of major political importance that should be fast-tracked in the legislative process”.¹⁴ Both transparency campaigners and corporate lobbyists seem to agree that

12. The Interinstitutional Agreement on Better Regulation, dated 13 April 2016, Article 32–40, available at <www.ec.europa.eu/smart-regulation/better_regulation/documents/iaa_blm_final_en.pdf>, (last visited 5 Oct. 2017).

13. Joint Declaration on the EU's legislative priorities for 2017, 13 Dec. 2016, available at <www.ec.europa.eu/priorities/publications/joint-declaration-eus-legislative-priorities-2017_en>, (last visited 5 Oct. 2017).

14. See the Commission press release, “A Union that delivers swifter and better results: Three institutions sign Joint Declaration on the EU's legislative priorities for 2017”, dated 13 Dec. 2016, available at <www.ec.europa.eu/priorities/announcements/union-delivers-swifter-and-better-results-three-institutions-sign-joint-declaration_en>, (last visited 5 Oct. 2017).

more and more EU law-making is being pushed out of public view.¹⁵ It is not surprising that issues relating to legislative transparency have also surfaced in recent Court cases,¹⁶ but also in enquiries by the European Ombudsman.¹⁷ Section 3 assesses some of the current challenges relating to legislative documents that are still stuck in a twilight zone, in particular given the legislative deadlock on an updated transparency regulation. These challenges relate to the opacity of Council and Member State positions, legal advice and the so-called “four-column documents” (discussed below), which are used to map out progress in interinstitutional negotiations. Our methodological approach is partly empirical.¹⁸ In order to examine how the institutions “think”, we have conducted a number of interviews with legal advisors and policy makers working for the EU institutions or for the Member States either in Brussels or in national capitals. In addition, we have applied and received access to the three institutions’ pleadings in the closed cases relating to legislative matters before the EU Courts. The pleadings are used to illustrate how the institutions argue about transparency in concrete cases. The institutional thinking illustrated by the pleadings is significant also for the reason that we find the influence of Court jurisprudence relating to legislative matters limited; in many cases institutional practices have continued largely unchanged despite rulings. Our interest also relates to institutional thinking and how it is reflected in the actual mundane administrative practice. In other words, we address the EU’s transparency framework in the context of its daily application, beyond the Court’s case law.

Finally, in section 4 we draw some conclusions. We do not believe that every single part of the legislative process should be fully transparent. We analyse how the balance is drawn and who should be responsible for drawing it. Who exercises these fundamental choices and the process by which these decisions are reached are of paramount salience for the the nature of democracy in the EU and its relationship with transparency and openness in the context of

15. See Cooper, “Where European democracy goes to die”, published by *Politico* on 7 Dec. 2016, available at <www.politico.eu/article/where-european-democracy-goes-to-die-european-parliament/>, (last visited 5 Oct. 2017).

16. Case T-540/15, *De Capitani v. European Parliament*, O.J. 2015, C 398/57, and Case T-421/17, *Leino-Sandberg v. European Parliament*, O.J. 2017, C 293/47 both pending.

17. European Ombudsman’s own-initiative inquiry OI/8/2015/JAS concerning transparency of trilogues closed on 12 July 2016; Strategic inquiry OI/2/2017/AB on access to documents relating to Council preparatory bodies when discussing draft EU legislative acts opened on 17 March 2017 and currently pending.

18. In relation to the methodological approach used here, see also Korkea-aho and Leino, “Interviewing lawyers: A critical self-reflection on interviews as a method of EU legal research”, (2018) *JELS* (forthcoming), and Korkea-aho and Leino, “‘New legal realities’? Interviews as a normative source for EU legal research”, (2018) *Tilburg Law Review* (forthcoming).

law-making. The current balancing act largely involves the institutions themselves keeping control of secrecy and adopting the relevant rules as a matter of an internal (or interinstitutional) working arrangement. When the institutions exercise legislative functions they are in fact exercising highly political functions that define the fundamental policy choices of the Union's action. This requires not only passive transparency in the form of responding to access to documents requests but also direct access and proactive transparency by the institutions themselves.

2. EU legislation and transparency

2.1. *EU law-making after Lisbon: The logic of public control*

The Lisbon Treaty assumes that EU law-making will be conducted openly.¹⁹ The Treaty establishes that the Parliament meets in public, as does the Council “when it deliberates and votes on a draft legislative act” (Arts. 16(8) TEU and 15(2) TFEU). The idea is that, at the very least, debate in Parliament should take place in an open and inclusive manner and on the basis of published drafts. The Treaty also places the Council and the European Parliament under an obligation to ensure the publication of the documents relating to the legislative procedures subject to Regulation 1049/2001 “in such a way as to ensure the widest possible access to documents”.²⁰ The Court confirmed already pre-Lisbon in *Turco* that increased openness,

“enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system... Openness in that respect contributes to strengthening democracy by allowing citizens to scrutinize *all the information which has*

19. “The Treaty of Lisbon also improves the transparency of work within the EU, extends to the Council the principle of public conduct of proceedings, which is already applied within the European Parliament, and will result in better information for citizens about the content of legislative proceedings”. See European Union, “The strengthening of European democracy”, 5 Feb. 2014, available at <www.eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:ai0021&from=EN>, (last visited 5 Oct. 2017).

20. Under Art. 12(2) of the Regulation, legislative documents – meaning “documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States” – should be made directly accessible unless one of the exceptions under the Regulation is applicable. “Direct access” means that making these documents publicly available should not presume specific requests but should instead take place automatically.

formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights”.²¹

Regulation 1049/2001 has not been updated following the Treaty of Lisbon – despite many years of trying.²² The interinstitutional impasse on reform has left the EU institutions a great deal of discretion since the Regulation does not give detailed guidance on how the balancing between the right of public access and the institutional need for secrecy ought to be made. The Article 4(3) “space to think” exception provides ample ground for arguments relating to the need to protect institutional efficiency.²³ In particular, the Regulation does not identify the documents in the legislative procedure that should be made available without delay, or specify the effect of the stage of decision-making – if any – on the applicable transparency requirements.²⁴ Since Regulation 1049/2001 leaves serious gaps, many of the key issues have been addressed internally by the Parliament’s and the Council’s Rules of Procedure – at their own discretion.

The Treaties stress how democracy in the EU has two varieties (Art. 10 TEU). These are direct democracy, which empowers the citizens to participate in the democratic life of the Union, and representative democracy. Representative democracy builds on citizen representation in the EP and Member States representation in the Council through their governments. The national governments are democratically accountable to their own parliaments or their citizens. While our focus is more on direct democracy, legislative transparency is vital to the operation of both forms of democracy. A particularly crucial element of democracy is public control. A legislative procedure which operates across multiple procedural stages allows the different players to “repeatedly question the arguments of the others, and mobilize public attention or affected interests around different ways of

21. Joined Cases C-39 & 52/05 P, *Turco*, EU:C:2008:374, paras. 45–46 (emphasis added).

22. Commission, “Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents”, COM(2008)229 final; Commission, “Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) 1049/2001 regarding public access to European Parliament, Council and Commission documents”, COM(2011)137 final.

23. The lead case in this regard is Case T-2/03, *Verein für Konsumenteninformation v. Commission*, EU:T:2005:125. See Leino, “Just a little sunshine in the rain: The 2010 case law of the European Court of Justice on access to documents”, 48 CML Rev. (2011), 1215–1252.

24. The difficulties in drawing this distinction are also visible in court cases like Joined Cases T-424 & 425/14, *ClientEarth v. Commission*, EU:T:2015:848 relating to impact assessments and C-331/15 P, *France v. Schlyter*, EU:C:2017:639, which involved a detailed opinion of the Commission concerning a draft Order relating to the annual declaration of nanoparticle substances.

concluding the legislation.”²⁵ Inclusiveness arguably requires that policy proposals are publicly contested, deliberated and justified.²⁶ As Advocate General Cruz Villalón recently put it: “‘Legislating’ is, by definition, a law-making activity that in a democratic society can only occur through the use of a procedure that is public in nature and, in that sense, ‘transparent’. Otherwise, it would not be possible to ascribe to ‘law’ the virtue of being the expression of the will of those that must obey it, which is the very foundation of its legitimacy as an indisputable edict.”²⁷

Taking these general principles as a starting point, we will now describe how the ordinary legislative procedure in general, and trilogues in particular have developed, and how public access has been realized in this context.

2.2. *The transformation of the ordinary legislative procedure: The multiplication of informal trilogues*

The codecision procedure (today known as the ordinary legislative procedure) was introduced by the Treaty of Maastricht largely to alleviate Europe’s democratic deficit.²⁸ It builds on the idea of the Council and the European Parliament co-legislating as more or less equal partners in three readings and, when necessary, in the Conciliation Committee. While the procedure was initially introduced to make EU law-making more democratic, many of the key decisions during this procedure are today made with little scope for public oversight. They are taken in a “plethora of informal and semi-formal meetings in which many of the real decisions about legislation are taken”.²⁹ In particular, the growing rise of trilogues as the forum where legislative files are negotiated and decided upon between the three institutions entails that interinstitutional deals are, as the main rule, made in a fast-track procedure in first reading.³⁰ During this phase, the EU democratic process is in the hands

25. Lord, “The democratic legitimacy of codecision”, 20 *Journal of European Public Policy* (2013), 1056–1173 at 1063.

26. Obholzer and Reh, “How to negotiate under co-decision in the EU. Reforming trilogues and first-reading agreements”, CEPS Policy Brief No. 270, May 2012, at 4.

27. Opinion of A.G. Cruz Villalón in Case C-280/11, *Council v. Access Info Europe*, EU:C:2013:325, para 63.

28. There is a rich political science literature on codecision, which can be divided into three main categories: those on the functioning and development of the procedure; on the relative influence of the various EU institutions; and those on broader questions such as those relating to democracy and possible Treaty changes. For a review, see e.g. Rasmussen, “Early conclusion in the co-decision procedure”, (2007) *EUI Working Papers MWP 2007/31*, at 3–4.

29. Farrell and Héritier, “The invisible transformation of codecision: Problems of democratic legitimacy”, SIEPS Report 2003/7, at 6.

30. See also Case T-755/14, *Herbert Smith Freehills LLP v. Commission*, EU:T:2016:482, para 56.

of very few: the European Parliament rapporteur(s), the representatives of the Council Presidency and Secretariat and a few Commission officials, or more recently, Commissioners. It is not just a matter of the “invisible transformation”³¹ of the legislative procedure as such, but also of substantive opacity.

The original aim of “informal trilogues” was to prepare for Conciliation Committee meetings.³² The format was found useful in many ways. A Coreper informal exchange of views in 1995 stressed the need to strengthen the trilogue, since the success of conciliation depended on the effectiveness of preparatory work; therefore the Ambassadors wondered about the possibility to “envisage a simplified procedure under which an agreement between the two institutions could swiftly be decided, in return for a few minor adjustments to the text, without recourse to the cumbersome Conciliation Committee procedure”.³³ Similar ideas were discussed on the side of the EP.³⁴ A mechanism for early agreement was also linked to power relations: since the Parliament had proved both willing and able to use its new prerogatives and block legislation, it was in the Council’s interest to initiate smooth discussions with Parliament at an early stage in the procedure.³⁵

Subsequently, the Treaty of Amsterdam introduced the option of early agreements in first reading. The new Treaty also included a Declaration (No. 34) in which the Intergovernmental Conference called on the three institutions “to make every effort to ensure that the co-decision procedure operates as expeditiously as possible”. Since then, trilogues have been used already during first reading, with the specific aim of adopting “fast track legislation” through early agreements. The ability to produce results fast has remained a core consideration.³⁶ The literature points to the balance between the criteria of efficiency and transparency in the legislative process, underlining the weight that has been accorded to the former and the relative lack of attention

31. The term is that of Farrell and Héritier, *op. cit. supra* note 29.

32. Council, “Report by the Presidency and the General Secretariat of the Council to the European Council on making the co-decision procedure more effective”, 13316/1/00 REV 1 LIMITE CODEC 875, 28 Nov. 2000.

33. Quoted in European Parliament Task Force on the Intergovernmental Conference, “Briefing No 8 on the Codecision procedure”, JF/bo/146/95, Luxembourg 20 July 1995, at 3.

34. See the Bourlages/Martin report adopted by the Plenary on 17 May 1995.

35. Farrell and Héritier, “Codecision and institutional change”, 30 *West European Politics* (2007), 285–300, at 295.

36. See e.g. Annex III of Helsinki European Council, “Presidency conclusions”, 10 and 11 Dec. 1999, para 18, guidelines for reform and recommendations with the purpose of guaranteeing “an effective Council for an enlarged Union”, which specifically instruct the Presidency to “take due account of the requirement to schedule conciliation and preparatory meetings”.

paid to the latter.³⁷ Despite the extended use of informal trilogues, the formal structure recognized by the Treaties for breaking institutional disagreement remains the Conciliation Committee. And yet, the principal mechanism for “appropriate contacts” between the Council and the European Parliament consists in practice of the trilogues³⁸ – an informal structure that is not recognized in the Treaties.³⁹

The wish to simplify procedures led to codecision being turned into the ordinary legislative procedure by the Treaty of Lisbon, and the use of special legislative procedures being limited. Today, the Treaties provide for 85 legal bases that refer to the use of this procedure in the adoption of EU legislation.⁴⁰ In the 7th parliamentary term (2009–2014), 89 percent of Commission proposals fell under legal bases that were adopted in the ordinary legislative procedure.⁴¹ This procedure is generally found to have succeeded beyond initial expectations,⁴² been broadly accepted and provoked little public controversy.⁴³ Since its introduction, the procedure has “developed into a well-oiled legislative procedure” where informal trilogues act as “drivers of much of the interinstitutional legislative activity”.⁴⁴ Over 1,500 trilogues on approximately 350 codecision files were held under the 7th legislative term. They are an incredibly efficient format for accommodating institutional positions, and assist in closing a great majority of deals early in the legislative procedure. In 2009–2014, the number of early agreements increased to 85 percent of files decided in the ordinary legislative procedure (out of 488 files) adopted in first reading and a total of 93 percent either in first or early second reading.⁴⁵ The initial logic behind the codecision procedure was that the most politically sensitive dossiers would reach the conciliation stage, while more

37. See e.g. Huber and Shackleton, “Codecision: A practitioner’s view from inside the Parliament”, 20 *Journal of European Public Policy* (2013), 1040–1055.

38. “Report by the Presidency and the General Secretariat of the Council to the European Council on making the co-decision procedure more effective”, 13316/1/00 REV 1 LIMITE CODEC 875, 28 Nov. 2000., at 20.

39. However, their existence has been acknowledged in case law. See e.g. Case C-409/13, *Council v. Commission (Micro-financial assistance to third countries)*, EU:C:2015:217 paras. 18–26.

40. For a full list, see European Parliament, “Activity Report on Codecision and Conciliation 14 July 2009 – 30 June 2014 (7th parliamentary term)”, DV\1031024EN.doc, Annex I.

41. *Ibid.*, at 3.

42. See e.g. Farrell and Héritier, *op. cit. supra* note 29.

43. Lord, *op. cit. supra* note 25.

44. European Parliament, “Activity report”, cited *supra* note 40, at 11.

45. Only 9 files went to conciliation, and of these all but one were adopted in third reading. *Ibid.*, at 8. Two committees were particularly apt to use first reading deals: the REGI Committee which adopted 100 % of its 14 files and the ECON Committee which adopted 98 % of its 54 files at first reading.

strictly technical dossiers could be adopted at first reading.⁴⁶ Today, however, the use of first reading solutions is in no way limited to technical, urgent or uncontested files.⁴⁷ Unlike in the later stages of the legislative procedure, in the first reading the institutions act under no specific deadline. Currently the average total length of the ordinary legislative procedure is 19 months.⁴⁸

This kind of fast-track legislation is largely promoted through by-passing the formal machinery of law-making.⁴⁹ Instead of the three readings and conciliation stipulated in Article 294 TFEU, the general practice now is agreement in first reading. In practice, trilogues are launched before the Parliament has adopted its formal position and Council adopted its common position, with a view to reaching “a prompt agreement on a set of amendments acceptable to the Parliament and the Council”.⁵⁰ Trilogues are increasingly taking over as the main forum for making legislative deals between the three institutions.⁵¹ As the Ombudsman concludes in her recent inquiry:

“Each co-legislator will be more willing to negotiate in good faith with the other co-legislator during the trilogue if it believes that the agreement reached will then be formally adopted unchanged. Thus, changes to the text during the subsequent formal procedure (the vote in Parliament and the consideration by Council) are uncommon. What happens in Trilogue negotiations is therefore key for the eventual content of much legislation.”⁵²

As a result, we witness an invisible transformation of the ordinary legislative procedure. The formal Treaty-based decision-making formats for interinstitutional decision making – to which transparency arrangements have more or less been linked – have been replaced by informal discussions. While the formal structures of the procedure provide for democratic potential, the informal practices established by the co-legislatures render these qualities

46. Council Report cited *supra* note 38, para 18.

47. See Bressanelli et al., “The informal politics of codecision: Introducing a new data set on early agreements in the European Union”, (2014) *EUI Working Papers* RSCAS 2014/64.

48. However, the average length of first reading deals has increased, reflecting how even most difficult files are now closed early in the process. European Parliament, “Activity Report”, cited *supra* note 40, at 10.

49. For a more detailed discussion, see Leino, “The politics of efficient compromise in the adoption of EU legal acts”, in Cremona (Ed.), *EU Legal Acts: Challenges and Transformations, Collected Courses of the Academy of European Law* (OUP, 2017, forthcoming).

50. Case T-755/14, *Herbert Smith Freehills*, para 55.

51. CEPS High Level Group, “Shifting EU Institutional Reform into High Gear: Report of the CEPS High-level Group”, (2014), available at <www.ceps.eu/book/shifting-eu-institutional-reform-high-gear-report-ceps-high-level-group>, (last visited 13 July 2017), at 1–24.

52. Decision of the European Ombudsman setting out proposals following her strategic inquiry OI/8/2015/JAS concerning the transparency of trilogues, 12 July 2016, para 19.

passive.⁵³ Early agreement in first reading is fundamentally different from procedures that go through two or three readings: institutional positions in the latter stages are formal and publicly available, like those used as a basis for conciliation.⁵⁴ Therefore, the use of the ordinary legislative procedure has also had unexpected side-effects with negative consequences for the objectives that it was specifically aimed to address: transparency and accountability.⁵⁵ The assumption is often that efficiency gains (speed) outweigh these negative consequences, but the relationship between transparency and efficiency is largely untested empirically.⁵⁶

The Parliament's Rules of Procedure are the only institutional rules that recognize the existence of trilogues.⁵⁷ Their conduct relies on institutional practice, codified in a "Joint declaration on practical arrangements for the co-decision procedure" adopted in 2007, preceding the Treaty of Lisbon.⁵⁸ The declaration stresses the flexibility involved in trilogues, which "may be held at all stages of the procedure and at different levels of representation, depending on the nature of the expected discussion". There is reluctance in the Council and among many MEPs to overhaul and formalize trilogue rules. Apart from considerations relating to efficient law-making, the informal and flexible functioning of trilogue rules is believed to enhance the opportunities for the key actors to influence the dossiers.⁵⁹ The lack of formal arrangements emphasizes the lucid character of trilogues: it is not only the substance of legislation that is subject to institutional compromise, but also the manner in which compromise is reached.

2.3. *Informal trilogues as institutional working arrangements: A matter of discretion*

Institutional attitudes and practices relating to transparency in trilogues have recently been mapped in the context of an own initiative Ombudsman

53. See e.g. Stie, "Co-decision – the panacea for EU democracy?" (2010) ARENA Report Series 01/2010; Lord, *op. cit. supra* note 25, at 1069–1070.

54. Huber and Shackleton, *op. cit. supra* note 37, at 1047.

55. Farrell and Héritier, *op. cit. supra* note 29; Burns, Rasmussen and Reh, "Legislative codecision and its impact on the political system of the European Union", 20 *Journal of European Public Policy* (2013), 941–952, at 949.

56. Novak, "Is there a tension between transparency and efficiency in decision? The case of the Council of the European Union", (2011) *EUI Working Paper* MWP 2011/33.

57. Rules 69b–69f provide for provisions on "interinstitutional negotiations during the ordinary legislative procedures".

58. Joint declaration on practical arrangements for the codecision procedure (Art. 251 of the EC Treaty), O.J. 2007, C 145/5.

59. Stie, *Democratic Decision-Making in the EU. Technocracy in Disguise?* (Routledge, 2013), p. 182.

investigation relating to the matter.⁶⁰ In their replies, all three institutions challenged the Ombudsman's mandate to engage in the own-initiative inquiry. In their view, trilogues and their organization are a part of their political functions and thus cannot be subject to maladministration but should instead be assessed through the political accountability mechanisms.⁶¹ The Council, for example, stressed the informal nature of trilogues as:

“working arrangements that the co-legislators have put in place in exercise of their Treaty prerogatives to organize the conduct of the legislative activity. Decisions on whether and how to conduct trilogues meetings – and notably decisions on when to conduct trilogues, in which composition, on whether and how to issue support documents – pertain to the political responsibility of the co-legislators. ...”⁶²

The meetings can take the form of (informal) trilogues or technical meetings. The latter are to focus on technical rather than political elements, and are conducted among civil servants and political advisers with a view to preparing for political discussions. The basis of these discussions is the four-column document, discussed below (section 3.3). The distinction between “technical” and “political” is however difficult to maintain:

“Sometimes you have political dialogues which are so technical that you wonder what would be a technical trilogue. But you also have very political trilogues, where it's really a lot of politics: more political messages and all the work was shifted to the technical level and the technical trilogues lasted much longer than the political trilogues, and they would come back and say OK that's fine go to the next topic. And I have to say this is where the deal is being made.”⁶³

Most matters are settled in technical trilogues. The function of meetings at the political level is to confirm the deal already made or agree on the proposals for solving the questions that remain formally open. Technical trilogues are to a large extent about brain-storming and the informal exchange of ideas; for

60. European Ombudsman's own-initiative inquiry OI/8/2015/JAS concerning transparency of trilogues. All relevant opinions are available at <www.ombudsman.europa.eu/en/cases/correspondence.faces/en/61592/html.bookmark>.

61. Opinion of the Council of the EU in the European Ombudsman's own-initiative inquiry OI/8/2015/JAS, concerning transparency of trilogues, 29 Oct. 2015, paras. 7–9.

62. *Ibid.*, para 10.

63. Interview with a Legal Adviser at a Member State EU Representation, 11 Feb. 2016 (Respondent 11).

example, EP officials are not expected to have a mandate for the solutions they propose.⁶⁴

“I’d like to think that there are some criteria to evaluate what is technical and what is political, but it is not always straightforward. Everything that is controversial is political. Things that seem technical can suddenly become political, and vice versa. There is an ongoing discussion between the different layers of decision-makers. Important elements can still be considered technical; elements can change nature. It is a trade where closed items can be re-opened, and nothing is agreed until everything is settled.”⁶⁵

The latter principle entails that, until the complete text of a proposal has been agreed by the co-legislators, changes can be made to any part, including those provisionally closed.⁶⁶ In practice, the institutions are in a more or less permanent dialogue at all levels, also outside the trilogue format, making informal contacts “something very normal and natural”.⁶⁷ Efficient law-making is stressed beyond those legislative files that have a clear deadline, such as where there is a need to replace a framework that is about to expire or tackle a particularly urgent challenge:

“It is clear that some legislative files have a fixed deadline or are linked to particular political pressure to close the file. But in many cases I have felt that it is good that somebody draws a limit to negotiations since the overall solution will no longer improve no matter how long we keep on negotiating, and that more time will only help more problems to emerge.”⁶⁸

An EP official explains how “exhaustion is often the real motivation for closing a file” in addition to the “need to make results, this is what the public expects from us”.⁶⁹

64. Interview with an Administrator at the EP JURI Committee, 9 Nov. 2016 (Respondent 33).

65. Interview with an Administrator in the EP JURI Committee, 26 Jan. 2017 (Respondent 37).

66. Opinion of the European Parliament in the European Ombudsman’s own-initiative inquiry OI/8/2015/JAS concerning transparency of trilogues, 22 Oct. 2015, at 4.

67. See the House of Lords European Union Committee, “Codecision and national parliamentary scrutiny – Report with Evidence”, 125 HL Paper (2009), at 14.

68. Interview with a Deputy Permanent Representative, 10 Feb. 2016 (Respondent 15).

69. Interview with an Administrator in the EP JURI Committee, 26 Jan. 2017 (Respondent 37).

One broader issue in this regard is how the Commission's role is understood in the legislative procedure in general, and in trilogues in particular. Is it that of a technical assistant or political body? In its own view, the Commission proposal is a preparatory act that marks the initiation of an "interinstitutional process in which the Commission is closely involved, and in the course of which it might change or even withdraw its proposal".⁷⁰ The General Court has acknowledged that, despite the Commission's right of initiative, the legislative functions are allocated to the Parliament and the Council. Therefore, when preparing and developing a proposal for a legislative act, the Commission is not acting in a legislative capacity.⁷¹ The Commission itself defined its own role in the context of recent litigation as follows:

"Although the final decision in the legislative procedure is taken by the European Parliament and the Council, the Commission is involved in it, from the beginning to the end, through its quasi-monopoly of legislative initiative (Article 17(2) TEU) and its 'ownership' of legislative proposals . . . The Commission may also withdraw its proposals. Finally, the Commission plays an essential role in the search for a compromise between the Council and the Parliament, in light of the general interest."⁷²

The Commission reply to the Ombudsman stresses that trilogue meetings are organized by the co-legislators (the EP and Council): "Commission assists the trilogue negotiations, by explaining and, if it feels the need, defending the merits of its proposal. The Commission may also withdraw a proposal in exceptional circumstances."⁷³ The latter prerogative is strong, as the Court recently confirmed in relation to a legislative file where the Commission withdrew its proposal on the very day that the Parliament and the Council were preparing to formalize their agreement.⁷⁴ The Commission objected to the decision of the co-legislators to replace the implementing power of the Commission with the ordinary legislative procedure for the purpose of the adoption of certain decisions due to the political impact those decisions were found to have. The Court examined a number of trilogue documents and confirmed – with reference to the principles of conferral of powers and

70. Commission Defence in Case T-796/14, *Philip Morris v. Commission*, sj.f(2015)1253808, paras. 58–59.

71. Joined Cases T-424 & 425/14, *ClientEarth v. Commission*, paras. 102–103.

72. Commission Defence in Case T-755/14, *Herbert Smith Freehills*, sj.f(2015)643751, para 22.

73. Opinion of the European Commission in the European Ombudsman's own-initiative inquiry OI/8/2015/JAS concerning transparency of trilogues.

74. Case C-409/13, *Council v. Commission (macro-financial assistance)*.

institutional balance – that while the Commission has no “right of veto in the conduct of the legislative process”, it does have the right of withdrawal “where an amendment planned by the Parliament and the Council distorts the proposal for a legislative act in a manner which prevents achievement of the objectives pursued by the proposal and which, therefore, deprives it of its *raison d’être*”.⁷⁵

Unlike the other bodies, the Commission has traditionally been represented in trilogues by civil servants, which has made quick political deals difficult on its part.⁷⁶ This setting is changing, noting President Juncker’s commitment to “always send political representatives to important trilogue negotiations”, the strong role of the Commission in mediating solutions in trilogues, and also the ambition of the current Commission President to lead what he calls a “highly political” Commission, as opposed to a technocratic one.⁷⁷ We wonder if the General Court’s justification for leaving the Commission outside the obligations flowing from broader legislative transparency, building on the reserving of legislative functions to the EP and the Council, really holds; the Court of Justice will have a second chance to address this issue since an appeal in the relevant case is pending.⁷⁸ In the trilogue context, it is obvious that the Commission also produces compromise texts – something that is built into its role as a mediator. Since EP and Council proposals are subject to a higher standard of transparency, it would be odd to consider the role of the Commission as merely that of an administrator, to which a lower standard applies.⁷⁹ More generally we would stress that it is not easy to distinguish the purely technical from the political – either as a matter of substance or over time.⁸⁰ It is striking that many of the institutional solutions are defended on the basis of the idea that technical decisions can be delegated and negotiated in secret, as long as they are subject to political control. However, we doubt that this is possible, as well as doubting the effectiveness of public control in this regard.

75. *Ibid.*, para 83. See generally Ritleng, “Does the European Court of Justice take democracy seriously? Some thoughts about the macro-financial assistance case”, 53 *CML Rev.* (2016), 11–34.

76. Fuglsang and Olsen, “Staying in the loop. The Commission’s role in first reading agreements”, (2009) EPIN Working Paper No. 25/Sept. 2009.

77. Juncker, “A new start for Europe: My agenda for jobs, growth, fairness and democratic change. Political guidelines for the next European Commission opening statement in the European Parliament plenary session”, Strasbourg, 15 July 2014, available at <www.ec.europa.eu/commission/sites/beta-political/files/juncker-political-guidelines-speech_en_0.pdf>, (last visited 13 July 2017).

78. Case C-57/16 P, *ClientEarth v. Commission*, pending, O.J. 2016, C 191/5.

79. Interview with a Member of the Council Legal Service, 9 Nov. 2016 (Respondent 31).

80. On the traditional justification for delegating technical issues to bodies that are subject to political accountability, see further, Majone, “The rise of the regulatory State in Europe”, 17 *West European Politics* (1994), 77–101.

2.4. Access to trilogue documents: The logic of communication

The public access legal framework does not address the question of trilogue documents specifically. The 2007 joint declaration on practical arrangements quoted above stipulates that trilogues “shall be announced, where practicable”, and “when conclusion of a dossier at first reading is imminent, information on the intention to conclude an agreement should be made readily available as soon as possible”.⁸¹ There is no mention of access to information while the process is in the substantive phase. Under the new IIA on Better Regulation, the three institutions commit to ensuring “the transparency of legislative procedures, on the basis of relevant legislation and case law, including an appropriate handling of trilateral negotiations”.⁸²

Today each institution has its own system for access, and primarily settles questions relating to access to documents produced by itself (when necessary, following a consultation, if the request concerns a document produced by another institution). For the Parliament’s part, documents can be found in the Legislative Observatory, which is currently the most comprehensive institutional register.⁸³ The Council also maintains a register, but finding documents in it requires knowledge of either its number, title or a time period for its creation. The Commission has no comprehensive public register. Its register contains “a number of documents, with a focus on legislative documents, as well as agendas and minutes of Commission meetings”, and official Commission documents⁸⁴ (such as COM or SEC documents that can be sought by number), but many documents it has in its possession can only be accessed by submitting a request. Therefore, following legislative procedures requires a serious amount of detective work. Ideas about a joint and comprehensive interinstitutional register have been presented for years,⁸⁵ and subject to discussions under the interinstitutional committee created under Regulation 1049/2001,⁸⁶ but so far produced no concrete results. The new IIA includes a commitment to “improve communication to the public during the whole legislative cycle” and “undertake to identify, by 31 December 2016, ways of further developing platforms and tools to this end, with a view to

81. Joint declaration on practical arrangements, cited *supra* note 58.

82. The Interinstitutional Agreement on Better Regulation, para 28, cited *supra* note 12.

83. See <www.europarl.europa.eu/oeil/>, (last visited 5 Oct. 2017).

84. See <www.ec.europa.eu/info/about-european-union/principles-and-values/transparency/access-documents/how-access-commission-documents_en#publicaccesstodocuments>, (last visited 13 July 2017).

85. See e.g. European Parliament, “Activity Report”, cited *supra* note 40, at 46, where reference is made to a “public register on trilogues, which could make available to the public, inter alia, information on files under negotiation and the composition of negotiating teams, and, once agreement on a given file is reached, all relevant documentation.”

86. See Art. 15(2) of Regulation 1049/2001.

establishing a dedicated joint database on the state of play of legislative files”. Work on a joint database between the three institutions is ongoing, and there is an initiative to present all documents relating to interinstitutional legislative procedures at a single point on EUR-LEX.⁸⁷

There are no joint or agreed minutes or reports of trilogue meetings. Instead, reporting takes place within each institution according to its own practices.⁸⁸ As far as interinstitutional discussions are concerned, in principle any kind of document that is seen by the parties as facilitating the negotiations is admitted.⁸⁹ In practice, the “four-column document” is the only jointly drafted report of discussions that tracks progress: “It is in effect the full ‘map’ of the informal, but decisive, trilogue negotiation process”.⁹⁰ It is a shared document between the institutions, which usually contains the initial Commission position, the Parliament’s position as adopted in Committee and the Council position. In addition, the document includes a fourth column, which shows the compromises suggested by any of the three institutions or considered agreed to between the negotiators.⁹¹

The practices relating to the creation of these documents are highly informal. The only institutional provision referring to four-column documents used to be found in an Annex to the Parliament’s Rules of Procedure, which specified that: “[n]egotiations in trilogues shall be based on one joint document, indicating the position of the respective institution with regard to each individual amendment, and also including any compromise texts distributed at trilogue meetings (e.g. established practice of a four-column document)”.⁹² In the Parliament’s new Rules of Procedure from January 2017, this point has been deleted, thus turning four-column documents into documents that exist as a matter of practice, but not as a matter of law. It is difficult to avoid the feeling that the change deleting explicit mention has been triggered by the fact that these documents are under a sustained accountability spotlight, both by the Ombudsman and by the Court as a result of challenges brought before it.

Four-column documents are drawn up in collaboration between the Secretariats of the three institutions, which also fill them in as negotiations

87. See the Opinion of the Council of the European Union to the own-initiative inquiry OI/2/2017 AB on access to documents relating to Council preparatory bodies when discussing draft EU legislative acts, available on the European Ombudsman’s website, <www.ombudsman.europa.eu/en/cases/case.faces/en/49461/html.bookmark> paras. 14–15.

88. Opinion of the European Commission, cited *supra* note 73.

89. Opinion of the European Parliament, cited *supra* note 66.

90. Decision of the European Ombudsman, cited *supra* note 52, para 49.

91. Opinion of the European Commission, cited *supra* note 73.

92. See Annex XX, which laid down a “Code of conduct for negotiating in the context of the ordinary legislative procedures”, point 5.

progress.⁹³ Only the fourth column with comments and compromise solutions changes during the negotiations.⁹⁴ In the fourth column, “any institution may table additional written contributions on specific issues for consideration in trilogue meetings”.⁹⁵ The order and the number of columns may also vary according to the political and negotiating circumstances.⁹⁶ Multi-column documents are atypical, since they are living documents, and there is no specific point in time when they are formally completed or registered. Instead, amendments and compromise proposals are added to the same Word file, which is subject to new discussions in varying formats and frequently amended.⁹⁷ A four-column document is not tabled in a formal setting, “it is just an exchange”.⁹⁸ It is a means to control and keep track of the negotiation process where agendas for meetings have little practical relevance:

“at the trilogue stage everything changes, agenda items are frequently postponed and matters outside the agenda are taken up . . . Matters that were provisionally closed are opened up again . . . nothing is definitely agreed. But of course we also make progress in trilogues. But informing about what actually happens would be confusing. I find it confusing, I often do not know what was decided.”⁹⁹

However, while carried out at the technical level, the process of drafting these documents is highly influential for the outcome, since solutions build largely on discussions between the Presidency, the Commission and the Council Secretariat when preparing the four-column documents.¹⁰⁰

All three institutions define the four-column document in technical terms. For the Commission, it is a “working-tool”.¹⁰¹ For the Council, it “is a shared document belonging to an informal process”.¹⁰² For the Parliament, it is a “pragmatic working tool [which] ensures that negotiations progress in an orderly fashion.”¹⁰³ The only institution stressing the importance of these documents is the EP, which recognizes their emergence as the main working tool for legislative negotiations. The Parliament also points out how the jointly

93. Opinion of the European Commission, cited *supra* note 73.

94. Opinion of the European Parliament, cited *supra* note 66.

95. Opinion of the European Commission, cited *supra* note 73.

96. Opinion of the Council, cited *supra* note 61, para 16.

97. Interview with a Member of the Council Legal Service, 9 Nov. 2016 (Respondent 31).

98. *Ibid.*

99. Interview with an Administrator in the EP JURI Committee, 26 Jan. 2017 (Respondent 37).

100. Interview with a Deputy Permanent Representative, 10 Feb. 2016 (Respondent 15).

101. Opinion of the European Commission, cited *supra* note 73.

102. Opinion of the Council, cited *supra* note 61, para 16.

103. Opinion of the European Parliament, cited *supra* note 66.

prepared four-column documents have been seen to promote transparency in trilogues but mainly within the Parliament itself.

In the Council, four-column documents are prepared as standard Council documents and registered in the public register when they are circulated to the Member States. Following distribution, therefore, their existence is visible in the register, but the documents cannot usually be downloaded. Only selected versions of the document are distributed to the Member States and subsequently registered, depending on when the Presidency wishes to place the matter on the agenda. The registered versions of the four-column documents are made publicly available after the final adoption of the legislative act. Before that, these documents can be made available based on individual requests under Regulation 1049/2001.¹⁰⁴ The Council policy has been to grant partial access, only to disclose the European Parliament and Commission positions (which are public anyway). The Council mandate is disclosed if it has been disclosed earlier – if disclosure is possible at time of request – but usually access to the Council part is refused.¹⁰⁵

Also, for the Parliament, documents relating to trilogue negotiations are generally disclosed once agreement on the file has been reached; this is linked to how the “final outcome of the negotiating process always becomes a public document”.¹⁰⁶ Disclosure of documents related to conciliation and third reading, in the rare cases when these stages are used, are systematically published in the Parliament’s public register, following signature of the final act by the co-legislators. The register also includes joint texts approved by the Conciliation Committee as well as other documents of general character concerning this part of the procedure

National parliaments often cannot follow how negotiations advance in trilogues. They depend on information provided by their national governments, who might be constitutionally required to provide such information but may themselves have difficulty in gaining access to information. This makes it virtually impossible for them to engage in a dialogue with their own parliament while trilogue negotiations are ongoing. The positions of national parliaments are usually based on the initial Commission proposal, which is often significantly altered during the legislative process; and that process moves fast, which hinders effective scrutiny.¹⁰⁷ While Member States may have other general channels of

104. Opinion of the Council, cited *supra* note 61.

105. Interview with Members of Council Secretariat, 20 Jun. 2016 (Respondents 35 and 36).

106. Opinion of the European Parliament, cited *supra* note 66.

107. House of Lords Report, cited *supra* note 67, at 15–16.

information concerning trilogues, for example by interaction with MEPs who are their own nationals,¹⁰⁸ their knowledge of actual amendments made during trilogues may be limited. A topical example of a trilogue deal can be found in Regulation (EU) 909/2014, which exceptionally includes a national derogation applicable to Finland.¹⁰⁹ What makes the file interesting is that neither the Finnish Government nor the Parliament ever asked for the derogation, nor was it included in the Council mandate. There are no public documents from the trilogue stage to verify its origin, but most likely the derogation originated in the financial lobby, and was inserted by a trilogue representative of the EP.¹¹⁰ This is an example of highly selective transparency – to the lobbyists, but not the affected national public interest. The unclearly drafted derogation in the Finnish case caused significant delay in national implementation, not least because there was no national position clarifying the objectives of this derogation. A legal advisor working for another national parliament explains that trilogues are:

“a sore point for us, in the sense that it is so lacking in transparency, so it’s very difficult to know what’s going on, and from a scrutiny point of view we only really manage to, on many occasions, get engaged when the whole thing’s all done and dusted and it’s all too late . . . what we end up with in the worst cases, or at the worst end of the spectrum, is here’s a Commission proposal, it’s been discussed in Council, it’s had a mandate in COREPER, none of which is being made to the public, it’s had all these trilogues and here’s the finished product, like it or lump it.”¹¹¹

National parliaments can only hold their own governments to account for positions taken in the EU legislative procedure if they have access to core information about the actual decision-making. In the following section, we address three issues that have been particularly contentious in this regard: Member State positions, legal advice by the institutions’ legal services, and four-column documents.

108. Interview with a Legal Adviser at a Member State EU Representation, 11 Feb. 2016 (Respondent 11), pointing out how in more political files the bigger Member States tend to be well represented among the rapporteurs.

109. Art. 38(5) Regulation (EU) 909/2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) 236/2012, O.J. 2014, L 257/1.

110. The Finnish Government’s proposal HE 28/2016 vp, Hallituksen esitys eduskunnalle laiksi arvo-osuusjärjestelmästä ja selvitystoiminnasta sekä eräiksi siihen liittyviksi laeiksi, at 23.

111. Interview with a Legal Advisor working for a National Parliament, 7 Sept. 2016 (Respondent 26).

3. Stepping into the twilight zone

3.1. *Council and Member State input*

The provisions on open Council deliberations found in the Treaty are significant as a matter of principle, but in practice often irrelevant for legislative matters that are closed in first reading. In the large majority of files, legislative work is undertaken by Council preparatory bodies (committees and working parties) convening under Coreper, which leads the work and closes most of the deals¹¹² before they reach a formal Council configuration at ministerial level. Coreper and working party discussions are not open to the public. Coreper documents, such as Council mandates for the trilogues, are not made public on distribution. When they are made publicly available depends on the file.¹¹³ Legislative documents are usually prepared as ST documents (“standard”) and marked in the Council register when circulated to delegations.¹¹⁴ Since 2016, this has increasingly also applied to room documents and working papers: the Council’s new system of recording documents also covers “informal documents”, which are now registered and thus easily retrievable.¹¹⁵ However, the great majority of them are made public only upon request, after a case-by-case assessment, while the discussions on the legislative file are ongoing. In this assessment, the existence of the risk that disclosure may seriously undermine the ongoing decision process is particularly considered.¹¹⁶ There are no statistics on how many documents are disclosed in full or in part, or at what stage of the procedure.

112. Art. 19 allocates the task of preparing the Council work on Coreper, which is to examine all items placed on Council agenda with the view of endeavouring to reach agreement prior to submission to the Council. Coreper also decides on the “adequate presentation of the dossiers to the Council and, where appropriate, shall present guidelines, options or suggested solutions”.

113. However, there are examples of legislative files, in particular the recent data protection package, where there have been several requests to documents upon issue both at EU and national levels by civil society and consultancy representatives. In those cases documents have been made universally available upon request, after the working group or trilogue for which they had been prepared. Since many of these documents were also leaked, a decision was taken to prefer official disclosure. Trilogue documents were however not always disclosed in full. Interview with Members of Council Secretariat, 20 Jun. 2016 (Respondents 35 and 36).

114. Some are prepared as DS documents (room documents) in which case they are not marked in the register, but on a separate list which is kept and published once a month by the responsible DG. If there is a request for all documents belonging to a certain file, these documents are considered as well. Interview with Members of Council Secretariat, 20 Jun. 2016 (Respondents 35 and 36).

115. Opinion of the Council to the own-initiative inquiry OI/2/2017 AB cited *supra* note 87 at 10.

116. Opinion of the Council, cited *supra* note 61, para 17.

In the Council, legislative documents are systematically disclosed via the public register only once a file has been closed, in practice after a delay of a year or two.¹¹⁷ However, even at the stage when documents are generally released there are certain documents that merit particular treatment. Such documents include, in particular, Legal Service opinions (see section 3.2 below) and contributions by Member States. The Council Rules of Procedure further make it possible for a Member State to request that documents reflecting its individual position in the Council are not to be made available to the public.¹¹⁸

In the trilogues, the Council is represented by its Presidency, assisted by staff from the Secretariat and the Council Legal Service. In principle, feedback from trilogues is given to the delegations either through working parties or Coreper: “Trilogues are usually reported from in detail in working parties and for Coreper on a slightly more general level. The Presidency also rather clearly articulates that this is the mandate you have given me but it will not be enough and I will need more flexibility. We also discuss tactical issues in detail.”¹¹⁹ Coreper as the forum for confidential deals has been emphasized in particular after the decision to turn formal Council discussions public:

“At some stage of the negotiating process we need a stage for making compromises, and currently it is Coreper. And in Coreper I we seldom take matters to the ministers that would include open questions. This is necessary because of the technical nature of questions but also for reasons of scheduling, since many of our Councils only convene less seldom than once a month. There is the question of efficiency, but also political credibility. And this smoke screen is needed at some stage where you can move without losing face and for Member States it is better that this takes place in an organized structure than that the forum for deal-making simply disappears.”¹²⁰

Discussions in Coreper are closed: “In a Union of twenty-eight Member States you need to have some system where you can just present something to the Member States to say could you agree or not and then go back because

117. Under Art. 11(6) of Annex II to the Council Rules of Procedure, “any documents” relating to legislative acts will be made available after the adoption of the act, including “information notes, reports, progress reports and reports on the state of discussions in the Council or in one of its preparatory bodies (outcomes of proceedings)”; Interview with Members of Council Secretariat, 20 June 2016 (Respondents 35 and 36).

118. See Art. 11 of Annex II to the Council Rules of Procedure on “Specific provisions regarding public access to Council documents”.

119. Interview with a Deputy Permanent Representative, 10 Feb. 2016 (Respondent 15).

120. Ibid.

otherwise the whole process will be slowed down so completely.”¹²¹ In this setting, the objective of ensuring transparency in EU policymaking, characterized by the ideal of consensus among sovereign States as main stakeholders, is genuinely challenging.¹²²

Fears of slowing down the process have largely guided Council policy, in particular when its decision-making is in its early stages. As far as Member State positions are concerned, the Council’s traditional policy line has been to black out delegation symbols from documents, referring to the fact that their identification “could considerably reduce the flexibility of delegations to reconsider their position or lead to a re-opening of the debate and thereby seriously undermine the Council’s decision-making process”.¹²³ Denials to grant access have been justified by reference to the fact that the requested contributions related to “particularly sensitive issues in the context of preliminary discussions within the Council . . . where thorough discussions have not yet taken place . . . and a clear approach has not yet emerged . . .”.¹²⁴ The Council has maintained that democratic debate does not presume the identification of delegations. Its “legislative process is very fluid and requires a high level of flexibility”, enabling Member States to modify their positions and thereby maximizing the chances of reaching an agreement. Maximum room for manoeuvre is needed for ensuring a “negotiating space”, which is necessary for preserving the effectiveness of the legislative process. If national positions were disclosed, this would trigger pressure from public opinion, and hamper the effectiveness of the Council’s decision-making process.¹²⁵ This would, in the Council’s view, reveal itself especially in the reluctance of delegations to provide their views in writing, which would “cause significant damage to the effectiveness of the Council’s internal decision-making process by impeding complex internal discussions on the proposed act, and would also be seriously prejudicial to the overall transparency of the Council’s decision-making”.¹²⁶ The secrecy surrounding Council decision-making also has interinstitutional implications for the Parliament, which enjoys limited access to information about discussions within the Council and individual Member States’ positions. Its lack of access

121. Interview with a legal advisor at a Member State Permanent representation, 11 Feb. 2016 (Respondent 12).

122. Harlow and Rawlings, *Process and Procedure in EU Administration* (Hart Publishing, 2014) p. 119.

123. Council letter of 19 Dec. 2002 quoted in Case T-84/03, *Turco v. Council*, para 7.

124. Decision of the Council of 26 Feb. 2009, quoted in Case T-233/09, *Access Info Europe v. Council*, EU:T:2011:105, para 24.

125. Case C-280/11 P, *Council v. Access Info Europe*, EU:C:2013:671 para 24.

126. Case T-233/09, *Access Info Europe v. Council*, para 10.

to information concerning Council negotiations is a frequently voiced concern.¹²⁷

The question relating to publicity of Member State positions was raised in 2009 when Access Info Europe, an NGO promoting freedom of information in the EU, requested access to a working party document relating to a legislative matter, which included footnotes indicating the positions of individual delegations. Negotiations on the file were ongoing at the time of the request, and no common position by the Council had yet been adopted. The central question was whether the disclosure of Member State positions detracts from the effectiveness of decision-making and, if so, whether effectiveness or openness should take priority. Another salient issue was what turns a document into one that is “of a particularly sensitive nature” within the meaning of *Turco* – for the Parliament, which intervened on the applicant’s side, this nature could not arise from media interest or the existence of divergences in the views of the parties.¹²⁸

In its appeal to the Court of Justice on this case,¹²⁹ the Council argued that the balance established by EU law between transparency and effectiveness would be excessively balanced in favour of the former if Member State positions needed to be disclosed. The ECJ rejected this argument, with reference to the fact that full access to a document can be limited only if there is a genuine risk that the protected interests might be undermined. The high standard of proof required to establish that level of harm makes it almost impossible to rely on the need to protect the institutions’ decision-making process (Art. 4(3) of Regulation 1049/2001) in this context. This was a strong and generally worded statement by the ECJ, also bearing in mind that the requested documents related to the early stages of Council decision-making. In particular, according to the Court:

“the various proposals for amendment or re-drafting made by the four Member State delegations which are described in the requested document are part of the normal legislative process, from which it follows that the requested documents could not be regarded as sensitive – not solely by reference to the criterion concerning the involvement of a fundamental interest of the European Union or of the Member States, but by reference to any criterion whatsoever”.¹³⁰

127. Rule 43. See also European Parliament, “Activity Report”, cited *supra* note 40, at 45.

128. Parliament Statement in Intervention in Case C-280/11 P, *Council v. Access Info Europe*, para 33.

129. Case C-280/11 P, *Council v. Access Info Europe*.

130. *Ibid.*, para 63.

Following this ruling, the Council General Secretariat prepared a paper of options for the Member States to consider.¹³¹ The Secretariat pointed out that there is, in fact, no legal obligation on the Council to draw up documents which identify Member States' positions, but such documents – when drafted systematically in all legislative files – assist in providing a detailed overview of the state of play of ongoing negotiations. However, situations exist where the automatic recording and subsequent public release of the names of individual Member States might be deemed inappropriate. Alternatively, the practice of recording individual delegations in all documents relating to ongoing legislative procedures could be ceased. This would address the specific concern that publicity could reduce Member States' negotiating flexibility, but also render the preparatory documents less useful for delegations. Coreper opted for a middle position: to continue recording Member State symbols in documents relating to ongoing legislative procedures where it is deemed appropriate, with reference to coherence, the impact on the efficiency of the Council's decision-making and the Member States' negotiating flexibility, the need to keep track of the evolution of the negotiations, and other considerations linked to the specific nature of the file or subject-matter, notably its sensitive character.¹³² However, there is reluctance to enforce the ruling in *Access Info*. A legal advisor working for a national parliament sees this reluctance as hindering national scrutiny as well: "I don't think the Council has been really following the spirit of the jurisprudence anyway on the disclosure of legislative documents. I mean they still whack a limité stamp on things that have Member State positions when it's by no means accepted by the Court."¹³³

The European Ombudsman recently launched a strategic inquiry relating to the disclosure of documents concerning discussions on draft EU legislative acts in Council preparatory bodies, in order to examine how the *Access Info* ruling is implemented in practice and to scrutinize the extent to which the present arrangements adequately facilitate public scrutiny of ongoing legislative discussions.¹³⁴ The Council feels that the ruling does not require the adaptation of its Rules of Procedure,¹³⁵ and that Regulation 1049/2001 is

131. See Council, "Drafting of documents relating to legislative activities", 8622/1/14 REV 1 LIMITE, 13 May 2014.

132. See Council, "Outcome of the proceedings of the 2479th meeting of the Permanent Representatives Committee held on 15 May 2014", 10078/14 LIMITE, 22 May 2014.

133. Interview with a Legal Advisor working for a National Parliament, 7 Sept. 2016 (Respondent 26).

134. Letter opening strategic inquiry OI/2/2017/AB on access to documents relating to Council preparatory bodies when discussing draft EU legislative acts, 10 March 2017.

135. Opinion of the Council to the own-initiative inquiry OI/2/2017 AB cited *supra* note 87, para 9.

applied so that access to delegation symbols is given in ongoing legislative procedures “save in duly justified and exceptional cases”.¹³⁶ The Council’s latest Annual Report on the application of the Regulation indicates that at the initial stage, the need to protect the Council’s internal decision-making was the most used exception (555 times, or 36% of refused applications). This was also the most used exception invoked to justify partial access (23 times, or 42%) and at the stage of confirmatory applications (90 times, or 87%).¹³⁷

These discussions raise a key issue relating to legislative transparency: what is an acceptable efficiency cost in a law-making procedure that claims democratic foundations? The underlying assumption seems to be that an increase in transparency (potentially) exposes the debates of law-makers to a general public composed of outsiders, and that this may lead to a loss of decisional efficiency measured either in time or the attainment of particular pre-set policy goals by the insiders.¹³⁸ By inverse logic, it is believed that a decrease in transparency leads to gains in terms of decisional efficiency.¹³⁹ In our view, the delay that may take place does not, without more, preempt the value of more substantive democratic engagement which might also result in qualitatively better outcomes.

3.2. *Legal advice*

Regulation 1049/2001 includes an exception to public disclosure relating to court proceedings and legal advice, which requires the institution to balance the harm from disclosure with the public interest in disclosure. The applicability of the exception to legal service opinions given in the context of legislative procedures has been repeatedly subject to disagreement. For the Council, their disclosure should be limited, since these opinions are: “an important instrument which enables the Council to be sure of the compatibility of its acts with Community law and to move forward the discussion of the legal aspects at issue. Secondly, disclosure of the legal service’s opinions could create uncertainty regarding the legality of legislative acts adopted further to those opinions and, therefore jeopardize the legal

136. *Ibid.*, para 8.

137. Council, “Fifteenth annual report of the Council on the implementation of Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents”, Council doc. 7903/17.

138. Hillebrandt and Novak, “Integration without transparency”? Reliance on the space to think in the European Council and Council”, 38 *JEI* (2016), 527–540, at 529.

139. *Ibid.*

certainty and stability of the Community legal order.”¹⁴⁰ The Council has not been convinced about the relevance of the legislative context for its analysis: in its view, “an overriding public interest is not constituted by the mere fact that the release of those documents containing the legal service’s advice on legal questions arising in the debate on legislative initiatives would be in the general interest of increasing transparency and openness of the institution’s decision-making process.”¹⁴¹

Like the Council, the Commission has been defensive of legal advice. In its view: “only clear and independent legal advice can play an effective role in influencing their internal decision-making process. Such advice permits the institutions to be informed realistically as to their margin of manoeuvre and, in particular, it permits them to exercise their discretion whether or not to follow such advice.”¹⁴² If such advice were to be made public, the Commission argues: “[l]egal services would be obliged to exercise self-restraint and to draft their legal advice in very cautious terms”; therefore, “[p]ublic legal advice, drawn up in cautious terms, cannot be as influential or effective in guiding the institution to a legally sound result and hence contribute to legal certainty and the rule of law”.¹⁴³

The role of legal services in assisting in the context of trilogues has also been on the judicial agenda recently. In that context, the Commission expressed its view:

“If the Commission Legal Service cannot freely advise on a particular drafting of a text when it is known that the text will be contested, its role will inevitably be limited to oral comments in order not to put at risk the work of the Commission and, in trilogues, of the legislators. In such circumstances . . . the drafting of a specific provision requires, almost by definition, written action, in the form of a first draft and then amendments to that draft, accompanied, as the case may be, by the reasons behind a particular drafting.”¹⁴⁴

The Commission assessed the matter in particular from the perspective of prospective litigation. Disclosure of documents that are relevant for future litigation would “place the debate in the public square, while at the same time being discussed before the courts”, which would “seriously also undermine

140. Council Decision concerning Mr Turco’s confirmatory application of 22 Nov. 2002, quoted in Joined Cases C-39 & 52/05 P, *Turco*, para 13.

141. *Ibid.*

142. Response of the Commission in Joined Cases C-39 & 52/05 P, *Turco*, JURM(2005)6028, para 13.

143. *Ibid.*, paras. 14 and 16.

144. Commission Defence in Case T-755/14, *Herbert Smith Freehills*, sj.f(2015)643751, para 57.

the serenity and integrity of the legal debates before the Union Courts”.¹⁴⁵ Consequently, it found that “on balance, the value-added of the disclosure of those documents for the democratic life of the Union is negligible or even negative, and that the need to protect ‘court proceedings and legal advice’ weighs much more.”¹⁴⁶

The Commission has also stressed that documents drafted by its legal services in the trilogue context do not reflect the positions defended by the Commission in the legislative process, but instead concern “legal advice in the preparation of positions to be taken. There is no overriding public interest to know how the position taken has been prepared”.¹⁴⁷ For the public, it is sufficient to read the relevant article “as it has been adopted by the legislature. It can draw conclusions from the text itself and from other documents available, and does not need to dispose of the legal advice of the Council legal service to know ‘how the legislature applies this principle’.”¹⁴⁸

The institution that seems to have the least issues with the publicity of its legal advice is the legal service of the European Parliament. Legal matters are handled by its Legal Affairs Committee, a political body, and its legal service, which gives much of its advice to and in committees whose work is public in any case, so there is no presumption that its advice should or could be confidential: “I have no particular problems about giving legal advice to the public, as I say, it has a very sanitary effect on the members on the Legal Service, they really have to try and get it right immediately, from the beginning. And if this means a little more caution, fine.”¹⁴⁹

The *Turco* ruling quoted earlier is not only influential because of the general principles of legislative transparency it expresses, but also for laying out the interpretation of the exception relating to the protection of legal advice in the legislative context. The ECJ established that “Regulation 1049/2001 imposes, in principle, an obligation to disclose the opinions of the Council’s legal service relating to a legislative process”.¹⁵⁰ However, access can be denied temporarily and in exceptional cases if the advice is “of a particularly sensitive nature or having a particularly wide scope that goes beyond the context of the legislative process in question”.¹⁵¹

145. *Ibid.*, para 59.

146. *Ibid.*, para 66.

147. *Ibid.*

148. Commission Statement of Intervention in Case T-710/14, *Herbert Smith Freehills LLP v. the Council*, sj.f(2015), paras. 8–9.

149. Interview with a Former Member of the Legal Service of the European Parliament, 29 Apr. 2016 (Respondent 19).

150. Joined Cases C-39 & 52/05 P, *Turco*, para 68.

151. *Ibid.*, para 69.

The implementation of the general principle of access was debated again in the *Miettinen* case,¹⁵² when the General Court had the opportunity to clarify that “particularly sensitive character” relates to the substance of the document, not the policy area (in this case, criminal law and fundamental rights) to which the document belongs. The General Court recalled that the application of Article 4(3) of Regulation 1049/2001 presumes that the decision-making process is *seriously* undermined through disclosure having a substantial impact. While the legislative procedure was ongoing at the time of Miettinen’s request, the contested decision failed to contain any tangible element demonstrating a risk that would be reasonably foreseeable and not purely hypothetical. Contrary to the Council’s arguments, the General Court stressed that:

“full public access to the contents of Council documents constitutes the principle, above all in the context of a procedure in which the institutions act in a legislative capacity, and that the exceptions must be interpreted strictly. First, . . . it should be noted that the requested document examines whether the proposed legal basis for the proposal for a directive is appropriate. It is sufficient to note . . . that the question of the legal basis is an essential question in the legislative process and does not shift the focus of debates, but is an essential part thereof. Secondly, as regards the risk invoked by the Council that disclosure of the requested document would impede its negotiating capacities and the chances of reaching an agreement with the Parliament, . . . a proposal is designed to be debated, in particular as regards the choice of legal basis. Moreover, as the applicant states, in the light of the importance of the choice of legal basis of a legislative act, the transparency of the choice does not weaken the decision-making process, but strengthens it.”¹⁵³

The scope of the legal advice exception in the legislative context has recently been examined in a number of cases relating to the negotiations of the new directive on the manufacture, presentation and sale of tobacco (TPD) and related products.¹⁵⁴ In these cases, a number of affected tobacco companies who were challenging the validity of the new legislation in national courts had

152. Case T-395/13, *Miettinen v. Council*, EU:T:2015:648.

153. *Ibid.*, paras. 67–70.

154. See Case T-18/15, *Philip Morris v. Commission*, EU:T:2016:487; Case T-796/14, *Philip Morris v. Commission*, EU:T:2016:483; Case T-800/14, *Philip Morris v. Commission*, EU:T:2016:486; Case T-710/14, *Herbert Smith Freehills v. Council*, EU:T:2016:494; Case T-755/14, *Herbert Smith Freehills v. Commission*, EU:T:2016:482. Case T-520/13, *Philip Morris Benelux v. Commission* closed with an order of the Court since the Commission disclosed the requested impact assessment after commencement of the action and there was no longer a need to adjudicate on the action.

applied for access to documents relating to the trilogue phase. The requested documents included a number of e-mail messages sent between the different legal advisers of institutions and Member States. The Council refused to grant access to these documents, emphasizing that the messages contained “informal exchanges regarding the preliminary legal positions” on particularly controversial, complex and debated provisions, arguing that informal documents of this kind “should enjoy specific protection, precisely because they were informal and intermediate”.¹⁵⁵ The Commission’s refusal was primarily based on the connection of these documents with pending litigation, some of which involved the applicants, whose interest in gaining access was thus more private and privileged than public.¹⁵⁶ The General Court accepted that:

“Although the legislative discussions conducted during a trilogue often concern political issues, they may also sometimes concern technical legal issues. In the latter case, on occasion, the legal services of the three institutions must discuss and agree on a position, an agreement that must subsequently be approved by each of the three institutions in accordance with their respective procedures.”¹⁵⁷

The General Court also accepted that the exchanging of views between the Legal Services of the three institutions in order to reach a compromise regarding a legislative text in the context of a trilogue could be described and subsequently protected as legal advice.¹⁵⁸

A significant difference with the *Turco* situation was that, at the time of requesting the documents, the chosen legal basis was already subject to legal challenge.¹⁵⁹ The applicants had a private interest in the outcome, unlike in *Turco*, which was brought by a Member of the European Parliament. In these *Tobacco* cases, the General Court accepted that the requested documents had a relevant link with a dispute pending before the EU Courts and that disclosure would “compromise the principle of equality of arms and, potentially, the ability of the institution concerned to defend itself in those proceedings”.¹⁶⁰ For the Court, the ability of an institution to defend itself would be seriously compromised if it needed to disclose internal positions concerning the legality of the various options envisaged in the context of the drawing up of the act in

155. Case T-710/14, *Herbert Smith Freehills v. Council*, paras. 7 and 9.

156. Case T-755/14, *Herbert Smith Freehills v. Commission*; Case T-800/14, *Philip Morris v. Commission*.

157. Case T-755/14, *Herbert Smith Freehills v. Commission*, para 55.

158. *Ibid.*, paras. 58–59.

159. Case T-800/14, *Philip Morris v. Commission*, paras. 70–71.

160. Case T-796/14, *Philip Morris v. Commission*, para 88.

question, including assessments by its own staff which may have ultimately been disregarded.¹⁶¹ Disclosure of such documents would:

“seriously compromise its decision-making process, as it would deter staff from making such remarks independently and without being unduly influenced by the prospect of wide disclosure exposing the institution of which they are part. The possibility of expressing views independently within an institution helps to encourage internal discussions with a view to improving the functioning of that institution and contributing to the smooth running of the decision-making process.”¹⁶²

It would seem that these rulings, from the General Court, expand the scope of the relevant exception as compared to previous case law. In *Turco*, the ECJ was not convinced by arguments relating to external pressure.¹⁶³ The institutional thinking in the legal services points to an understanding ranging from categorical protection of their advice to a need to protect advice beyond the closure of the relevant legislative procedure every time institutions act contrary to the advice of their legal services.¹⁶⁴

Due to the predominant institutional mindset, the *Turco* ruling never had any more than a marginal effect on institutional behaviour.¹⁶⁵ Indeed, a pertinent example of this is the Council Rules of Procedure, which were never updated to reflect the case law. Several appeals are pending before the European Ombudsman. The fact that very few legal service opinions are actively made public is a point observed also at national level when the justification for amendments made during Council discussions have remained difficult to trace in public documents.¹⁶⁶ Legal advice is, however, routinely used for the purpose of solving deadlocks because it is seen as the common, objective and therefore “neutral” ground – irrespective of how objective it in fact is. Indeed, the notes from the legal services often largely describe the state

161. Case T-18/15. *Philip Morris v. Commission*, para 73.

162. *Ibid.*, para 87.

163. Joined Cases C-39 & 52/05 P, *Turco*, para 64.

164. Interview with a former Legal Advisor at a Member State EU delegation, 3 Feb. 2016 (Respondent 1).

165. This is also reflected in jurisprudence, see e.g. Case T-452/10, *ClientEarth v. Council*, EU:T:2011:420; Case T-303/13, *Miettinen v. Council*, EU:T:2014:48; Case T-395/13, *Miettinen v. Council*.

166. See the recent statements of the Constitutional Law Committee of the Finnish Parliaments PeVL 61/2016 vp concerning the establishment of the European Public Prosecutor’s Office, and PeVL 50/2016 vp, which concerned the legislation concerning elections to the European Parliament. In both cases significant amendments had been made following an opinion of the Council Legal Service, which however was only made publicly available to an extremely limited extent – a practice that the Committee found unsatisfactory with reference to democratic principles.

of the law, often with reference to case law or EU legislation, rather than concrete suggestions on the choices to be made or what should be done. Recent rulings demonstrate that there are however instances where legal advisers in the trilogue context not only give advice on legal matters; rather, they can and also do act as mandated with the task of reaching an agreement.¹⁶⁷ This may lead to the drafting of compromise texts. The legal advice then becomes part of the actual EU law-making process. The line between what is “legal” and what is “political” is thus notoriously difficult to draw.

3.3. *Interinstitutional (four-column) documents*

A case concerning access to the core trilogue documents, the four-column documents, is currently pending before the General Court.¹⁶⁸ Their publicity has so far only been addressed by the European Ombudsman in the context of her recent investigation.¹⁶⁹ The Ombudsman recognizes a general difficulty with tracing and locating existing public information relating to legislative procedures and recommends the establishment of a joint database. She urges the institutions to provide information on trilogue dates and the institutions’ initial positions on a Commission proposal, regardless of the level at which the position has been adopted internally. As noted above, this is a highly relevant recommendation for the Council in particular. The Ombudsman also asks for general summary agendas before or shortly after the trilogue meetings, but is satisfied with information that does not reveal individual strategies or compromise negotiations. She acknowledges that access to the evolving versions of the four-column document would allow the public to follow how a final text has emerged from the institutions’ different starting positions. However, the Ombudsman proves sensitive to institutional concerns relating to efficiency: “It is arguable that the interest in well-functioning trilogue negotiations temporarily outweighs the interest in transparency for as long as the trilogue negotiations are ongoing.”¹⁷⁰ Four-column documents should, however, proactively be made available as soon as possible after the negotiations have been concluded. In addition, she argues for making lists of trilogue documents, including a list of the politically responsible

167. Case T-755/14, *Herbert Smith Freehills v. Commission*, paras. 58–59.

168. Case T-540/15, *De Capitani v. European Parliament*.

169. Ombudsman investigation 2015, cited *supra* note 17.

170. Decision of the European Ombudsman setting out proposals following her strategic inquiry OI/8/2015/JAS concerning the transparency of Trilogues. Para 54. The whole decision can be found here: <www.ombudsman.europa.eu/en/cases/decision.faces;jsessionid=03336474A7944097D17AD21EA4EC188E>.

representatives present. If negotiations are delegated to civil servants, their names should be accessible.

The Ombudsman's recommendations appear very restrained considering that her approach resembles that already enunciated by the Council itself in a report adopted in 2000. In that report, legislative transparency is mainly treated as a matter falling under a common communications strategy:

“A paradoxical situation exists. The co-decision innovation has become a point of reference among legislative procedures, but is still little known. Its results, even when they relate to areas of direct concern to Europe's citizens, are given only very little publicity. Efforts must be made to rectify this situation by setting up a communications strategy which will ensure transparency and the flow of information to citizens, while safeguarding the effectiveness of proceedings and the confidentiality of the negotiations and guaranteeing the freedom of each institution.”¹⁷¹

This was seen to require in particular the publication of updated information on the progress of codecision dossiers, informing about the results of negotiations within the Conciliation Committee, and informing the press about the progress of legislative codecision procedures. Apart from requiring the establishment of a joint database, the Ombudsman report adds little to the position adopted by the Council itself almost 20 years ago, long before the Lisbon Treaty entered into force.

One of the predominant reasons for institutions to prefer a logic of transparency that privileges communication, such as the policy proposed by the Ombudsman above, is the ability for the (executive) institution to enjoy almost unlimited discretion to autonomously decide what, and what not, to intentionally reveal and with what slant to communicate it. It also allows the institutional actor to assess the necessity for communication in view of the overall needs of efficiency and the ability to reach decisions. It is the classic argument of negotiations of any kind – that only decisions behind closed doors will enable actual compromises to be reached. While “[c]losed settings could be legitimate in situations where actors search for common ground and where a shielded setting is a means to reaching goals that can otherwise not be achieved . . . when the purpose of a setting is the adoption of public policy, secretly reached agreements must at some point be tested and justified in a publicly accessible manner.”¹⁷² If that is applied more concretely to the legislative setting then, in order to produce good legislation, “legislators have to be able to use their discretion and judgement to negotiate compromises that improve on the status quo, but they also have to be responsive to their

171. Council Report, cited *supra* note 38, at 23.

172. Stie, *op. cit. supra* note 59, p. 189.

constituents as a matter not only of political survival but also of democratic duty.”¹⁷³

In addition, we find that the Ombudsman’s conclusion disregards some of the key principles of the Access Regulation: the presumption of openness, and the consideration of harm, as interpreted in particular in the *Access Info* ruling quoted above, where the Court required a high standard of proof to establish a genuine risk of serious harm. The presumption of openness requires that documents are made available, unless this criterion is fulfilled, based on individual examination of documents. We see no reason why these general principles would not apply also to four-column documents. What the European Ombudsman seems to suggest is a general presumption of secrecy in the legislative context, which would free the institutions from the duty of examining each requested document and replace this with communication. While the General Court has acknowledged in *ClientEarth*¹⁷⁴ that general presumptions of secrecy can be established in the legislative context,¹⁷⁵ we seriously doubt that they would be suitable in the context of a negotiating stage forming the core of legislative activity. The judgment by the General Court in *ClientEarth* has been appealed, and the case is now before the Grand Chamber of the Court of Justice.¹⁷⁶ General presumptions can, as a matter of principle, be held not to apply if the applicant manages to demonstrate that the presumption does not apply or that there exists a “higher public interest” justifying disclosure.¹⁷⁷ So far no applicant has managed to cross this threshold; this illustrates just how irrefutable in practice these general presumptions may be.¹⁷⁸ The presumption of non-disclosure is intrinsically rather abstract and with no access to the actual document it may be very difficult, if not impossible, to refute the presumption. This may require some rethinking of general presumptions of non-disclosure.

The Ombudsman’s conclusion also contradicts an emerging feature in case law on legislative transparency which suggests that closed stages in

173. Gutmann and Thompson, *The Spirit of Compromise. Why Governing Demands It and Campaigning Undermines It* (Princeton University Press, 2012), p. 159.

174. Joined Cases T-424 & 425/14, *ClientEarth v. Commission*.

175. In its earlier case law, the ECJ contrasted the framework of administrative functions with cases in which the EU institutions acted in the capacity of a legislature, identifying the latter cases as those where wider access to documents should be authorized, and seen this difference as a reason to justify presumptions of secrecy in the administrative context. Case C-139/07 P, *Technische Glaswerke Ilmenau*, EU:C:2010:376, para 60.

176. Case C-57/16 P, *ClientEarth v. Commission*, pending.

177. Case C-139/07 P, *Technische Glaswerke Ilmenau*, para 62.

178. This is linked to the broader question of whether the existence of an overriding interest justifying the disclosure of documents could always be presumed to exist in legislative matters, which the Council and the Commission specifically challenged in Case T-710/14, *Herbert Smith Freehills v. Council*. The Court did not rule on this question.

decision-making can be justified if they are followed by open ones where it is possible to influence the outcome. For example, in *ClientEarth* the General Court accepted that the citizens' right to know the underpinnings of legislative action in real-time is less relevant at the preparatory stage of a legislative proposal than later on. This is because there will be a chance to influence the procedure after the legislative procedure has been initiated.¹⁷⁹ This logic is familiar from the Court's earlier case law relating to transparency at the stage of Conciliation Committee. In the *IATA* case, the claimants contended that the principles of representative democracy were undermined since the meetings of the Conciliation Committee were not public. The Court pointed out that the joint text adopted by the Conciliation Committee must still be examined by the Parliament itself with a view to its approval; an examination takes place in the conditions of transparency under the Parliament's normal transparency provisions, thus ensuring "in any event the genuine participation of the Parliament in the legislative process in compliance with the principles of representative democracy".¹⁸⁰ The extent to which a similar principle can be extended to legislative initiatives is however questionable, as is its application in the trilogue context, where the stages following the closing of trilogues tend to be a mere formality.

Exceptions applying to types of documents (such as four-column documents) during entire phases of the legislative procedure (like trilogues) create block exceptions that run contrary to the logic of Regulation 1049/2001 in guaranteeing the "widest possible openness" that is based on the consideration of concrete harm in individual cases. Limiting access during the entire stage of trilogue negotiations is not a minor temporary limitation as is exceptionally permitted under Article 4(7) of the Regulation. Since the Treaties set no time limit for negotiations in first reading, they can be ongoing for months or even years, during which the initial legislative proposal may change fundamentally, and is usually approved without any further changes apart from technical modifications proposed by lawyer-linguists. If these documents remain confidential, there are limited ways in which civil society or citizens can engage in a timely and informed debate about matters that are on the legislative agenda, beyond the use of communication policy tools, which we find unsatisfactory as an avenue for ensuring public access as a part of ensuring accountability. The logic of discretionary communication should not automatically pre-empt the very different logic of public access, in particular access to legislative documents. This does not mean in our view that confidential negotiations cannot at a certain stage be acceptable if followed by

179. Joined Cases T-424 & 425/14, *ClientEarth v. Commission*.

180. Case C-344/04, *International Air Transport Association v. Department for Transport*, EU:C:2006:10, paras. 60–61.

a public arena enabling public involvement. How this could work in practice in the specific context of trilogues is not evident when the subsequent public stages are currently a mere formality, without genuine possibilities for political contestation.

The time may well be ripe for efficiency to beat a chequered retreat. EU normative provisions point to a logic of transparency, in the sense of openness and of public access that is privileged in the Treaty of Lisbon. This logic does not patronize the citizen but rather values the role that the public and the informed citizen can play in a wider democratic perspective. From this perspective, transparency is seen as a fundamental citizens' right and as a means of securing public accountability. Democracy is after all not only about the adoption of pre-set policy goals, but also debating those goals in a genuine and open manner. The institutions do not need protection from civil society input or diverging opinions; in any event, it is not an acceptable reason for secrecy in a democratic procedure. Nor is it appropriate for European civil servants who apply the public access rules within the institutions to use their intrinsic discretion so as to "protect" the legislative agenda and pre-legislative policy choices within the Commission or another institution. This is all the more so when one takes into account the selective transparency through access that many lobbyists enjoy in practice within the legislative process.¹⁸¹ The reality of selective transparency for the privileged few brings with it the need to balance in the broader public interest and ensure more possibilities for broader public scrutiny. Transparency to a highly selective audience can never be a substitute for general transparency – the precursor of accountability.

4. On the cusp of dawn

Regulation 1049/2001 is chronically and structurally outdated. It is not just a matter of muscle fatigue but also of an altered institutional environment. The clear and stated ambition of the Lisbon Treaty is to ensure legislative transparency. The outdated Regulation leaves far too much scope for institutional discretion. Amending the Regulation in line with the Lisbon Treaty is and remains desirable for many reasons. But – quite aside from the seeming political deadlock on this and the risk of retrogression – the crucial issue is how the legislative procedure itself is regulated and how it operates de facto, as merely one reading instead of the three indicated in the legal framework.

181. See Korkea-aho, "EU lobbyists: Rulemakers 'in the shadows'?", in Fahey (Ed.), *The Actors of Postnational Rule-Making: Contemporary Challenges of European and International Law* (Routledge, 2015), pp. 207–230.

Limited issues of legislative transparency such as access to legal opinions and Member State input are arguably now already quite clear irrespective of legislative revision. Existing case law stresses the democratic objectives of the Treaties. The main challenge is to ensure that the institutions actively apply that case law in practice. What happens at the moment is that in iterative cases the institutions effectively challenge the Court's rulings again and again. There is moreover no way to get repeated institutional resistance into the Court, as the Commission as guardian of the Treaties is unlikely to bring a case against itself or one of the other institutions for failure to comply with the Court's own judgments. This means that the role of the Ombudsman in this area is particularly crucial and remains very topical. The nettle remains to be grasped.

The most imperative part of legislative transparency relates to the search for transparency at the stage of interinstitutional negotiations, in particular trilogues. This is the arena where compromises are being made on the legislative package as a whole, resulting in the final text of the act being approved unamended in formal procedures. In this arena, the Ombudsman's conclusion relying on the logic of communication instead of the logic of public access is unsatisfactory from the perspective of guaranteeing transparency of the crucial stage in EU law-making. Communication is fundamentally about control by the institution holding the information, whereas in a democratic procedure, control should by definition be with the citizens. The creation of secluded spaces for entire, decisive procedural parts such as trilogues in the manner suggested by the Ombudsman is taking the logic of secrecy too far. Secrecy should in our view not dominate decisive stages of decision-making where everything is on the table and compromises are reached which then become the final text of the EU legislation and the rest of the procedure – the actual votes in Council and in the European Parliament – is in reality a mere formality.

Consequently, we do not agree with the Ombudsman on four-column documents, which runs contrary to the democratic underpinnings of the Regulation and some of the Court's most established case law. In our view four-column documents should, as the general rule, be made available proactively and in real time, following the presumption of openness built into the Treaties and the Regulation. At the very least and as an interim arrangement – not quite dawn but only the first hints of it – four-column documents should be made publicly available when the public access provisions are activated (passive access to documents). Disclosure should be, as with any disclosure under the Regulation and in line with existing case law, subject to concrete evaluation of harm in individual cases. When possible harm to the interests protected by the Regulation is being assessed, the risk of

that interest being undermined must be reasonably foreseeable and not purely hypothetical. Such harm is difficult to justify in the legislative context, but we do not exclude the possibility entirely. In current institutional thinking it would seem that much of the efficiency cost claimed is far from being foreseeable and highly hypothetical in nature, as the institutional thinking quoted above demonstrates. The evaluation of harm must primordially reflect the democratic underpinnings of the Regulation. It should not be used as an excuse to avoid political responsibility before citizens or national parliaments for choices made. It is hard to see why the general public interest in the adoption of EU-wide legislation would not outweigh the institutions' own interests in completing a law-making procedure as quickly as possible. This is not to say that we see no room whatsoever for secluded spaces. But the bottom line is that if secluded pockets exist they are limited in time and subject matter and are followed by opportunities for political debate and contestation. This is not currently the case given the manner in which the ordinary legislative procedure operates.

The new normalization of the "first reading" (only) trilogues should be replaced by a much more widespread and full use of all three readings. Since the subsequent readings come with time limits it is not evident that the use of the full legislative procedure would automatically contribute to its length, but would instead bring more openness, more accountability and often also better quality legislation.¹⁸² The Conciliation Committee process has many positive aspects: a clearer outcome; not every detail is discussed but the focus can be kept on politically relevant questions; matters are not closed and re-opened several times; and the focus is on a feasible number of issues that can be grasped, presented to the public and national parliaments, and brought to an appropriate conclusion.¹⁸³

The commitment to create a joint database could contribute moreover not only to making more documents available earlier in the process – and making their identification easier – but also to shedding light on the vast number of legislative documents that are currently not made public while the process is ongoing. The time has come for less obfuscation and for the adoption by the Member States and by the European Parliament, with the facilitation of the Commission, of incremental steps towards genuine interinstitutional reform in the legislative sphere. The challenge of getting the EU legislative procedure under control demands no less – a visible and accountable legislative handshake that no longer takes place hiding in the shadows of the twilight

182. Interview with an Administrator at the EP JURI Committee, 9 Nov. 2016 (Respondent 33).

183. *Ibid.*

zone but in the special and emerging light of dawn. Transparency is a necessary but insufficient condition in and of itself of accountability. Citizens, civil society groups, the media and other stakeholders can use transparency to trigger fire alarms that in turn can publicly engage parliamentary participation (both European and national) in a timely and constructive fashion. The task of building a European wide democracy calls for no less.

EU CITIZEN PARTICIPATION, OPENNESS AND THE EUROPEAN CITIZENS INITIATIVE: THE TTIP LEGACY

JAMES ORGAN*

Abstract

This paper analyses the European Citizens Initiative, consultation, and transparency in the context of the Transatlantic Trade and Investment Partnership (TTIP) negotiations, to assess what it tells us about EU citizen participation and the principle of openness. It focuses on the institutional mediation of citizen participation and the degree to which the Commission facilitates such participation and accepts citizen influence over policy-making in EU external affairs. Three categories of openness are used in the analysis: institutional transparency with little or no participation; a democratically weak institutional approach as a means to improve the effectiveness of governance and support existing policy; and thirdly an institutional acceptance of effective citizen participation that facilitates citizen influence over agenda-setting. It is argued that the Commission has made some progress during TTIP in terms of transparency, but that the Commission does not take a strongly democratic position on citizen participation in external affairs. It only engages with citizens as passive actors who can support the effectiveness of EU governance.

1. Introduction

The Transatlantic Trade and Investment Partnership (TTIP) between the EU and US has generated an exceptional level of public interest and political engagement.¹ We have seen tens of thousands protesting in the streets in EU Member States, a European Citizens Initiative (ECI) supported by over 3 million citizens,² and unprecedented responses to public consultations. There has been widespread news coverage of TTIP, a heated public debate and

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1. For information on the content of the 24 chapters of TTIP: <ec.europa.eu/trade/policy/in-focus/ttip/about-ttip/contents/> (all websites last visited 15 Sept. 2017).

2. Information about the campaign and the levels of citizen support are available at <stop-ttip.org/>.

citizen engagement, and wide-ranging academic commentary on the possible final content of TTIP.³ This article, though, analyses EU citizen participation in the TTIP negotiations, rather than the policies within TTIP or its possible outcomes, or the validity of the complaints about the content of the negotiation. The democratic legitimacy of the EU's external affairs has been largely overlooked during the long-running EU democratic deficit debate,⁴ and although there has been discussion of the possible impact of the TTIP agreement on the democratic decision-making of Member State governments post-ratification,⁵ there has been little assessment of the impact of citizens' participation on the legitimacy of the TTIP negotiation process itself – a gap which this article addresses.

The negotiation of international agreements is a political role that has traditionally been the preserve of administrative and governing bodies, with little citizen or even parliamentary deliberative input. The impact and legitimization of EU external affairs, though, are changing. The EU institutions now have a single legal personality,⁶ act as a quasi-State when negotiating and concluding international agreements such as TTIP,⁷ and decisions taken can have significant legal effects for EU citizens and Member States.⁸ The exclusion of parliament and citizens from the external affairs agenda, and the accompanying reduction in democratic legitimacy for EU

3. E.g. see the recent analysis of TTIP in the special edition 21 EFA Rev. (2016).

4. e.g. Eeckhout, *EU External Relations Law*, 2nd ed. (OUP, 2011), p. 194. One notable exception that discusses democratic legitimacy in relation to international agreements, but not specific to TTIP, is Eckes "How the European Parliament's participation in international relations affects the deep tissue of the EU's power structures", 12 I-CON (2014), 904–929. For discussion of the development and limitations of EU democracy see e.g. Kohler-Koch and Rittberger (Eds.), *Debating the Democratic Legitimacy of the European Union* (Rowman and Littlefield, 2007); Weiler et al., "European democracy and its critique", 4 *West European Politics* (1995), 4–39; Hix, *What is wrong with the European Union and How to Fix It* (Polity, 2008); Beetham and Lord, *Legitimacy and the European Union* (Longman, 1998). For alternative views on democracy in the EU see e.g. Moravcsik, "In defence of the 'democratic deficit': Reassessing legitimacy in the European Union", 40 JCMS (2002), 603–624; Moravcsik, "The myth of Europe's democratic deficit", 43 *Intereconomics: Journal of European Public Policy* (2008), 331–340; and Majone et al., "Europe's democratic deficit: The question of standards", 5 ELJ (1998), 5–28.

5. E.g. Mendes, "Regulatory cooperation under TTIP: Rulemaking and the ambiguity of participation" in Pantaleo, Douma and Takács (Eds.), *Tiptoeing to TTIP: What Kind of Agreement for What Kind of Partnership?* (CLEER Papers, 2016).

6. Art. 47 TEU. For discussion, see Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform* (OUP, 2010), p. 387.

7. The EU is also, for example, a member of the WTO and FAO, with a State-like position in these organizations. See Eckes, op. cit. *supra* note 4, at 905.

8. e.g. Eeckhout, op. cit. *supra* note 4, p. 193: "The scope and depth of the EU's treaty making practice are such that it has become a central instrument of law making, often of a general normative or legislative character ... law making effectively takes place by way of participation in international negotiations".

negotiations has therefore become increasingly unjustified and changes have been made.⁹ For example, the Lisbon Treaty significantly extended the role of the European Parliament in the democratic legitimization of EU external affairs.¹⁰ Effective citizen participation in the TTIP negotiations might also now be expected because it is clearly established in Article 11 TEU and accepted as a developing part of the principle of openness,¹¹ and the Commission recognizes it as a key pillar of good governance.¹² Moreover, the TTIP public debate and related activities show that there is a thirst for citizen participation in the EU's external affairs policy agenda.¹³ The analysis in this article, though, highlights the continued limitations on citizen participation to influence EU international agreements, despite the need for greater democratic legitimacy.

This article uses the TTIP negotiations to analyse the degree to which citizen participation can complement representative democratic legitimacy in EU external affairs. This analysis of citizen engagement in the TTIP negotiation process enables broader conclusions to be drawn about the meaning of and institutional attitudes towards EU citizen participation, and its ability to legitimize EU external affairs, in particular where the Commission might be placed on a scalar categorization of "openness" based on the effectiveness of EU citizen participation. It is argued that the Commission has made some progress during TTIP in terms of transparency, but its approach to the ECI and to public consultation does not reflect a strongly democratic attitude towards citizen participation in external affairs policy. Instead citizen participation is still strongly mediated, and is limited to engaging with citizens as passive actors to support the effectiveness of EU governance and existing policy preferences, rather than active participants who can strongly influence

9. For analysis of the arguments for greater supranational democratic legitimacy see e.g. De Burca, "Developing democracy beyond the State", 46 CJTL (2008), 101–158.

10. For analysis of the European Parliament's wide-ranging role at all stages of the negotiation of international agreements, see Meissner, "Democratizing EU external relations: The European Parliament's informal role in SWIFT, ACTA, and TTIP", 21 EFA Rev. (2016), 269–288.

11. The ECI, for example, has been called "one of the most tangible expressions of the principle of openness", in Alemanno, "Unpacking the principle of openness in EU law: Transparency, participation and democracy", 39 EL Rev. (2014), 72–90, at 81.

12. In the Commission 2001 White Paper on EU governance, COM(2001)428, participation was recognized as a key pillar of good governance. Available at <europa.eu/rapid/press-release_DOC-01-10_en.htm>.

13. An important distinction to note is that this article is an assessment of formal citizen participation from a legal perspective, rather than an analysis of citizen participation through social movements that are not regulated by the Treaty provisions of the EU.

the policy agenda and its outcomes. This leaves openness of EU governance still based largely on transparency and with little participative content or democratic value as a result.

After first setting out the theoretical background for effective citizen participation and the principle of “openness” in the next section, the article proceeds as follows. First, it analyses the issue of transparency in the TTIP negotiations. Secondly, there is analysis of the Commission’s consultation with EU citizens on the proposed Investor State Dispute System (ISDS); this is an example of the Commission’s more established approach to EU citizen participation, which is formally established in Articles 11(1)-(3) TEU.¹⁴ Thirdly, the article assesses the Commission’s significant and controversial decision to refuse citizens the opportunity to use the ECI as a means to influence TTIP policy. This decision, in effect, could have excluded EU external affairs from the ECI,¹⁵ and had a significant negative impact on the potential for citizen influence over the EU’s policy agenda and decision-making.

2. Citizen participation and openness in EU law

The concept of “openness” is used as a normative frame for the analysis in this article.¹⁶ Traditionally openness has been almost synonymous with transparency, but in the EU Treaties it now includes participation as well, and is an increasingly important aspect of the legitimacy of EU governance. Transparency underpins democratic governance, as it facilitates the accountability of policy makers and assists citizen participation, through instruments of both representative and participatory democracy, but it does not of itself guarantee increased democratic legitimacy.¹⁷ Effective citizen participation, on the other hand, is a key indicator of a polity’s democratic

14. This was one of the most controversial aspects of the TTIP negotiation, and is particularly relevant to the impact that TTIP might have had on democracy in the EU and its Member States.

15. Art. 11(4) TEU.

16. For a detailed analysis of the developing meaning of openness in the EU, see Alemanno, *op. cit. supra* note 11, and Mendes, “Participation and the role of law after Lisbon: A legal view on Article 11 TEU”, 48 CML Rev. (2011), 1849–1877. For its meaning in relation to EU governance see Mendes, *Participation in EU rule-making: A rights-based approach* (OUP, 2011).

17. For discussion of the relationship between transparency and legitimacy in an EU context, see Curtin and Meijer, “Does transparency strengthen legitimacy? A critical analysis of EU policy documents”, 11 *Information Polity* (2006), 109–122.

legitimacy, as a criterion in its own right.¹⁸ Two levels of citizen participation, one more strongly meeting democratic criteria than the other, are reflected in the three categories of openness used in this article.

On one level, citizen participation through instruments of deliberative and direct democracy, such as the public consultations and ECI examined here, can be viewed just as a means to support existing policy decisions and effective governance. At a democratically stronger level, these instruments can also facilitate citizen influence over the policy agenda and its outcomes, including challenge to existing policy preferences. The three categories of openness used to explore the relationship between the principles of transparency and citizen participation are therefore as follows: a first category of openness that is focused primarily on institutional transparency, with little or no participation; a second category of openness that includes participation as well as transparency, but only as a means to improve the effectiveness of governance and support existing policy preferences; and thirdly, a category of openness that includes a democratically stronger approach to effective citizen participation that facilitates citizen influence over agenda-setting and also, crucially, the possibility of challenging existing policy preferences.¹⁹ As indicated next, these levels of the democratic strength of citizen participation are reflected in the Treaties.

The EU Treaties state that representative democracy is the fundamental basis of EU democracy in Article 10 TEU.²⁰ Participatory democracy though is also established, in Article 11 TEU, as an integral part of the EU's democratic legitimization.²¹ Article 11 TEU reflects the two levels of participation used in the categories of openness in this article.²² On the one hand, Article 11(1)-(3) TEU states the importance of citizen and civil society dialogue and consultation, and provides standards against which Union activity can now be held to account. For example, Article 11(2) TEU states:

18. See Dahl, *Democracy and Its Critics* (Yale University Press, 1989) and Dahl, *On Democracy* (Yale University Press, 2000) for discussion of effective participation and other criteria for a democratic polity.

19. See Blaug, "Engineering Democracy", 50 *Political Studies* (2002), 102–116, on the democratic importance of being able to challenge established preferences.

20. For discussion of the EU democratic provisions see, *inter alia*, Dougan, "The Treaty of Lisbon: Winning minds, not hearts", 45 *CML Rev.* (2008), 617–703; and von Bogdandy, "The European lesson for international democracy: The significance of Articles 9–12 EU Treaty for international organisations", 23 *EJIL* (2012), 315–334.

21. For analysis of Art. 11, see Cuesta Lopez, "The Lisbon Treaty's provisions on democratic principles: A legal framework for participatory democracy", 16 *EPL* (2010), 123–138; and Mendes, "Participation and the role of law ...", *op. cit. supra* note 16.

22. For further comment on the distinction between Art. 11(1)-(3) TEU and Art. 11(4) TEU, see Monaghan, "Assessing participation and democracy in the EU: The case of the European Citizens' Initiative", 13 *Perspectives on European Politics and Society* (2012), 285–298.

“The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society”. This reflects a narrower understanding of participation as interest representation to facilitate administration, and largely reflects existing practice in the EU.²³ Article 11(3) TEU, for example, states: “The European Commission shall carry out broad consultations with parties concerned”, but, significantly, the purpose of Article 11(3) TEU is “to ensure that the Union’s actions are coherent and transparent”, and not to improve the alignment of policy preferences with citizen wishes, which would reflect the more strongly democratic purpose in the third category of openness outlined above. These provisions largely codify the established consultation and citizen deliberation processes controlled by the Commission, and reflect an approach to citizen participation as a means to support, rather than challenge, policy decision-making.

On the other hand, the ECI introduced by Article 11(4) TEU is an innovative instrument of direct democracy that potentially gives citizens greater democratic control through a proactive opportunity to ask the Commission to consider proposing a legal act.²⁴ The ECI potentially gives citizens the chance to influence the EU policy agenda and its outcomes, and to challenge established policy preferences.²⁵ It therefore has the potential to facilitate a democratically stronger form of citizen participation that citizens themselves control. However, there are limitations: the Commission still strongly mediates the ECI through registration decisions,²⁶ and through the almost complete discretion over the impact of a successful initiative.²⁷ Despite the

23. See Mendes, *Participation in EU Rule-making...*, op. cit. *supra* note 16, on discussion of participation as a form of effective regulatory implementation and the limited legitimacy this brings; in particular pp. 78–111.

24. Some commentators would define the ECI as an instrument of deliberative democracy rather than direct democracy largely because of the weakness of the obligations it imposes. For discussion of the nature of the ECI see Conrad, Knaut, Böttger (Eds.), *Bridging the Gap? Opportunities and Constraints of the European Citizens’ Initiative* (Nomos, 2016).

25. For discussion of the significance of the ECI for EU democratic legitimacy see e.g. Warleigh, “On the path to legitimacy? The EU citizens initiative right from a critical deliberativist perspective” in Ruzza and Della Sala (Eds.), *Governance and Civil Society in the European Union* (Manchester University Press 2007); Dougan, “What are we to make of the Citizens’ Initiative?”, 48 CML Rev. (2011), 1807–1848; Kaufmann, “Transnational ‘babystep’: The European Citizens’ Initiative”, in Setala and Schiller (Eds.) *Citizens’ Initiatives in Europe: Procedures and Consequences of Agenda-Setting by Citizens* (Palgrave Macmillan, 2012); and Smith, “The European Citizens’ Initiative: A new institution for empowering Europe’s citizens?” in Dougan, Nic Shuibhne and Spaventa (Eds.), *Empowerment and Disempowerment of the European Citizen* (Hart, 2012).

26. See Organ, “Decommissioning direct democracy? A critical analysis of Commission decision-making on the legal admissibility of European Citizens Initiative proposals”, 10 EuConst (2014), 422–443.

27. The Commission is only required to consider proposing a legal act. Limitations on this discretion are political rather than legal. The obligation is set out in Art. 10 of Regulation

Commission's strong gatekeeper role, there is still the potential for participation through the ECI to increase citizen participation significantly as a means to influence EU policy and its outcomes, rather than as a means merely to confirm the technical and policy decision-making of the administration. Citizens at least have the opportunity to set the agenda for their engagement in policy decisions, and are able to oblige a formal response from the Commission, albeit one that does very little to limit the Commission's discretion in making policy decisions or initiating legislation. These two factors distinguish the ECI from the purely deliberative consultation processes of the Commission, which do not allow citizens to set the agenda for debate or oblige any institutional response at all.

Not only is citizen participation provided for in the participative instruments established in Article 11 TEU, it is also associated in the Treaties, albeit less clearly, with the principle of openness. The combination of transparency and participation in openness is reflected, for example, in Article 10(3) TEU, which reiterates the Article 1 TEU requirement that "decisions are taken as openly as possible", and links openness to participation and democracy: "Every citizen shall have the right to participate in the democratic life of the Union". The participatory democratic provisions in Article 11(1)-(3) TEU also refer to the need for "open participation" with institutions, through dialogue and consultation. The clearest link between openness and participation, though, is in Article 15(1) TFEU, which states that the Union should work "as openly as possible . . . to promote good governance and ensure the participation of civil society". There is, however, no mention of citizens, and "good governance" is stated as an objective of working openly, which is indicative of citizen participation being for the purpose of effective governance, rather than the democratically stronger level of participation to enable direct citizen influence over the policy agenda and its outcomes, which Article 11(4) TEU potentially facilitates.²⁸

The increasing recognition of participation in "openness" for the purpose of enhancing democratic legitimacy is more clearly reflected in secondary legislation and in case law. Regulation 1049/2001 on Access to Documents states that: "Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of

211/2011. For comment on impact of successful ECIs, see Karatzia, "The European Citizens Initiative and the EU institutional balance: On realism and the possibilities of affecting EU lawmaking", 54 *CML Rev.* (2017), 177–208.

28. On the role of participation in regulatory cooperation and governance in relation to TTIP see Bull, "Public participation and the Transatlantic Trade and Investment Partnership", 83 *The George Washington Law Review* (2015), 1262–1293.

democracy....”²⁹ In *Turco* in 2008, the ECJ stated that: “it is precisely openness ... that contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated”.³⁰ In the next three sections on transparency, public consultation and the ECI, this article analyses the democratic strength of EU citizen participation and also how far this theoretical combination of transparency and participation in the principle of openness is reflected in practice in relation to TTIP.

3. Transparency and access to TTIP documents during negotiations

Transparency has long been on the Commission policy agenda,³¹ and President Juncker included transparency as a key part of his political guidelines for the Commission in 2014.³² The TTIP negotiations, though, as with all EU international agreements,³³ were heavily criticized at the outset for their secrecy. The sensitivity of negotiations and the undermining of political interests have been the default arguments against increased transparency and openness in the negotiation of international agreements. During the TTIP negotiations, though, the Commission has gradually opened up and provided further information, particularly since the new Trade Commissioner Malmstrom took up her post; for example, TTIP is the first time that the negotiating mandate has been made public. The purpose of this section is twofold: to establish that there have been increases in the transparency of the TTIP negotiations that redress some of the complaints about secrecy that have dogged all international agreements, and to draw conclusions about the connection between transparency and citizen participation in an EU based on “openness”.

The right of access to documents, which is central to EU transparency,³⁴ is established in EU primary law in Article 15 TFEU. Article 15(1) TFEU states that the “Union’s institutions, bodies, offices and agencies shall conduct their

29. Recital 2, Regulation 1049/2001, O.J. 2001, L 145/43.

30. Joined Cases C-39 & 52/05, *Kingdom of Sweden and Turco v. Council of the EU*, EU:C:2008:374, para 97.

31. E.g. the European Transparency Initiative Green Paper, COM(2006)194.

32. See <www.eesc.europa.eu/resources/docs/jean-claude-juncker-political-guidelines.pdf>.

33. The Anti-Counterfeiting Trade Agreement and the SWIFT agreement are two examples of EU International Agreements criticized in relation to secrecy; that was part of the reason for the European Parliament refusal to approve them.

34. For an early account of EU transparency see Tomkins, “Transparency and the emergence of a European Administrative Law”, (1999) YEL, 217–256.

work as openly as possible”.³⁵ Article 15(3) TFEU sets out the principle of a right of access to documents and, in conjunction with Article 11 TEU, the principle of transparency and the obligation to engage and consult with civil society and the EU public. Regulation 1049/2001 is the principal EU legislation relating to transparency and access to documents.³⁶ In general, EU citizens and residents have the right to request access to documents. They are only required to make the request in writing and for it to be sufficiently clear to identify the information requested. Some exceptions, though, are provided for in Article 4 of Regulation 1049/2001. Of most relevance to the TTIP negotiations is the exception that is allowed because access to the documents would undermine the interests of the EU in international relations, and which reflects the main argument against increased openness in the negotiation of international agreements.³⁷

There have been a series of ECJ cases relating to the exceptions to the general rule of access in the Regulation, with the ECJ and General Court decisions tending to increase the transparency of EU actions and restrict the ability of EU institutions to refuse access to documents.³⁸ Two recent appeal cases brought by the Council, in particular, have had an impact on the international relations based public interest exception: *Access Info Europe* and *Sophie In 't Veld*.³⁹ *In 't Veld* is one of the few cases that have specifically addressed the international relations exception. Of particular significance in these two cases for the TTIP negotiations was, first, that the distinction between decision-making in a legislative process and with regard to international relations could not necessarily warrant a lower standard of transparency in the latter situation; second, there was no general exemption of negotiations from the requirements of transparency that would justify not

35. Curtin, “Citizens’ fundamental right of access to EU information: An evolving digital passepartout”, 37 CML Rev. (2000), 7–41.

36. On Regulation 1049/2001, see e.g. De Leeuw, “The regulation on public access to European Parliament, Council and Commission documents in the European Union: Are citizens better off?”, 28 EL Rev. (2003), 324–333.

37. The exceptions are set out in Art. 4(1)(3) of Regulation 1049/2001 and how to treat sensitive documents in Art. 9 Regulation 1049/2001. There must be a clearly made justification; see e.g. Case T-42/05, *Williams v. Commission*, EU:T:2008:325. Adamski, “How wide is ‘the widest possible’? Judicial interpretation of the exceptions to the right of access to official documents revisited”, 46 CML Rev. (2009), 521–549.

38. Heliskoski and Leino, “Darkness at the break of noon: The case law on Regulation No. 1049/2001 on access to documents”, 43 CML Rev. (2006), 735–781; Leino, “Just a little sunshine in the rain: The 2010 case law of the European Court of Justice on access to documents”, 48 CML Rev. (2011), 1215–1252.

39. Case C-280/11 P, *Council v. Access Info Europe*, EU:C:2013:671; and Case C-350/12 P, *Council v. Sophie in't Veld*, EU:C:2014:2039.

making a case-by-case assessment of whether refusal or restriction of disclosure was justified; and, third, that a genuine risk of seriously undermining the decision-making process must be proven for the specific document(s) under consideration. These decisions, shortly before the TTIP negotiations, may have increased the likelihood of transparency in EU external affairs in general, and increased the pressure on the Council and the Commission to release information relating to TTIP.⁴⁰

The Court linked openness closely to democracy and accountability in these two cases, emphasizing the importance of transparency, but it should be noted that the specific issue of citizen participation and increased citizen involvement in decision-making in the area of international agreements, rather than the legislative process, was not directly addressed, even in *In 't Veld*, and the Council was not required to disclose information relating to ongoing negotiations. The Court, therefore, has raised the threshold for establishing justification for refusing to provide access to information relating to both legislative and also non-legislative decision-making processes, and reduced the distinction between the two, but the link in the principle of openness between transparency and a requirement for citizen participation in the non-legislative decision-making of international agreements is not specifically developed.

Despite the position of the EU courts and the general presumption of access to information, and the fact that international negotiations are not specifically mentioned as a justification for classifying documents as sensitive in Article 9 of Regulation 1049/2001,⁴¹ the Commission and the Council considered a number of documents relating to the TTIP negotiations to fall within an exception to the general principle of access to information, and marked them as “Secret” or “Confidential” early in the TTIP negotiations.⁴² The default position of the executive EU institutions at the start of the TTIP negotiations still seemed to be to limit transparency and this led to widespread criticism of the negotiations.⁴³ Two specific early Council decisions that were strongly criticized were the restricted access to documents given to MEPs, and the

40. Abazi and Hillderandt, “The legal limits to confidential negotiations: Recent case law developments in Council transparency: Access Info Europe and *In 't Veld*”, 52 CML Rev. (2015), 825–846.

41. Only public security, defence and military matters are specifically mentioned in Art. 9(1) of Regulation 1049/2001.

42. Adamski, “Approximating a workable compromise on access to official documents: The 2011 developments in the European courts”, 49 CML Rev. (2012), 521–558.

43. E.g. outgoing Trade Commissioner, De Gucht, in his last speech on the subject of TTIP to the European Parliament, stated, *inter alia*: “Many people have alleged that the [TTIP] negotiations have been conducted so far in secrecy”. Available at <europa.eu/rapid/press-release_SPEECH-14-549_en.htm>.

non-release of the TTIP negotiating mandate adopted by the Council on 17 June 2013 because of its sensitivity to the TTIP negotiations.⁴⁴

3.1. *The Council, the Commission and the transparency of TTIP negotiations*

The Ombudsman opened two own-initiative investigations on 29 July 2014 relating to the transparency of TTIP negotiations. One was an investigation relating to the decision not to publish the TTIP negotiating mandate.⁴⁵ She stated that the Council should declassify the negotiation directives “in the interests of transparency, good administration, the effective use of resources and...to enhance legitimacy”.⁴⁶ There was limited engagement with the Ombudsman, but two years after the start of the TTIP negotiations and following an unintended leak of the negotiating mandates, the Council finally announced its decision to declassify the negotiating directives on 9 October 2014.⁴⁷ Shortly after this, the Council reiterated its commitment to transparency during TTIP negotiations: “The Council underlines the importance...to enhance transparency and dialogue with civil society in order to highlight the benefits for European citizens and the opportunities it would create for EU companies”.⁴⁸ The purpose of transparency is linked to dialogue, although not consultation, but its purpose is to persuade European citizens of the value of the TTIP negotiations. It is not for the purpose of adapting policy to better fit the policy preferences of European citizens, or for EU or Member State citizens to be able to hold institutions to account for policy decisions. The Council’s decision to publish the negotiating mandate does not, therefore, appear to be motivated by a desire for strong democratic participation of citizens that can influence policy decisions. Statements of this sort, the reluctance and delay in releasing information, and the limited engagement with the Ombudsman made the Council appear to be an institution that wishes to continue to rely on executive discretion as to what

44. The Council are largely responsible for decision-making on the release of information; and Commissioner De Gucht told the House of Lords committee that it was a Council decision not to publish the negotiating mandate; House of Lords EU Committee, “The Transatlantic Trade and Investment Partnership”, 14th report (2013–2014) at para 195.

45. Case OI/11/2014/RA. Decision available at <www.ombudsman.europa.eu/en/cases/decision.faces/en/58238/html.bookmark>.

46. <www.ombudsman.europa.eu/en/cases/correspondence.faces/en/58056/html.bookmark>.

47. <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/145014.pdf>.

48. Council conclusions on TTIP Foreign Affairs Council (Trade), Brussels, 21 Nov. 2014, para 2. Available at <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/145906.pdf>.

information relating to international agreement negotiations should be made available, rather than being bound by a principle of maximizing openness.⁴⁹

There were fears that the declassification of negotiating mandates would be an “empty gesture” and not a change in approach.⁵⁰ Since then, however, the Commission, with the approval of the Council, has released all the negotiating texts and position papers for each chapter of TTIP.⁵¹ Furthermore, the Commission has continued to take a relatively open approach during the Brexit negotiations, at least when compared to the UK Government, and they have, for example, again released the negotiating mandates.⁵² TTIP and the Article 50 negotiations with the UK are just two examples, but it appears that there may have been a change in policy towards access to documents relating to international agreements, which increases the transparency of the EU institutional decision-making. The specific steps taken by the Commission are commented on next.

The second Ombudsman investigation concerned the role of the Commission. This was a wider investigation that aimed “to help ensure that the public can follow the progress of these negotiations as far as possible *and contribute to shaping their outcome*” (our emphasis).⁵³ This linked transparency to the possibility of citizen participation influencing EU policy, which is in contrast to the Council’s approach of increasing transparency to validate their decision-making. The Commission’s response to the Ombudsman’s initial suggestions to increase transparency stated that it had already taken a number of transparency initiatives, such as an online set of materials, unprecedented outreach on TTIP towards Member States and the European Parliament, and extensive civil society consultation.⁵⁴ In contrast to

49. For further criticism of the Council’s approach to openness in other policy contexts see Leino, “Transparency, participation and EU Institutional practice: An enquiry in to the limits of the ‘widest possible’”, EUI Working Paper (Law 3/2014).

50. E.g. Hoedeman, Corporate Europe Observatory: “This hopefully will set a precedent, making it normal practice to publish documents around international trade talks. But the Council should clarify whether this signals a new transparency policy, or is nothing more just an empty gesture.” <www.euractiv.com/section/trade-society/news/ttip-negotiating-mandate-finally-declassified>.

51. Further information available at <ec.europa.eu/trade/policy/in-focus/ttip>.

52. <ec.europa.eu/commission/brexit-negotiations/european-commissions-approach-transparency-article-50-negotiations-united-kingdom_en> and <ec.europa.eu/commission/brexit-negotiations/negotiating-documents-article-50-negotiations-united-kingdom_en>.

53. Case OI/10/2014/RA, available at <www.ombudsman.europa.eu/en/cases/decision.faces/en/58668/html.bookmark>.

54. Ombudsman’s initial letter to the Commission available at <www.ombudsman.europa.eu/en/cases/correspondence.faces/en/54633/html.bookmark>. PDF of the Commission’s response to the opening of the Ombudsman’s own initiative enquiry is available at <www.ombudsman.europa.eu/en/cases/correspondence.faces/en/58450/html.bookmark>.

the rather defensive, uncooperative tone of the Council,⁵⁵ the Commission welcomed the comments of the European Ombudsman “as an input to ongoing reflections on the overall issue of transparency” and recognized some of the issues that were raised. After the Ombudsman’s initial report, in November 2014, the Trade Commissioner Malmstrom announced some key developments in the transparency of TTIP, including: making public more EU negotiating texts that the Commission already shares with Member States and Parliament; providing access to TTIP texts to all Members of the European Parliament, not just a select few; classifying fewer TTIP negotiating documents as “EU restricted”; publishing and updating on a regular basis a public list of TTIP documents shared with the European Parliament and the Council.⁵⁶ This commitment to maximizing document publication was reiterated in July 2016,⁵⁷ and a wide range of information relating to TTIP negotiations is now available.

The Ombudsman subsequently carried out a public consultation and on 7 January 2015 released a final report.⁵⁸ This recognized that the Commission provides more documents than required by the Lisbon Treaty and that efforts were being made to increase the transparency of the TTIP negotiations. However, the report included a range of further steps that could be taken to increase transparency, and also emphasized that any non-disclosure of documents must be fully justified.⁵⁹ The response of the Commission to the recommendations in the final report was to promise action and further consideration, and to highlight where steps had already been taken. In a subsequent press release, the Ombudsman said that “The Commission has engaged positively with the Ombudsman to increase the transparency of the TTIP negotiations. While more can be done in the coming months ... I am pleased with the way in which the Commission has further moved to build on the transparency measures already put in place.”⁶⁰ Interestingly, in the same statement, in contrast to the position taken by the EU institutions, she also took the opportunity to once again stress the importance of transparency leading to

55. Letter from Council available at <www.ombudsman.europa.eu/en/cases/correspondence.faces/en/57621/html.bookmark>.

56. Comments available at <europa.eu/rapid/press-release_IP-14-2131_en.htm>.

57. <trade.ec.europa.eu/doclib/press/index.cfm?id=1527>.

58. Closing report in Case 1777/2014/PHP, available at <www.ombudsman.europa.eu/cases/decision.faces/en/61228/html.bookmark>.

59. That a refusal to disclose should be the exception was confirmed by the ECJ in Case T-301/10, *In 't Veld*, para 107.

60. Press release No. 6/2015, 23 Mar. 2015, available at <www.ombudsman.europa.eu/en/press/release.faces/en/59353/html.bookmark>.

democratic engagement, and that transparency is not an end in itself for more efficient policy making.⁶¹ The Ombudsman and the Commission appear to have engaged in a positive and sustained dialogue about transparency, and the Ombudsman's role has almost certainly been influential in the developments relating to the transparency of the TTIP negotiations.

3.2. *MEPs' full access to documents*

This final section on transparency considers transparency in light of MEPs' access to TTIP related documents. The European Parliament has repeatedly stated the importance of transparency in the TTIP negotiations, and has continued to push for change despite the actions of the Commission to increase transparency commented on above. In the report containing the European Parliament's recommendations to the Commission on the TTIP negotiations in June 2015 it was stated that "the lively public debate across Europe on TTIP has shown the need for the TTIP negotiations to be concluded in a more transparent and inclusive manner, taking in to account the concerns voiced by European citizens".⁶² The recommendations in the report conclude with a section on transparency and wider deliberation, which includes, *inter alia*, a request to implement the Ombudsman's recommendations on transparency, a request for all MEPs to have access to all negotiating documents, and a recommendation that the Commission "reinforce its continuous and transparent engagement with a wide range of stakeholders, throughout the negotiation process".⁶³ In the extensive plenary debate on these recommendations, transparency was referred to repeatedly and strong language used at times to indicate it is a requirement if TTIP is to be accepted by the European Parliament.⁶⁴ This threat carries significant weight because of the European Parliament veto power over international agreements

61. This progress towards greater transparency in the Ombudsman's opinion was confirmed in the response to a complaint made to the Ombudsman by FOE about a refusal to provide access to TTIP documents. The conclusion on 4 Nov. 2015 was that the Commission had acted properly in refusing to provide access to the documents requested, in part because of the progress made in terms of transparency and in response to the Ombudsman's recommendations in her report of Jan. 2015: <www.ombudsman.europa.eu/en/cases/decision.faces/en/61261/html.bookmark>.

62. Report A8-0175/2015 containing the European Parliament's recommendations to the Commission on the TTIP negotiations, at 7, section (q).

63. *Ibid.*, at 19, section (e)(iv).

64. See e.g. Silva Pereira, verbatim report of proceedings on 7 Jul. 2015, at 101, available at <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20150707+ITEMS+DOC+XML+V0//EN&language=EN#creitem4>.

introduced by the Lisbon treaty in Article 218 TFEU,⁶⁵ and which they have already used regarding the ACTA and SWIFT agreements.⁶⁶

Progress has been made with regard to the majority of the European Parliament proposals of July 2015. Particularly significant has been the increase in access to documents for MEPs. Initially only 30 MEPs could access the large number of documents relating to TTIP that were classified and placed in a restricted access reading room at the Parliament building in Strasbourg. This was despite the requirement in Article 218(10) TFEU that “the European Parliament shall be immediately and fully informed at all stages of the procedure”. A change to this situation was campaigned for strongly by the European Parliament, with some limited evidence of the self-organized Stop TTIP ECI being used by MEPs to add weight to demands for greater transparency through references in plenary debate to the strong citizen support for the campaign. This change was also supported by the recent court decisions. The *In 't Veld* decision rejected a presumption that confidentiality of negotiating documents was required at institutional discretion, and in *Parliament v. Council (Mauritius)*, the ECJ confirmed that the European Parliament is entitled to immediate and full information at all stages of the negotiation of international agreements.⁶⁷ Despite the campaigns, Article 228 TFEU, and the ECJ's decisions, it was 11 months of negotiations before, on 2 December 2015, all MEPs were finally given access to the confidential documents relating to the TTIP negotiations.⁶⁸

3.3. Transparency Conclusion

The steps taken to increase transparency led Commissioner Malmstrom to declare on 7 July 2015 in a plenary debate about TTIP in the European Parliament: “I am happy to say that TTIP is the world's most transparent bilateral free trade negotiation”.⁶⁹ This may sound a touch hyperbolic, but there has been significant progress made regarding transparency, albeit from a virtual standing start, in a policy area – trade agreements – usually dominated

65. For a summary of the Lisbon Treaty changes affecting European Parliament's role in external affairs see Passos, “The EU's external relations a year after Lisbon: A first evaluation from the European Parliament”, in Koutrakos (Ed.), *The EU's External Relations a Year after Lisbon* (CLEER Papers, 2011), at p. 49.

66. See Eckes, op. cit. *supra* note 4.

67. Case C-658/11, *Parliament v. Council (Mauritius)*, EU:C:2014:2025.

68. <www.europarl.europa.eu/news/en/news-room/20151202IPR05759/All-MEPs-to-have-access-to-all-confidential-TTIP-documents>.

69. European Parliament debates, 7 Jul. 2015, at 70: <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20150707+ITEMS+DOC+XML+V0//EN&language=EN#creitem4> and <ec.europa.eu/commission/2014-2019/malmstrom/blog/debating-ttip-today-and-tomorrow_en>.

by the executive branch of State with little transparency. The Commission originally took the traditional position: it stated in 2014, for example, that it was publishing all the documents *it could* in relation to TTIP.⁷⁰ Subsequently the Commission bowed to considerable pressure and decided it could publish more information, and open up MEP access. The pressure came from a range of sources. Institutional pressure from the European Parliament, supported by its veto over international agreements, from the Ombudsman, and the EU Courts, pressure from civil society and citizens, not least through the 3 million supporters of the Stop TTIP Initiative, and from leaks of information.⁷¹ It is questionable whether the Commission or the Council, in particular, would have increased transparency without this pressure. MEP Sophie in 't Veld, who has campaigned for years on the issue of access to documents, commented that, “despite all the nice words, I find that the three institutions – and that includes the European Parliament – still have a very conservative reflex when it comes to opening up and being transparent”.⁷² The TTIP negotiations have seen progress, and could even be amongst the most transparent international agreements, but more transparency is possible and the changes made have been reluctantly made and reactive to institutional and citizen pressure, rather than proactive developments.

An important point for the argument in this article is that the developments in transparency have not established a link between transparency and citizen participation. The Commission's attitude towards transparency reflects that of the Council, which is that acting transparently is important to gain public support, but not necessarily about stronger implementation of public opinion or enhancing citizen participation. The Commission stated, for example, in November 2014 that: “access to documents is not only a right, it is also good policy. Maximizing transparency around TTIP negotiations is important to inform EU citizens, allay fears and build a wider basis of support”.⁷³ Transparency is beneficial therefore for the public to understand the TTIP negotiations and their potential benefits, as they stand, rather than to facilitate citizen influence on current policy. The limited link between transparency and participation during the TTIP negotiations also implies that the principle of

70. Commission TTIP transparency update 28 Mar. 2014: “We're also sharing all the documents we can”. <trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152276.pdf>.

71. E.g. Greenpeace access to documents. <ttip2016.eu/files/content/docs/Full%20documents/TTIP%20leaks%20analysis%20Greenpeace.pdf> For comment on the significance of these leaks see special edition 7 EJRR (2016).

72. Verbatim report of proceedings, 7 Jul. 2015, at 516. Available at <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20150707+ITEMS+DOC+XML+V0//EN&language=EN#creitem4>.

73. Comments of the Commission on the European Ombudsman's own-initiative inquiry, OI/10/2014/RA, at 2.

openness is a principle still focused on transparency and effective governance. To enhance the EU democratic legitimacy of international agreements, openness needs to combine transparency with a form of participation that could facilitate citizen influence over, and perhaps even challenge, the policy agenda. In other words, focus on the effectiveness of citizen participation rather than just the effectiveness of governance. Openness should not just be a window to look through on the work of the EU institutions, but an open door that allows citizens in to policy-making and agenda-setting discussions, and to challenge existing policy preferences. Having looked at openness from the perspective of transparency, the article now moves on to look at participation during the TTIP negotiations; first the ISDS consultation and then the ECI.

4. Investor State Dispute System (ISDS) and citizen participation through consultation

The purpose of this section is to illustrate the Commission's approach to participation, as embedded in Article 11(1)–(3) TEU, through analysis of the consultation during the TTIP negotiations on the controversial topic of the proposed ISDS. An ISDS is commonly included in international trade agreements to enable an investor to bring proceedings against a foreign government when rules from the agreement are breached.⁷⁴ It is an arbitration tribunal established outside the domestic judicial system, which is intended to encourage foreign investment by providing increased security for investors against activities of the host State that might deprive the investment of its value. In June 2013 the Commission was authorized to begin the TTIP negotiations and ISDS was included in the investment chapter as a standard approach to investment dispute resolution.⁷⁵ The removal of ISDS from TTIP was one of the primary aims of the Stop TTIP Initiative amid widespread and increasing concern that including ISDS in the TTIP agreement could impede the democratic right of State governments to regulate in the public interest, as illustrated by the *Lone Pine* case in Quebec.⁷⁶ This potential to challenge

74. For background and development of ISDS, see e.g. Choi, "The present and future of the Investor-State Dispute Settlement paradigm", 10 *Journal of International Economic Law* (2007), 725–747. For a recent analysis of the current ISDS issues, see Kalicki and Joubin-Brett (Eds.), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill Neijhoff, 2015).

75. EU's proposal for Investment Protection and Resolution of Investment Disputes is available at <trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf>.

76. ICSID Case No. UNCT/15/2, *Lone Pine Resources Inc. v. The Government of Canada*. Lone Pine is suing the State of Quebec after the government decided to introduce a moratorium on fracking. For comment, see Venzke, "Investor-State Dispute Settlement in TTIP from the

policy decisions taken by elected officials can, according to the Stop TTIP Initiative organizers, “also affect laws which were enacted in the interest of the common good, such as environmental and consumer protection”.⁷⁷ The wide number of difficulties raised in relation to ISDS, beyond the claim most relevant to this article that it is an infringement of democracy, were summed up by Joseph Weiler as follows:

“The litany of complaints and objections is well known and articulated at different levels of generalization: ISDS constitutes an assault on sovereign institutions; a circumvention of the normal national judicial procedures; a privileging of private investor interests (American to boot) over European societal interests; an arbitral system which is elected by the parties, answerable to no one and for which there are but limited appeal possibilities. Much of this is correct and well founded.”⁷⁸

The inclusion of an ISDS in TTIP has been specifically criticized as unnecessary because the EU and the US have well-developed and respected court systems that could be used with a State to State dispute system.⁷⁹ This position was supported by a number of academics in 2010 and reiterated in their response to the Commission’s consultation on ISDS.⁸⁰ MEPs have also called for ISDS to be removed from TTIP. In a parliamentary debate on 22 May 2013, for example, Helmut Scholz MEP said: “this is a matter on which we are doubtless all agreed: investments are important. The rule of law is a central prerequisite for the flow of investments. Ensuring compliance with the law, however, is a task for the courts”; Kriton Arsenis MEP said: “we now see the Commission introducing the form of investor protection which is... most likely to endanger democracy, labour rights and much of the legislation that this Parliament will decide from now on”. There has therefore been significant pressure on the Commission to remove or alter the ISDS included in TTIP from both citizens, experts and institutions, with the European Parliament’s veto over international agreements likely to carry particular weight.

perspective of a public law theory of international adjudication”, 17 *Journal of World Investment & Trade* (2016), 374–400.

77. <stop-ttip.org/what-is-the-problem-ttip-ceta/>.

78. Weiler, Editorial, 25 *EJIL* (2014), 961–975, at 964.

79. For consideration of the pros and cons of domestic or international courts, see Bronckers, “Is Investor–State Dispute Settlement (ISDS) superior to litigation before domestic courts? An EU view on Bilateral Trade Agreements”, 18 *Journal of International Economic Law* (2015), 655–677.

80. <www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/>.

In March 2014 the Commission launched a consultation on a modified form of ISDS “due to strong public interest”.⁸¹ There was an overwhelming response to the consultation with 148,830 responses from individuals and 569 from organizations.⁸² This was despite the Stop TTIP Initiative organizers’ complaints about the technical nature of the consultation, which they thought was a deliberate attempt again to exclude citizens from the TTIP process. A high majority of the responses were critical: “The collective submissions reflect a widespread opposition to ISDS in TTIP or in general...and [it] is perceived as a threat to democracy and public finance or to public policies”.⁸³ The Commission identified three categories of responses from the consultation. The first category included general criticisms of TTIP, which the Commission only noted as their focus was on statements relating to specific aspects of ISDS. The second category included general criticisms of ISDS, which the Commission considered to be of little relevance to a consultation like this one, which was focused on specific questions relating to an alternative ISDS proposal for TTIP, even though there was comment that also related to these new proposals. The Commission accepted that the right to regulate was central to ISDS reforms, but defended their approach against these general criticisms, and described the high number of responses as “an assault” on the consultation. The third category of comments were “specific views...with considerable level of detail” and the recommendations they contain were, according to the Commission, “an important outcome of this consultation”.⁸⁴ The Commission’s response to the consultation indicates a preference for expert, technocratic participation in consultations, and seems to be primarily concerned with acquiring information needed to improve the efficiency of their decision-making. The consultation was not for gauging general public opinion towards ISDS and facilitating citizen, rather than expert, influence over the policy agenda – which would have established a stronger link between consultation participation and democratic legitimacy.

Given the high level of public interest, the refusal to register the TTIP ECI, and the lack of opportunity to directly influence the TTIP agenda, it is perhaps understandable that citizens would take the opportunity provided by the consultation to express their general view of ISDS and TTIP. After all, the consultation was launched in response to “strong public interest” not just in response to technical criticism. Article 11 provides some limited support for a

81. Report on public consultation on ISDS in TTIP, SWD(2015)3 final, at 8, <trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf>.

82. European Commission website went down for two hours because of the demand, and the consultation was extended by one week as a result. Responses were from across the EU, but 77% were from the UK, Austria and Germany.

83. Report on public consultation on ISDS in TTIP, SWD(2015)3, at 14.

84. *Ibid.*, at 25–6.

claim that the Commission should have done more to facilitate citizen participation in relation to ISDS, and TTIP more broadly, as it requires institutions to give citizens the opportunity “to make known and publicly exchange views”.⁸⁵ Citizens may have been able to make known their views in the consultation, but there has been little public exchange, as required by Article 11(1) TEU. The number of responses to the consultation would indicate that there was a public wish for this sort of exchange. Rather than criticize citizens for engaging through the consultation process, and to avoid the sense of a public assault on the ISDS consultation, the Commission could have introduced alternative public deliberation mechanisms, such as mini-publics or stronger online consultations, into the TTIP process to complement the more technical consultation it set up.

However, the Commission commentary on the consultation responses is understandable, to some degree, given that it was specifically seeking responses to the technical details of the new ISDS proposal, and not seeking views on whether or not to include ISDS in TTIP.⁸⁶ Further support for the Commission’s approach can be drawn from the Treaties themselves and the Article 11(3) TEU requirement for the Commission to carry out “broad consultations with parties concerned”, and that the consultations are “to ensure the Union’s action are coherent and transparent”. There is no requirement that consultations should be to facilitate citizen influence over the policy agenda, or to help identify citizen preferences for policy outcomes in a democratically stronger form of citizen participation. Indeed, Article 11(2) TEU only requires that the institutions maintain dialogue with civil society. The weakness of the Treaty obligations might therefore justify the priority given to expert responses and the limited attention to the general citizen criticisms of TTIP, and these provisions may need to change before there is significant development in citizen participation.

As with transparency, there are indications that the current Commission is taking steps to develop public consultation and dialogue, particularly in relation to the REFIT programme with initiatives such as “Lighten the load – Have your say”,⁸⁷ and going beyond the minimum standards of consultation required.⁸⁸ However, these activities are valued in terms of the effectiveness of Commission policy-making and to gain support for decisions taken. As was said in a recent Better Regulation Communication: “Opening up policy-making... means [policies] are based on the best available evidence and

85. For further analysis of Art. 11 TEU, see Cuesta Lopez, *op. cit. supra* note 21.

86. Venzke, *op. cit. supra* note 76, 374–400 at 383.

87. <ec.europa.eu/info/law/better-regulation/lighten-load_en>.

88. COM(2002)704, complemented by COM(2012)746, SWD(2012)422 and COM(2014)368.

makes them more effective”...“target[s] the evidence needed to make sound decisions.” “[W]e need to explain better why we are acting... why it is the best tool for the EU to use”.⁸⁹ More dialogue and better regulation are, of course, welcome, but the Commission’s focus is still on enhancing governance processes rather than citizen participation and democratic legitimacy, which are not mentioned in the communication at all. The Commission refers to the idea of openness several times, but as a principle for the Commission it remains almost synonymous with transparency and with only a limited link to effective citizen participation.

The ISDS consultation process provided little agenda-setting capacity for citizens. It was a passive form of citizen engagement initiated and designed by the Commission, with full institutional control over the framing of the debate and any response that might follow. Although relating to participation, the first three clauses of Article 11 are more significant in terms of transparency and reinforcing representational governance principles, and reflect a limited approach to citizen participation. The focus on exchanging views, dialogue and consulting clearly distinguishes the content of Article 11(1)-(3) TEU from the ECI in Article 11(4) TEU. Article 11(4) gives citizens a chance to be proactive and frame a formally recognized public debate, as well as a limited opportunity to directly influence policy making. The possibility of citizen-led debate and some obligation imposed on the Commission by a successful ECI means that it is a democratic instrument in a different definitional category from public consultation. However, as we will see in the next section the ECI legislation and the Commission’s approach to its implementation have, in practice, meant that this differentiation is limited and Article 11(4) has little impact on the Commission’s control over the proposing of legal acts.⁹⁰

5. TTIP and the ECI – keeping citizens out of the policy debate

The article turns next to the Commission’s response to citizen use of the innovative European Citizens Initiative (ECI). If welcomed by the Commission, this would have indicated a move towards the third level of openness and a stronger acceptance of the value of citizen participation. The ECI is a direct democratic instrument that gives citizens the opportunity to influence EU institutional decision-making by inviting the European Commission to propose legal acts. Article 11(4) TEU establishes that an ECI must gather one million statements of support from a significant number of Member States before the European Commission is obliged to consider

89. COM(2015)215, “Better regulation for better results – An EU agenda”.

90. Karatzia, *op. cit. supra* note 27.

proposing the initiation of a legal act of the Union. Regulation 211/2011 establishes the full legal framework of the ECI, including the registration criteria and the limited obligations on the Commission that a successful initiative would impose.⁹¹ Once registered, the organizers have one year to collect one million statements of support from a minimum of seven Member States. The European Commission is obliged to respond to successful initiatives within two months of their submission stating what action it will take in response to the proposals, if any.⁹² There was no specific provision that restricted the use of the ECI to internal EU affairs in Article 11(4) TEU or in the implementing regulation, but as we will see below European Commission decisions tried to introduce just such a restriction to the EU's only instrument of direct democracy.

Organizers submitted a Stop TTIP ECI for registration in April 2014. The aim of this ECI was "to invite the Commission to recommend to the Council to repeal the negotiating mandate for TTIP and not to conclude the [Comprehensive Economic and Trade Agreement] CETA". The organizers believe that these agreements should be stopped because they are a threat to democracy and the rule of law,⁹³ and they fear that standards will be lowered in areas such as environmental protection, privacy and employment laws, amongst many others.⁹⁴ This was a high profile ECI because of the publicity surrounding TTIP, and the first to challenge the conclusion of an EU international agreement.⁹⁵ The Commission decided to refuse registration of the initiative and block citizens from using the only formal route of direct democracy provided for in the Treaties.⁹⁶ In response, the organizers launched an unofficial "self-organized ECI" on 7 October 2014. This "self-organized ECI" far surpassed the formal ECI criteria needed to oblige the Commission to respond, and received significantly more support than any previously

91. Respectively Art. 4, and Arts. 10 and 11 Regulation 211/2011, O.J. 2011, L 65/1.

92. The European Commission has not taken any action in response to two of the three successful ECIs so far, and there has been a limited response to the other, the Right to Water Initiative.

93. For example, the rules on regulatory cooperation that allow large multi-national corporations to influence EU law before it is presented to the elected European Parliament, and the Investor State Dispute System that may affect the decision-making of democratically legitimized institutions. This article is about the democratic legitimacy of the TTIP process, rather than the democratic concerns caused by the content of the agreement.

94. See <stop-ttip.org/what-is-the-problem-ttip-ceta/> for a summary of campaign concerns.

95. The previously registered Swissout ECI was related to an international agreement, but this asked for abrogation of an existing deal between the Swiss and the EU, rather than non-conclusion, <ec.europa.eu/citizens-initiative/public/initiatives/obsolete/details/2012/000015>.

96. Refusal letter is available at <ec.europa.eu/citizens-initiative/public/documents/2552>.

registered ECI.⁹⁷ Within the 12-month collection deadline, 3 284 289 citizens supported the Stop TTIP campaign proposals, and the threshold required by the ECI regulation was reached in 23 Member States.⁹⁸ The statements of support were symbolically presented to the European Commission on 7 October 2015, and to Martin Schulz, the president of the European Parliament, on 11 November 2015. There was no response from the European Commission. There was no obligation on the European Parliament to respond to the “self-organized ECI”,⁹⁹ but they organized a plenary debate, and referred in speeches in Parliament to the level and importance of the support for the Stop TTIP Initiative in reflecting the wishes of EU citizens.

On 10 November 2014, the Stop TTIP ECI organizers also brought an action against the Commission, seeking annulment by the General Court of the Commission’s registration decision,¹⁰⁰ which the Stop TTIP organizers called “a despotic act...[that] has refused a healthy debate”.¹⁰¹ The Court confirmed, in judgment of 10 May 2017, that this action was successful and that “it must be concluded that the Commission infringed Article 11(4) TEU and Article 4(2)(b), in conjunction with Article 2(1), of Regulation No 211/2011, by refusing to register the ECI proposal.”¹⁰² The arguments relating to the decision to refuse registration of the ECI, as presented by the applicants and the Commission, which are discussed next, are indicative of the Commission’s restrictive attitude towards the general right of every citizen to participate in the democratic life of the Union. The Commission’s attempt to block the use of the ECI in relation to TTIP meant that the Commission missed an important opportunity to positively engage with EU citizens about TTIP and enhance the democratic legitimacy of the EU’s external affairs.

The next section analyses the arguments put forward by the Commission in defence of its decision to refuse registration. This is done in order to draw conclusions about the Commission’s attitude towards the ECI, which has the potential to facilitate challenge to existing institutional preferences in important policy areas. There are two aspects to the ECI’s potential to challenge policy. First is the question of debate. As we have seen in the previous section, the Commission is able to frame the agenda of the debate as

97. Information about all ECIs is available at <ec.europa.eu/citizens-initiative/public/welcome>.

98. One million signatures from 7 Member States are required by the ECI regulation. For full results of the Stop TTIP Initiative, see <stop-ttip.org/the-eci-result-in-numbers/>.

99. Art. 227 TFEU establishes no requirement for European Parliament to respond to a petition.

100. Case T-754/14, *Efler and Others v. Commission*, EU:T:2017:323.

101. <stop-ttip.org/eu-commission-wants-to-wipe-out-citizens-involvement-in-ttip-and-ceta/>.

102. Case T-754/14, *Efler*, para 49.

this relates to issues put to public consultation. This limits the potential to impact on pre-formed policy positions. The ECI, on the other hand, allows citizens to formally raise questions of policy that perhaps the Commission would rather not debate, and to frame that debate in a way that more directly challenges policy preferences. Secondly, the ECI obliges the consideration of a legal act in response to a successful ECI. Although no legal acts have been adopted yet in response to an ECI, the need to publicly issue a formal policy position in response to a citizen-led debate can be unwelcome for institutions trying to navigate sensitive, well-established policy preferences through the decision-making process. This again distinguishes the ECI from consultation where there is no obligation imposed at all.

5.1. *ECI Registrations and meaning of “manifestly outside Commission powers”*

The Commission has refused to register almost a third of the 67 ECIs submitted since the launch of the ECI in 2012. The Stop TTIP Initiative, though, was the first to propose legal acts that would influence an EU international agreement,¹⁰³ and as we will see below the Commission’s reasoning set the registration refusal of the Stop TTIP Initiative apart from all previous registration decisions.¹⁰⁴ The first legal hurdle for registration of the Stop TTIP Initiative was that the legal act proposed must not be “manifestly outside the powers of the Commission”.¹⁰⁵ The organizers of the Initiative referred to Articles 207 and 218 TFEU, which establish the process for negotiating and concluding international agreements, as legal bases for a Commission proposal to stop the TTIP negotiations and conclusion of CETA. Article 207 sets out the Treaty provisions relating to the Common Commercial Policy, and states in Article 207(3) that where agreements with a third country need to be negotiated and concluded, such as TTIP, Article 218 TFEU will apply. Article 207(3) also states that: “The Commission shall make recommendations to the Council, which shall authorize it to open the necessary negotiations... The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the

103. All previous ECI proposals but one have been related to internal EU policy issues. The Swissout ECI is the only other initiative to relate to external affairs.

104. On previous reasoning for refusals, see *Organ*, op. cit. *supra* note 26.

105. Art. 4(2)(b) of Regulation 211/2011. The other three criteria in Art. 4(2) of the Regulation are: that a citizens committee has been formed; that the proposed citizens’ initiative is not manifestly abusive, frivolous or vexatious; and that the proposed citizens’ initiative is not manifestly contrary to the values of the Union as set out in Art. 2 TEU. To date all initiatives including the Stop TTIP initiative have fulfilled these other three criteria.

Council may issue to it.” Article 218 TFEU sets out this procedure for negotiating with third countries in more detail, but does not make expressly clear what the process is for suspending or terminating negotiations of an international agreement with a third country. Article 218(9) TFEU, though, does state that the suspension of an agreement already concluded shall happen upon recommendation of the Commission. It therefore seems reasonable to assume that the suspension of negotiations, or decision not to conclude an agreement, would also be at the recommendation of the negotiator or the Commission, or at least that such a recommendation could be made by them, and that the legal acts proposed by the Stop TTIP Initiative are not “manifestly outside the powers of the Commission”, which was the basis for all previous refusals to register an ECI.¹⁰⁶

In a notable departure from all the previous decisions, the Commission refused to register the Stop TTIP Initiative because of the meaning given to “a legal act” in Article 4(2)(b) and Article 2(1) of Regulation 211/2011 and the requirement that the legal act an ECI proposes must be “for the purpose of implementing the Treaties”.¹⁰⁷ In other words it was within the powers of the Commission to propose a legal act of the type requested by the Stop TTIP Initiative, but the wording of the ECI regulation, according to the Commission, prevents it from doing so.¹⁰⁸ All previous proposals were deemed to be “manifestly *outside* the powers of the Commission”; this meant, therefore, that the Commission interpreted Article 4(2)(b) of Regulation 211/2011 in a manner that, had it not been for the Court’s annulment, would have significantly restricted the legal acts that an ECI could ask it to propose that are *within* the Commission’s powers. The two reasons that the Commission gave for limiting the powers that it can accept in an ECI proposal are: first, that the legal act proposed by the Initiative organizers is a preparatory act and, secondly, that the Initiative proposed that the Commission *not* do something. The legality of these reasons for refusing registration and the inconsistencies with other registration decisions are analysed next.

106. Confirmed e.g. in Case C-589/15 P, *Alexios Anagnostakis v. European Commission*, EU:C:2017:663.

107. See p. 3 of refusal letter, available at <europa.eu/citizens-initiative/public/documents/2552>.

108. This registration criterion is quoted on the official register, but the quote used in the letter informing the organizers of the reasoning behind the registration refusal is subtly different: “both parts of the proposed citizens’ initiative fall outside the framework of the Commission’s powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties *within the meaning of Article 4(2)(b) of the Regulation, read in conjunction with Article 2, point 1, thereof*”. The addition of the second highlighted part of this phrase is notable, because it narrows the reason for the Commission’s refusal.

5.2. “Preparatory acts” in EU law

The first reason given by the Commission for refusing to register the Stop TTIP Initiative is that the legal act it was asked to propose, i.e. a Council decision authorizing the repeal of the TTIP negotiation mandate, is a “preparatory act” that only deploys legal effects between institutions without modifying EU law. According to the Commission’s argument, EU law is only modified once an international agreement is signed and concluded, and this modification is required for an ECI proposal to meet the criterion that it is “for the purpose of implementing the Treaties”, and thus to be registered. In the next paragraph of the letter to the organizers, the Commission restated this position without adding any further explanation for this decision. It merely confirmed that in the area of international agreements only the conclusion of an agreement can meet the requirement that initiatives must concern “matters where citizens consider that a legal act of the Union is required *for the purpose of implementing the Treaties*”,¹⁰⁹ and therefore Council decisions to negotiate or repeal negotiations are not a “legal act of the Union” constituting an “appropriate proposal” within the meaning of the relevant ECI legislation. The reasoning behind the assertion that the phrase “for the purpose of implementing the Treaties” excludes preparatory acts and limits ECI proposals to legal acts that modify EU law was not clear.¹¹⁰

The Commission, though, could register proposals for “preparatory” legal acts. This was confirmed by the General Court.¹¹¹ There is no necessity to limit initiatives to proposing legal acts that directly modify EU law. Neither Article 11(4) TEU nor the ECI Regulation indicate the types of legal act that may or may not be an appropriate proposal in the subject matter of an initiative, certainly there is no specific exclusion of legal acts that might be defined as “preparatory”. The ECI legislation does not equate “legal acts for the purpose of implementing the Treaties” with EU legislation as such, and there is no general understanding of “legal acts” in that sense. Article 289(3) TFEU describes “legislative acts”, those adopted by a legislative procedure, as

109. This phrase has already been the basis of excluding the modification of EU primary law from the ECI: *Organ*, op. cit. *supra* note 26 and Karatzia “The European Citizens’ Initiative in practice: Legal admissibility concerns”, 40 *EL Rev.* (2015), 509–530.

110. One particular point at which the Commission explanation lacks clarity is in the third paragraph of the TTIP section of the Commission’s response, where it is not clear whether the Council decision authorizing the opening of negotiations is “not a legal act” at all according to the Commission, or whether it is only “not a legal act . . . within the meaning of Article 11(4)”. I take the second meaning to be the Commission’s intention.

111. Case T-754/14, *Efler*, para 49.

a specific subset of the more broadly defined “legal acts”, which, according to Article 288(1) TFEU, also include recommendations and opinions, which have no binding force and do not directly modify EU law.

The decision by the Commission to exclude “preparatory acts” from the scope of the ECI was also problematic due to inconsistency with the broader approach taken by the Commission when registering several other initiatives. The Commission registered the High Quality Education for All Initiative,¹¹² which proposed a debating platform, and the Teach for Youth Initiative, even though it only sought to change an EU programme rather than modify EU law. The Universal Basic Income Initiative was initially refused registration, but was then resubmitted and registered with the same subject matter and long term goal, after the legislative proposal was replaced by softer, preparatory actions. In fact there is some early indication that initiatives proposing softer legal acts are actually more likely to be registered than those proposing legislative acts.¹¹³ The decision to exclude “preparatory acts” also contrasted with the Commission’s response to the three initiatives that have successfully collected the necessary levels of support to oblige a response from the Commission. None of these initiatives have had a response from the Commission that would modify EU law. The One of Us Initiative led to no action at all; the Commission proposed a scientific conference as a follow up to the Anti-Vivisection Initiative; and a consultation was the response to the Right to Water Initiative.¹¹⁴ This left a position where the Commission can respond to successful, well-supported initiatives with no act or with a proposal for a “preparatory act”, such as a consultation, that has no impact on EU law and deploys no autonomous legal effect, but organizers cannot propose these same outcomes when seeking registration at the start of the process. There appears, therefore, to have been a difference in the Commission’s attitude towards the registration of initiatives that address internal policy matters and the registration of an initiative, such as the Stop TTIP Initiative, that addresses external affairs.

112. For description of the High Quality European Education for All initiative, see <europa.eu/citizens-initiative/public/initiatives/obsolete/details/2012/000008>. Other examples include the Anti-Vivisection initiative, which invites the “Commission to abrogate Directive 2010/63/EU on the protection of animals used for scientific purposes”, and the One of Us initiative, which asks the EU not to finance activities which presuppose the destruction of human embryos.

113. Organ, *op. cit. supra* note 26.

114. Commission’s response to Right to Water, available at <ec.europa.eu/citizens-initiative/public/initiatives/successful/details/2012/000003>. There are ongoing policy discussions in relation to the issues raised by this ECI.

5.3. No “negative” ECI proposals permitted

The second reason that the Commission gave for refusing to register the Stop TTIP Initiative was that the phrase “for the purpose of implementing the Treaties” in Article 2(1) of Regulation 211/2011 (and also in Art. 4(2)(b) Reg. 211/2011) means that an initiative cannot invite the Commission to *not* submit a proposal for a legal act. According to the Commission, therefore, the proposal from the Stop TTIP Initiative that the Commission refrain from recommending the conclusion of TTIP cannot fall within the meaning of an ECI proposal.¹¹⁵ Next, the Commission stated that a recommendation that the Council take a decision to repeal the negotiation mandate or to not conclude the TTIP agreement was also outside the scope of an ECI proposal. This was because such decisions or proposals from the Commission to take negative action would not deploy any autonomous legal effect. This reasoning appears to be analogous, although not clearly so, with the requirement discussed above that there must be a modification of EU law, and that legal effects between the EU institutions are not sufficient for an initiative to be registered.

The Commission went on to state that this exclusion of invitations of negative or no action from the scope of the ECI meant that the CETA part of the Stop TTIP Initiative “also falls outside the framework of the Commission’s powers to submit a proposal for a legal act of the Union *for the purpose of implementing the Treaties*”.¹¹⁶ Again, as for “preparatory” acts, the issue for initiatives that invite a form of negative proposal from the Commission, such as to propose stopping an agreement from being concluded, is not whether they are a legal act of the Union, or whether they are within the framework of the Commission’s powers, but whether they fall within the meaning of “legal acts for the purpose of implementing the Treaties” in the ECI legislation. Again, as confirmed in *Efler v. Commission*,¹¹⁷ there is no support in the ECI legislation or wider EU law for the exclusion of negative legal acts from an ECI proposal, and the arguments against the requirement for a direct modification of EU law also apply to the requirement written into the registration process by the Commission that the legal act proposed must have “autonomous legal effect”. In his advice to the Stop TTIP Initiative organizers, Kempen argued that “implementing the Treaties” should be viewed as meaning that ECI proposals remain “within the EU programme of integration...[and] all measures operationalizing

115. There is no specific legal basis for recommending the repeal of a negotiating mandate. The requirement for the Commission to recommend when the Council should conclude an international agreement is based on Art. 218(6) TFEU: “The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement”.

116. Commission’s refusal letter, at 3.

117. Case T-754/14, *Efler*.

under the jurisdiction of EU primary law will serve the purpose of implementing [the Treaties]”.¹¹⁸ This part of the European Commission’s justification for refusal therefore appears to be a result of their selective interpretation of the ECI’s legal framework, rather than being an interpretation obliged by EU law, and a broader interpretation of “for the purpose of implementing the Treaties” is possible.

As with the issue of preparatory acts, there are inconsistencies with other decisions that have been taken by the Commission in relation to the ECI. For example, the Commission had previously registered an initiative that proposed a negative act, viz. the abrogation of an EU directive: the Anti-Vivisection Initiative which is seeking the abrogation of Directive 2010/63/EU on the protection of animals used for scientific purposes. The Commission also registered the so-called Swissout Initiative, which relates to a negative act that seeks the termination of an international agreement with Switzerland.¹¹⁹ The Commission has previously determined therefore that ECI proposals for negative acts can be registered and do not fail the requirement that they are “for the purpose of implementing the Treaties”, and there is nothing inherent in international agreements that excludes them from being the subject of an ECI. The Commission’s response to the Stop TTIP Initiative organizers did not address these inconsistencies.

There are also inconsistencies with ECI registration decisions taken after the Stop TTIP Initiative refusal. On 30 November 2015, an initiative was registered that asks for the Commission to present to the Council the seriousness of the democratic issues in Hungary under the Government of Viktor Orban, and the need to preserve the values of the Union.¹²⁰ The ECI proposal would not modify EU law or produce any autonomous legal effect as it only asks for a presentation by the Commission to the Council, and it is unclear why this should be distinguished legally from the Stop TTIP Initiative other than that it is an internal and not an external issue. Also, on 19 September 2015 the Fair Transport Europe Initiative was registered by the Commission despite containing a wide range of non-legislative proposals. Again, these inconsistencies highlight a difference in approach taken by the Commission in relation to ECIs with proposals relating to internal policy matters, and proposals that relate to external affairs, but no explanation is offered for this difference.

118. On this question of what is a legal act and what should be part of an initiative, see legal opinion of Kempen, at 11–14, available at <stop-ttip.org/legal-opinion/>.

119. For comment on contradiction with this previous registration decision, see Kempen, *ibid.*, at 17–19.

120. <ec.europa.eu/citizens-initiative/public/initiatives/obsolete/details/2015/000005>.

5.4. *ECI conclusion*

The Commission decision to refuse to register the Stop TTIP Initiative was an unsustainable, inconsistent and excessively restrictive interpretation of the ECI legislation. The ECI legislation does not make it explicit which legal acts are included and under which circumstances, or distinguish between internal and external EU affairs, or exclude proposals that only deploy legal effects between EU institutions, and does not require an initiative to be proposing a legislative act that modifies EU law. As confirmed by the General Court, the restriction on the scope of the ECI to exclude “preparatory” or “negative” acts and the decision to treat external affairs differently from internal policy and legislation was, therefore, a matter of Commission’s interpretative discretion not obliged by Article 11(4) TEU or Regulation 211/2011. Given the inconsistency with other registration decisions, the Commission appears to have decided it did not want public debate and citizen policy preferences unsettling the TTIP and CETA process, and then worked back from there to try to find a legal justification for the decision to refuse the registration of the Stop TTIP Initiative. As a result the Commission’s claim that the refusal to register the Stop TTIP Initiative was not a political decision and that their hands were tied by the legal provisions of Regulation 211/2011 was not well founded.¹²¹ The Commission prioritized policy preferences in relation to TTIP over democratic participation and citizen influence over the policy agenda, and in deciding to exclude TTIP from the ECI the Commission tried to dress a political decision as a legal obligation.

If the decision to refuse the registration of the Stop TTIP Initiative and the reasoning of the Commission had been upheld and applied consistently to future ECI registration applications, it would have had a dramatic impact on the democratic potential and scope of the ECI. It would have meant that citizens could not use the ECI to challenge the signing, conclusion or contents of an international agreement. Citizens would have been very unlikely to go to the effort of organizing an initiative to ask for the conclusion of an international agreement that the EU institutions had stated they intended to sign anyway. Thus, in effect, the Commission would have excluded international agreements from the ECI, which would have been a major exclusion of an area of significant EU institutional power from the EU’s only instrument of direct democracy. It is unclear whether the Commission intended to exclude the ECI from all international agreements or whether it was just concerned about TTIP, but it is interesting that the Commission did

121. At conference in Brussels on the ECI. Alexander Winterstein, European Commission spokesperson: “It is a legal matter, not a political assessment that was carried out”, *EU Observer*, 7 Oct. 2015.

not try to justify its decision to refuse to register the Stop TTIP Initiative precisely on the ground that the proposals related to an international agreement. It could perhaps have relied on the claim that it would undermine the EU's negotiation position *vis-a-vis* third countries, or that it would have unduly delayed negotiations. No argument was put forward, either to the organizers or in the Court, for internal and external affairs to face a different legal test in relation to the registration of an ECI or that the approach to their legitimization should differ. This further suggests that the Commission decision to refuse to register the Stop TTIP ECI was a politically motivated attempt to reduce citizen participation related to the high profile and controversial nature of the TTIP contents. This also reflects a reluctance by the Commission to develop a strongly democratic approach to EU citizen participation.

Despite the high level of citizen support for the self-organized ECI and the coincidence between its proposals and the changes made to TTIP, it seems probable that this campaign only had limited impact beyond that which might be expected of any protest movement.¹²² Its policy influence has been strongly reliant on pressure for change from the European Parliament, Ombudsman and the courts, and perhaps only occurred because it aligned with some existing policy concerns of the European Parliament, such as transparency and ISDS. The European Parliament's twice-used veto over international agreements adds considerable weight to European Parliament suggestions for change,¹²³ which is in contrast to the weakness of any obligation imposed by citizen participation through consultation or the ECI, and probably means the European Parliament is a far stronger driver for change than citizen participation.

Whether the self-organized ECI had a strong impact or not, the TTIP experience suggests that the framework of the ECI, which is the strongest form of citizen participation in the Treaties, needs revising, if it is to be an effective instrument for citizen influence and participation in the EU's external affairs. On the one hand, if the self-organized ECI did influence policy without following the formal ECI process, then there is little campaign value in following that process when it imposes little obligation on the Commission to take action. Why should citizens go through the complexities of the formal democratic process of the ECI if you can have the same, albeit limited, impact through informal means without the legal constraints? On the other hand, if

122. For further discussion of possible impact of social movements, see Parks, *Social Movement Campaigns on EU Policy: In the Corridors and in the Streets* (Palgrave Macmillan, 2015).

123. On the strength of European Parliament influence over international agreements, see Meissner, *op. cit. supra* note 10.

this self-organized ECI route did not influence policy significantly without other institutional factors coming in to play, which seems more likely, it indicates a need to strengthen the obligation imposed by the ECI, because support from millions of citizens is clearly not enough on its own. The formal legal framework of the ECI needs to oblige a response from the Commission for citizen participation to have an influence over policy. The Stop TTIP experience indicates that the inclination of the Commission when faced with an ECI on a controversial topic is to resist the pressure from citizens. The core benefit of direct democracy is that citizens are able to choose policy issues on which to deliberate and seek support, and then make use of the legal framework to influence policy decision-making. At the moment, though, the gatekeeper role of the Commission at the start and end of the ECI process means that this benefit is heavily mediated. The current review of ECI legislation is an opportunity to reduce this institutional mediation, by confirming the Commission's broader recent approach to registration,¹²⁴ and, more importantly, by strengthening the obligation on the Commission to respond to successful ECIs.

6. What the TTIP process tells us about citizen participation in EU external affairs

The TTIP process, which has included citizen engagement through widespread social movements, in public consultations and the ECI, has shown greater transparency, but only limited acceptance of influence over EU external affairs through citizen participation. The Commission has rejected use of the formal ECI process, has not referred to the self-organized ECI in its communications about the changes made to TTIP, and in response to the ISDS consultation has made it clear that it valued expert opinion over public responses. Citizen participation through the self-organized ECI is perhaps a good example of public debate and campaigns complementing the work of the EU institutions and elected representatives, which is a positive sign for the democratic legitimacy of the EU, but it is not a strong indicator of the development of formal participatory democracy as provided for in Article 11 TEU, or of citizen participation as a central aspect of openness in EU governance.

The central findings from the analysis in this article relate to transparency, participation, and their combination in the three levels of the EU principle of

124. Only one ECI has been refused registration in the last three years, and recent ECJ judgments have addressed a number of registration restrictions the Commission had imposed, e.g. Case T-754/14, *Efler v. Commission* and Case T-646/13, *Minority SafePack v. Commission*.

“openness” identified at the start of this article: one level where transparency is the focus and any citizen participation is incidental, a second level where participation is welcomed and citizens are engaged in the policy process, but this participation is through institution-initiated opportunities and for the purpose of increasing the effectiveness of governance, and a third level where transparency and participation are combined for the purpose of facilitating citizen influence over the policy agenda and its outcomes, including the possibility of challenging existing policy preferences.

The European Commission has responded positively to demands for more transparency, and it seems likely that there will be far greater levels of transparency during the negotiation of future international agreements than was seen prior to TTIP. There is already evidence of this in the Brexit negotiations where, for example, the negotiating mandates have again been published.¹²⁵ It also seems to compare favourably to the transparency of the UK’s approach to the negotiations. Although the increase in transparency should enable the EU institutions to be held more strongly to account by both the European Parliament and EU citizens in the future, the Commission could still be more transparent during negotiations, and there remains particular reluctance towards transparency in the Council. The first level of “openness”, which is the more traditional position, appears to be more strongly met, but the increase in transparency has been focused on increasing support for TTIP, rather than a broader ambition of linking it to citizen participation during the negotiation process.

There has been citizen engagement during the TTIP negotiations, but the analysis of the TTIP negotiations makes it clear that the Commission values citizen participation to support the existing governance structures and policy preferences, rather than to facilitate effective citizen participation that can influence the policy agenda and its outcomes. The TTIP experience indicates that further change is needed in institutional attitudes and in EU law, if the EU wants to strongly implement participatory democracy and the principle of “openness”, to complement its existing representative democracy basis. Article 11 TEU may need to be changed to strengthen the primary law basis for participatory democracy. The ongoing review of Regulation 211/2011 on the ECI could also be important in the development of direct democracy, with the Commission indicating that they wish to develop the effectiveness of citizen participation.¹²⁶ The legal framework of the ECI could be revised to increase the obligations on the Commission when responding to successfully

125. Negotiating mandates available at <ec.europa.eu/commission/brexit-negotiations/negotiation-mandate-and-transparency_en#background>.

126. Vice-President Timmermans announced a full review of the ECI at the ECI Day in the EESC on 11 April 2017.

supported ECI proposals, and also to clarify that external affairs are included within its scope.¹²⁷ This would provide a direct democratic instrument at EU level that more strongly meets the democratic criteria of effective citizen participation and that campaigners would see as a cost effective means of influencing the decision-making in EU external affairs.

Pending these possible changes, however, EU citizen participation reflects the democratically weaker participation in the second level of openness outlined above. The indication from the TTIP negotiations is that enhancing transparency was for the purpose of engaging citizens in the process to persuade them of the value of TTIP. It was not to facilitate citizen participation that could influence TTIP policy. The consultation process, established in Article 11(1)-(3) TEU, is well developed at EU level and was used in relation to TTIP, but this engagement with citizens is largely a means of evaluating and developing existing policy preferences in a technocratic process framed by the Commission themselves, and with no expectation, certainly no obligation, of influence on the decision-making agenda. The clearest evidence from TTIP that the Commission is far from embracing the third level of openness with its strongly democratic form of citizen participation comes from the Commission's approach to the ECI. Despite the weak legal and political obligations the ECI imposes on the European Commission, that institution took a political decision to try to exclude the EU's one instrument of direct democracy from the TTIP process, which would have effectively excluded international agreements from the scope of the ECI in the future. Democratic tools are provided for in the Treaties and EU law links transparency and participation in its references to "openness", and case law has strengthened this link. However, the TTIP process indicates that the principle of openness in the EU remains almost synonymous with transparency, and there is institutional resistance to the inclusion of forms of citizen participation that increase the ability of citizens to frame the policy agenda, confront its existing preferences, and influence policy outcomes.

The challenge for the Commission is therefore threefold if a strong implementation of participatory democracy is wanted, so as to reduce the distance between citizens and institutions, and to enhance EU democratic legitimacy, particularly in the politically significant area of international agreements. First, it needs to continue to remove limitations on transparency that still exist, and to do so proactively to maximize the opportunity for participation, not just to support good governance. Secondly, to fully embrace the principle of openness and recognize that it includes citizen participation as

127. The Commission published its proposal for a new Regulation on the ECI, COM(2017)482, on 13 Sept. 2017. Available <ec.europa.eu/citizens-initiative/public/regulation-review>.

well as transparency. Thirdly, to welcome citizen participation as a means to facilitate citizen influence over international agreements and other controversial issues, even when citizens may wish to challenge existing policy preferences. To achieve this, the EU institutions need to maximize the potential of existing democratic tools, such as the ECI, and also consider the future introduction of new democratic instruments, such as citizen assemblies, that are being experimented with across the continent.

7. Conclusion

Participation is not a magic bullet that will resolve, on its own, the difficulties of engaging citizens in a multi-State, geographically and culturally diverse polity, but it is an important and feasible part of the solution to the EU's democratic and popular malaise, and a limited approach to citizen participation is part of the distance between EU institutions and EU citizens. If the EU is to act like a quasi-State, as it does during the negotiation of international agreements, then as far as possible it should meet the criteria of a democratic polity. Participatory democracy and openness have been established in the treaties and, given that participation is one of the key indicators of democratic legitimacy, it is time that these were positively grasped by EU institutions to supplement the developing EU representative democracy. Of course, citizen participation has its risks and international agreements such as TTIP might be strongly resisted by the public. However, when existing policy is rejected, a developed system of participatory democracy will at least increase the chance that the popular decision is well-informed and not taken on the back of a politically manipulated, populist campaign run by unscrupulous politicians, as seen during the UK referendum on EU membership. Citizen participation is an opportunity to break the cycle of increasingly distant, technocratic political institutions and increasingly disconnected citizens supporting populist positions; an opportunity that the EU institutions did not grasp during the TTIP process.

DEPOSIT INSURANCE IN THE EU: REPETITIVE FAILURES AND LESSONS FROM ACROSS THE ATLANTIC

IVAN LAZAROV*

Abstract

This article outlines weaknesses in the EU deposit insurance legal framework and proposes necessary amendments in its substantive rules to enhance the system's ability to ensure financial stability by preventing bank runs. It first examines the overall relationship between systemic liquidity risk and bank runs, the relevant systemic events and transmission channels, stressing the information asymmetry phenomenon, and claiming that it is valid for all depositors. The article presents the main elements of the safety net against systemic liquidity risk and highlights the crucial role of deposit insurance. It also provides a practical example of several bank runs on both sides of the Atlantic, illustrating that the EU rules are less apt to prevent them. A comparison is drawn between the current EU and US legal frameworks of deposit insurance. That analysis, together with the practical case studies, elucidates the shortcomings of the EU legislation with respect to coverage, payout periods and funding mechanisms. Key amendments, related to wider overall deposit coverage, faster payout periods, and higher deposit insurance fund ratio backed with a governmental guarantee, are proposed.

1. Introduction

The public debate with regard to building a resilient third pillar of the Banking Union focused predominantly on the institutional framework of deposit insurance. Without undermining the importance of the institutional arrangements, this article aims at filling in an element of the discourse that was largely overlooked – namely the substantive provisions of the deposit guarantee legal framework. By means of legal, comparative and case study

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analysis, the current contribution will demonstrate certain key deficiencies in EU rules governing the coverage, payout period and funding of deposit insurance in the Union.

Nationwide Deposit Guarantee Schemes (DGS/Deposit Insurance) were introduced at the beginning of the twentieth century, first in Czechoslovakia¹ and then in the US,² as a response to the frequent bank runs leading to bank failures during the Great Depression.³ The introduction of Deposit Insurance in the US proved to be a great success in practice,⁴ and now, almost every country with a functioning banking system has an explicit or implicit⁵ Deposit Insurance system with most countries opting for an explicit scheme.⁶ Implicit Deposit Insurance is referred to as “implicit governmental guarantee”⁷ and blurs the difference between lender-of-last-resort (LOLR) and DGS as alternative tools for countervailing bank runs, so when DGS/Deposit Insurance is referred to in this article, it is understood *sensu stricto* – as an explicit deposit guarantee.

The main issue examined in the article is whether the new EU Deposit Insurance Directive⁸ is capable of adequately achieving the main purpose of any deposit insurance, namely increasing the stability of the banking system by preventing bank runs. At the outset, it must be admitted that the EU legislative measure’s goals go beyond that aim, since they have as a principal objective the achievement of the internal market while increasing the stability

1. Kaufman, “FDIC Reform: Don’t Put Taxpayers Back at Risk”, *Policy Analysis* No. 432 (2002), 2.

2. Federal Deposit Insurance Corporation (FDIC), “A brief history of Deposit Insurance in the United States”, (1998), 1; for the history of deposit insurance in the US before the 1930s, see Calomiris, “Deposit insurance: Lessons from the record”, 13 *Economic Perspectives* (1989), 10.

3. Richardson, “Categories and causes of bank distress during the Great Depression, 1929–1933: The illiquidity versus insolvency debate revisited”, 44 *Explorations in Economic History* (2007), 606. However, bank runs were not uncommon before that as well: see e.g. Davison and Ramirez, “Local banking panics of the 1920s: Identification and determinants”, 66 *Journal of Monetary Economics* (2014), 164–177 on the bank runs in the US in the 1920s.

4. FDIC paper, cited *supra* note 2, 1.

5. With the main difference being that the explicit deposit insurance is regulated by law, operates under specific procedural rules and stipulates the deposits/depositors insured, while the implicit one is usually described as “a blanket guarantee” for all bank creditors, and is mostly relevant for banks that are considered “too-big-to-fail”. See Lastra, *International Financial and Monetary Law*, 2nd ed. (OUP, 2015), p. 162, para 4.43 on explicit deposit insurance, and p. 163, para 4.48 on implicit deposit insurance.

6. See the Table on Explicit Deposit Insurance Schemes Around the World on Demirgüç-Kunt, Kane, and Laeven, “Deposit Insurance Database”, (2014) *IMF Working Paper*, 32.

7. Lastra, *op. cit. supra* note 5, p. 163, para 4.50.

8. Directive 2014/49/EU of the European Parliament and of the Council of 16 Apr. 2014 on deposit guarantee schemes, O.J. 2014, L 173/149.

in the banking system and the protection of depositors.⁹ However, as this article is not aimed at questioning the validity of the Directive, but rather at the rationale behind some of its substantive norms, the focus will be on Directive 2014/49 as a means to ensure financial stability, while leaving aside the issues of consumer protection and market integration. Furthermore, it is at best questionable whether the goal of consumer protection goes beyond a mere statement in several recitals of the Directive, as the provisions of the instrument do not refer to consumers – e.g. the eligible depositors are not restricted to “consumers”.

Keeping that in mind, this article will first briefly provide an insight into the existing financial safety net with respect to systemic liquidity risk, and will demonstrate the crucial role of Deposit Insurance in that net. The article will then examine several case studies concerning failed credit institutions¹⁰ on both sides of the Atlantic; it will illustrate, by comparing the principal elements of Deposit Insurance in the EU and the US, some practical shortcomings of the Union system of DGS. Finally, the article will propose some crucial changes in the EU system related to wider overall deposit coverage, faster payout periods, and higher deposit insurance fund ratio backed with a governmental guarantee.

2. Bank runs, systemic liquidity risk, and available tools

In order to inform the discussion, while avoiding going into too much detail, first, the general connection between bank runs and systemic liquidity risk must be outlined, as this is the only way to understand the dynamics that must be counterbalanced. Three elements are important for the current analysis: the definition of liquidity risk, the systemic events that trigger a liquidity crisis and the transmission mechanisms of contagion that create the “domino effect”.

Let us begin with the definition of systemic liquidity risk. For the purposes of this paper, liquidity risk is understood as the risk that a bank, although still balance sheet solvent, does not have sufficient cash resources to meet its due payment obligations.¹¹ Further, the systemic liquidity risk can be defined as a

9. Ibid., Recital 3. See also C-233/94, *Germany v. Parliament and Council*, EU:C:1997:231, paras. 10–21.

10. For the purposes of this article, the terms “credit institution” and “bank” will be used as synonyms.

11. Financial Services Authority, “Review of the liquidity requirements for banks and building societies”, 7 *Discussion Paper* (2007), 8, para 2.2; for a different definition related to the inability to recover the full monetary value of an asset when sale is desired, see Davis, “Liquidity, financial crises and the lender of last resort – How much of a departure is the

system-wide liquidity crisis.¹² At the outset, it must be mentioned that high liquidity risk is inherent to banking activity, due to the fact that deposits are always due immediately, while loans, in principle, are not,¹³ and is related to the maturity transformation activity¹⁴ performed by the banks.¹⁵ However, from the very beginning it must be stressed that it is the amount of *money* withdrawn by depositors that can disrupt the liquidity structure of a bank rather than the number of *depositors* withdrawing. In other words, one depositor withdrawing 100 units is more disruptive than 50 depositors withdrawing one unit each. Such a conclusion might seem obvious and intuitive but it turns out to be less obvious for the EU policymakers and is, therefore, crucial for the coming analysis.

Turning to the systemic events, there are two types of potential triggers for a liquidity crisis – (i) a widespread market shock and (ii) the collapse of a single credit institution.

Concerning the widespread market shock as a triggering event, a few dynamics are worth mentioning. First, with or without a bank run, systemic liquidity problems are inherent in times of crises due to the “illusion of liquidity” phenomenon, which increases in times of economic prosperity.¹⁶ This phenomenon is described as “a false sense of optimism held by a financial unit over the safety and resilience of its portfolio”,¹⁷ thus leading to portfolio expansion, rendering the system as a whole increasingly illiquid.¹⁸ Hence, at the beginning of a distress period, the operating environment is by definition one of dried up liquidity. Second, the situation exacerbates when the liquidity issue is further intensified by uncertain bank customers, who run

sub-prime crisis?”, (2008) *Reserve Bank of Australia*, 112. The latter definition is instructive as to the transition mechanism between liquidity and solvency risk.

12. Ellis, Haldane, McAndrews, and Moshirian, “Liquidity shocks, governance, systemic risk and financial stability”, 45 *Journal of Banking and Finance* (2014), 171.

13. Some have defended the view that in order to mitigate that risk, the fiduciary duty of bank directors should be expanded to include not only the shareholders but also creditors (incl. depositors). See in that regard Macey and O’Hara, “The corporate governance of banks”, (2003) *FRBNY Economic Policy Review*, 92. However, as the law stands now, there is in principle no fiduciary relationship between a bank and its client. For the circumstances where such a relationship, nevertheless arises (e.g. when the bank acts as a financial advisor) and the related case law, see Hudson, *The Law and Regulation of Finance*, 2nd ed. (Sweet & Maxwell, 2013), p. 104.

14. The “transformation of illiquid assets into liquid liabilities”: Diamond and Dybvig, “Bank runs, deposit insurance, and liquidity”, 91 *The Journal of Political Economy* (1983), 402.

15. Berger, Molyneux, and Wilson, *The Oxford Handbook of Banking* (OUP, 2010), p. 637.

16. Nesvetailova, “Liquidity illusions in the global financial architecture”, in Kern and Rahul (Eds.) *Research Handbook on International Financial Regulation* (Edward Elgar, 2012), p. 329.

17. *Ibid.*, p. 329.

18. *Ibid.*, p. 329.

at the credit institutions.¹⁹ Thus, in times of uncertainty, bank runs occur on an indiscriminate basis,²⁰ as depositors have no timely and accurate information concerning the banks that are in trouble,²¹ and are contagious when depositors are under the impression that banks are economically connected²² or are perceived as being exposed to the same risks. It is also worth noting that in a time of crisis, banks often experience a run, not only on the deposits but also on the available credit lines,²³ which leads to the so-called “double bank run”²⁴ and further depletion of available liquidity.

Moving to a single credit institution failure as a cause for a systemic liquidity crisis – although some argue that if a run is aimed at a solvent bank, such a bank should easily and relatively cheaply be able to obtain the necessary liquidity to face it,²⁵ empirical evidence supports the view that a bank run might lead a solvent bank into insolvency,²⁶ even in a situation of relative banking stability and in the absence of a widespread market shock, due to the aforementioned maturity mismatch in banking.²⁷ Thus, if depositors are put under the impression that a particular bank is in trouble, they tend to withdraw their money immediately,²⁸ even if this impression is created solely

19. A scenario occurring for instance in the examples of IndiMac, Washington Mutual, Wachovia and Northern Rock which will be discussed in more detail *infra*.

20. Temzelides, “Are bank runs contagious?”, (1997) *Business Review*, 3.

21. Singh and LaBrosse, “Northern Rock, depositors and deposit insurance coverage: Some critical reflections”, (2010) *Journal of Business Law*, 58.

22. Brown, Trautmann and Vlahu, “Understanding bank run contagion”, *European Central Bank Working Paper Series*, No. 1711 (2014), 4.

23. Ivashina and Scharfstein, “Bank lending during the financial crisis of 2008”, *97 Journal of Financial Economics* (2010), 320.

24. José, Peydró, Polo and Sette, “Double bank runs and liquidity risk management”, *European Systemic Risk Board, Working Paper Series*, No. 8 (2016), 1.

25. See Kaufman, “Bank runs: Causes, benefits and costs”, *7 Cato Journal* (1988), 562. However, this view could not stand the factual test of the 2007–2008 financial crisis as all market participants faced liquidity problems, as concluded by Brunnermeier, Crocket, Goodhart, Persaud, and Shin, “The fundamental principles of financial regulations”, (2009) *Geneva Reports on the World Economy*, 23: “When a bank such as Northern Rock finds itself at the receiving end of a run by its creditors, it cannot simply turn to another creditor to take up the slack, for all other creditors are simultaneously curtailing their lending. In this sense, liquidity should be understood in terms of the growth of balance sheets (i.e. as a flow), rather than as a stock.”

26. See Calomiris, “Runs on banks and the lessons of the Great Depression”, *22 Regulation* (1999), 6, with respect to bank failures during the Great Depression.

27. Bulgarian National Bank (BNB), “Events and actions undertaken in relation to Corporate Commercial Bank AD and Commercial Bank Victoria EAD”, (2014) *A Report, Prepared by the Bulgarian National Bank for Information of the Members of the 43rd National Assembly of the Republic of Bulgaria*, 8: before its failure Corporate Commercial Bank had overall capital adequacy of 13.85 %, of which 10.64 % Tier 1 capital.

28. A phenomenon that exists ever since banking exists; see e.g. Calomiris, *op. cit. supra* note 2, 26–27 on the bank run that occurred in the Roman Empire in AD 33.

on the basis of rumours and media publications.²⁹ This leads to a disruption in the liquidity structure of the bank and may potentially lead to erosion of the bank's capital and eventually to its insolvency.³⁰ Hence, a bank run might become a self-fulfilling prophecy,³¹ causing an entirely solvent bank to fail³² and be the very cause of systemic liquidity contagion in banks perceived by the public as similar to the failed bank.³³

If the systemic event is what triggers liquidity crises, the transmission mechanisms of contagion are what fuels the spread of the breakdown to other financial institutions. Narrowed to the scope of this article, the relevant channels of contagion are informational and psychological. The informational channel relates to the asymmetry between the information available to the banks and the depositors, leading to a situation where depositors cannot assess the soundness of the assets that a bank holds.³⁴ Thus, as described in greater detail above, systemic events create an environment of uncertainty, leading to deposit withdrawals in an indiscriminate manner.³⁵ The second channel of contagion, highly relevant for bank runs, is psychological, with this channel being closely related to its informational counterpart, as the existing uncertainty fuels panic and irrational behaviour.³⁶ Such correlations are naturally harder to assess, as they touch upon problems such as public perception and public confidence, which can be difficult to quantify. However, this channel of contagion should not be underestimated, as it can have quick, irrational and devastating consequences.³⁷

29. A good example in that respect is the run on Corporate Commercial Bank in Bulgaria (2014), discussed further *infra*.

30. Diamond and Dybvig, *op. cit. supra* note 14, 401.

31. On the modelling of self-fulfilling bank panics related to the willingness of governments to bailout, see Vaugirard, "Beliefs, bailouts and spread of bank panics", (2005) *Bulletin of Economic Research*, 98.

32. Berger, Molyneux, and Wilson, *op. cit. supra* note 15, p. 639 (see the third hypothesis).

33. Empirical evidence in that respect was observed in Bulgaria in 2014, when a bank run on Corporate Commercial Bank spread to First Investment Bank and, to a lesser extent, the few other banks with Bulgarian shareholders, leading to redistribution of deposits to foreign-controlled banks that were perceived as "safer" by the public.

34. Lastra, *op. cit. supra* note 5, p. 190, para 4.148.

35. On the fact that wrong information might trigger a bank run, see also Jacklin and Bhattacharya, "Distinguishing panics and information-based bank runs: Welfare and policy implications", 96 *Journal of Political Economy* (1988), 568.

36. Lastra, *op. cit. supra* note 5, p. 192, para 4.153.

37. On the relationship between individual and group thinking, and the possible scenarios of rapid view changes in a group, see Kindleberger and Aliber, *Manias, Panics, and Crashes A History of Financial Crises*, 5th ed. (Wiley, 2005), pp. 41–42; On the impact of panics on banking crises, see also Allen and Carletti, "What is systemic risk?", (2013) *Journal of Money, Credit & Banking*, 122.

Hence, the policy makers are faced with the following problem: how to prevent liquidity crises due to the maturity mismatch in banking in an environment of informational asymmetry, herd behaviour by the public and an interrelated financial sector. In that respect, there are two potential approaches – (i) to prevent the systemic events from occurring, and (ii) to preclude the mechanisms of contagion from realizing themselves. Since the management of systemic events far exceeds the scope of the present study, we will assume that occasional market shocks and failures of credit institutions are unavoidable, and will therefore focus on counteracting the mechanisms of contagion as a means of preventing bank runs. The financial safety net that is intended to counter the different relevant transmission channels of contagion consists, broadly speaking, of the prudential solvency and liquidity requirements, Lender of Last Resort and Deposit Insurance.

Looking at the mechanisms of contagion, the prudential solvency and liquidity requirements perform the role of countervailing the informational asymmetry by providing a picture of the current financial situation of each bank (solvency requirements), and by giving the necessary time for evaluation of that situation in times of liquidity crisis (liquidity requirements). However, a brief overview of the applicable framework shows that these rules are neither apt to resolve the informational asymmetry nor to manage panic for a sufficient amount of time.

Starting with the solvency requirement – neither the minimum capital requirements nor the disclosure rules under Regulation 575/2013³⁸ allow us to overcome the informational imbalance. First, the capital requirements are risk-based and thus prone to rapid fluctuations, depending on the market. Furthermore, by definition, they do not allow for a timely evaluation of the soundness of a bank's portfolio even by the national supervisor in case of market shocks, let alone by depositors. Third, there is no mandatory leverage ratio as of yet. However, it is argued that, because such a mechanism is easy to understand, it should limit the informational asymmetry by providing a measurement of the soundness of credit institutions that does not depend on the risk-weight of their assets.³⁹ In that respect, the absence of such a requirement under Regulation 575/2013 is difficult to understand. Lastly, the frequency of mandatory disclosure under Article 433 of Regulation 575/2013 does not allow for an effective day-to-day overview of the credit institution's

38. Regulation (EU) 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) 648/2012, O.J. 2013, L 176/1.

39. Dermine, 'Basel III leverage ratio requirement and the probability of bank runs', 53 *Journal of Banking and Finance* (2015), 1.

financial situation, and hence, contributes to the informational asymmetry only to a marginal extent.⁴⁰

With regard to prudential liquidity requirements,⁴¹ a bank must at all times keep high-quality liquid assets⁴² that allow it to meet a 30 calendar day liquidity stress scenario.⁴³ The scenario closely resembles the 2007 crisis, as the Basel Committee acknowledged in paragraph 20 of the Basel III LCR (including “the run-off of a proportion of retail deposits”⁴⁴).⁴⁵ However, the rule suffers from at least two drawbacks: (i) it is questionable whether withholding a 30 days bank run is possible in practice, and (ii) it can potentially have adverse long-term effects on market liquidity. The first point can be easily illustrated with a few examples of depositors’ outflows. In 2008, IndyMac and Washington Mutual (US) lost around 10 percent of their deposit base within 2 weeks from the start of the run, with a hypothetical monthly outflow of around 18 percent as the banks ceased operation earlier than 30 days.⁴⁶ In 2014 in Bulgaria, Corporate Commercial Bank lost 20 percent of its deposit base within a week⁴⁷ and First Investment Bank – 10 percent within a single day.⁴⁸ If the hypothetical monthly outflow is calculated for both these banks, the figure will be close to 100 percent. In that sense, surviving a 30-day period of severe liquidity distress is an unattainable target, either due to the severity of the bank run (Bulgaria) or because the liquidity has shrunk in the system as a whole, and is therefore inaccessible to financial players from sources other than the government (2008 crisis).⁴⁹ It would follow that the

40. Generally, it is only on an annual basis (Art. 433(1) of Regulation 575/2013), with some information on quarterly and semi-annual basis (EBA Guidelines on materiality, proprietary and confidentiality and on disclosure frequency under Articles 432(1), 432(2) and 433 of Regulation 575/2013, para 26).

41. For the potential positive effect of the liquidity requirements see Claessens, “Capital and liquidity requirement: A review of the issues and literature”, 31 *Yale Journal on Regulation* (2014), 743.

42. Cash or highly tradable assets that can be quickly converted into cash at little or no cost.

43. Basel III Liquidity Coverage Ratio (revised 2013), p. 4.

44. *Ibid.*, p. 6. That proportion is set at 3% and higher of “stable deposits” (insured and in a special relationship with the bank) and 10% and higher of uninsured depositors. See Basel Committee on Banking Supervision, “Basel III: The liquidity coverage ratio and liquidity risk monitoring tools” (2013), paras. 75–79.

45. The rule is implemented in the EU via Art. 412 of Reg. 575/2013.

46. Rose, “Old-fashioned deposit runs”, Finance and Economics Discussion Series 2015-111 (Board of Governors of the Federal Reserve System, 2015), Table 1, 30.

47. International Monetary Fund, MF Country Report No. 15/119, “Bulgaria, Corporate Commercial Bank: Bank Failure and Resolution”, (May 2015), 42, at <www.imf.org/external/pubs/ft/scr/2015/cr15119.pdf>, (last visited 25 May 2017).

48. *Ibid.*

49. Brunnermeier, Crocket, Goodhart, Persaud and Shin, *op. cit. supra* note 25, 23 on viewing liquidity as a flow rather than as a stock.

only remaining means of effectively dealing with a liquidity stress scenario for 30 days will be if credit institutions keep a substantial percentage of their assets in cash – which leads to the second downside regarding the long-term effects on market liquidity. Explained in simple terms: the more cash a bank is keeping, the less likely it is to trade on the wholesale funding market, which in turn will depress the liquidity on these markets⁵⁰ and should raise the lending rates.⁵¹

Thus, the prudential solvency and liquidity requirements are not capable of effectively addressing the channels of contagion – the solvency and disclosure requirements do not allow for a timely and accurate “picture” of a credit institution’s financial status, while the liquidity requirements are unable to provide the necessary period for taking such a picture in practice, as it is difficult to perform a rapid evaluation of whether a credit institution is only having liquidity issues or is also decapitalized.⁵²

Bearing the aforesaid in mind, there are two remaining options for preventing and/or managing bank runs – Lender of Last Resort (LOLR) and Deposit Insurance, the first being a public institution (in most cases the central bank) with the discretion to provide liquidity against collateral in case of an atypical demand from the depositors⁵³ or to provide liquidity assistance through open market operations,⁵⁴ the latter being: “a system established to protect depositors against the loss of their insured deposits in the event that a bank is unable to meet its obligations to the depositors”.⁵⁵

50. Malherbe, “Self-fulfilling liquidity dry-ups”, (2014) *The Journal of Finance*, 948–949.

51. Blundell-Wignall and Atkinson, “Thinking beyond Basel III: Necessary solutions for capital and liquidity”, (2010) *OECD Journal. Financial Market Trends*, 29. However, in practice this is not always the case: see Bonner, “Liquidity regulation, funding costs and corporate lending”, (2012) *DNB Working Paper*, No. 361, 14, at <www.dnb.nl/binaries/Working%20Paper%20361_tcm46-283047.pdf>, (last visited 25 May 2017).

52. Davis, *op. cit. supra* note 11, 117; See also Berger, Molyneux and Wilson, *op. cit. supra* note 15, 297–298. Therefore, some authors argue that, when intervening, the Central Bank should be more concerned about the collateral provided and not so much about the solvency itself, as this is an evaluation that can be accurately performed only post factum: Wood, “The lender of last resort reconsidered”, 18 *Journal of Financial Services Research* (2000), 217. However, on the risks of a broad list of assets that can qualify as a collateral see Schich, “Financial crisis: Deposit insurance and related financial safety net aspects”, 2008/2 *OECD Journal: Financial Market Trends* (2009), 83.

53. Davis, *op. cit. supra* note 11, 115.

54. Lastra, *op. cit. supra* note 5, p. 151, para 4.09.

55. Basel Committee on Banking Supervision and International Association of Deposit Insurers, “Core principles for effective deposit insurance systems” (2014), 8; Some academics propose different definitions. For example, defining it as “an insurance policy, written to certain depositors by the other banks in the national banking system concerned”: Lastra, *op. cit. supra* note 5, p. 161, para 4.42.

Usually, the narrative states that both these systems entail a moral hazard⁵⁶ by depressing market discipline, thus increasing the probability of unsound bank practices.⁵⁷ However, as previously illustrated, the current framework on disclosure and the risk-based solvency requirements render it impossible for depositors to accurately assess the soundness of a credit institution, and thus their actions are much closer to a blind guess rather than to what can be described as market discipline. Hence, without denying the existence of moral hazards, the present author argues that their extent is greatly exaggerated on the depositors' side.

Regarding the influence of these tools on the mechanisms of contagion – due to their characteristics, both LOLR and Deposit Insurance have the potential to impact upon the psychological channel. However, the deterring effect of Deposit Insurance should in theory be higher as, unlike LOLR,⁵⁸ it is usually compulsory and clearly regulated by law, thereby granting a greater degree of predictability. Furthermore, empirical evidence shows that LOLR sometimes has a counterproductive effect and that its very implementation may lead to a bank panic. A good example of this is the case of Northern Rock, where the announcement of the LOLR measure triggered a banking panic, as it signalled to the market that the bank was experiencing problems. However, in other instances it can serve as a powerful tool for managing an already ongoing bank run where the Deposit Insurance's deterring factor was insufficient (due to flaws in the DGS system or lack of public awareness of its parameters).⁵⁹ Hence, Deposit Insurance and LOLR can be viewed as the two sides of the same coin with the former serving as a preventative mechanism while the latter having a central role in containing an already ongoing crisis.

Therefore, without ruling out the necessity of LOLR in situations of ongoing banking panic, as well as the importance of the prudential solvency and liquidity requirements, it must be acknowledged that the single most

56. Ibid., "Core principles", 11: a situation of moral hazard is one where the parties are motivated to take higher risk because the economic consequences in case of loss are borne wholly or partly by others.

57. Davis, op. cit. *supra* note 11, 115.; see also Lastra, op. cit. *supra* note 5, p. 154, para 4.16; Thies and Gerlowski, "Deposit insurance: A history of failure", (1989) *Cato Journal*, 677.

58. Lastra, op. cit. *supra* note 5, p. 152, para 4.11. However, this is not always the case. See e.g. Implementing Regulation A ("Extensions of Credit by Federal Reserve Banks") of the Federal Reserve Act (1913) which specifies the concrete rules on the lender of last resort role of the Federal Reserve Board, available at <www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=635f26c4af3e2fe4327fd25ef4cb5638&tpl=/ecfrbrowse/Title12/12cfr201_main_02.tpl>, (last visited 25 May 2017). See also Ordinance No. 6 on Extending Collateralized Lev Loans to Banks, issued by the Bulgarian National Bank with respect to its powers as a lender of last resort, at <www.bnb.bg/bnbweb/groups/public/documents/bnb_law/regulations_collateralizedloa_en.pdf>, (last visited 25 May 2017).

59. See the case study on First Investment Bank *infra*.

powerful tool for the prevention of bank runs is Deposit Insurance. Therefore, the appropriate framework for such insurance is crucial for banking stability, which leads us to the question as to what are the concrete characteristics of a viable DGS. In order to demarcate these characteristics, first, the contribution will analyse several case studies of failed banks and then test the conclusions therefrom against the current legal frameworks in the EU and the US.

3. Case studies of bank runs

The paper will now examine several bank runs in the EU⁶⁰ and the US to illustrate the above theoretical propositions and to show the drawbacks that were experienced. The aim of these studies will be to examine the dynamics of the bank runs and the application of the deposit insurance framework and/or other methods of tackling ongoing bank runs. Secondly, the effectiveness of these methods will be assessed, and conclusions drawn.

3.1. *In the European Union*

The first two cases will examine the experience in the Netherlands: the payout of depositors of Landsbanki (2008) and DSB Bank (2009).

The case of Landsbanki dates from 2008 and concerns the Icelandic bank, Landsbanki, which was offering deposit products in the UK and the Netherlands through a branch, thus, in principle, falling under the DGS of its home State – Iceland. However, when the bank collapsed as a result of the 2008 financial crisis, the Icelandic Deposit Insurance fund was unable to pay out all depositors, while the Icelandic Government was unwilling to step in for those depositors who were abroad, in that way dismantling the whole idea of home State deposit guarantee. Thus, and bearing in mind that the bank had opted for additional coverage under the Dutch and the UK DGSs, the respective governments of the two countries took action.⁶¹ The Dutch DGS paid out 100 000 EUR per depositor,⁶² which covered the vast majority of

60. The study in the EU will focus on examples from three countries: the Netherlands, the UK, and Bulgaria. They represent different instances in developed (UK and Netherlands) and less-developed (Bulgaria) Member States, countries in the Eurozone (Netherlands) and countries outside the Eurozone (UK and Bulgaria), countries with ex-ante funded DGS (Bulgaria) and countries with no ex-ante funding at the time of the case (UK and Netherlands).

61. Proctor, *The Law and Practice of International Banking* (OUP, 2010), pp. 272–273, para 13.14.

62. Orebech, ‘Icesave Bank of Iceland; From rock-solid to volcano hot: Is the EU deposit guarantee scheme resisting financial meltdown’, 6 *The Croatian Yearbook of European Law and Policy* (2010), 131.

deposits.⁶³ The repayment started after a few months, which was in line with Directive 94/19 which, at the time, prescribed a payout period of up to three months.⁶⁴ In terms of funding the payout, because at the time the Netherlands did not have a system of pre-funded DGS,⁶⁵ the necessary resources came predominantly from a direct contribution by the State (1.428 billion EUR).⁶⁶

However, only a year later, a media publication alleging unsound practices caused a run at DSB Bank, in the Netherlands.⁶⁷ The run started on 1 October 2009, with 664 million EUR being withdrawn by 11 October 2009.⁶⁸ This led to the proclamation of the bankruptcy of the credit institution on 19 October 2009⁶⁹ and the activation of the deposit guarantee instrument.⁷⁰ The total amount of deposits paid out was 3.5 billion EUR⁷¹ with the majority (85%) of the depositors being reimbursed a couple of days after submission of their applications electronically.⁷² The payout was again funded primarily by the State.

The Dutch example shows that, although the deposit insurance performed in line with the statutory requirements one year earlier (in the *Landsbanki* case), the DSB bank run nevertheless occurred due to bad publicity. The problem can be traced not only to the applicable legal framework for depositors' protection, but also to the public perception thereof, as a study from 2012 has shown that there was a substantial lack of understanding with

63. Of 114 000 retail depositors, only 469 had more than EUR 100 000, representing 40 million EUR of uncovered deposited amounts out of 1.67 billion EU in total: Ministry for Foreign Affairs of Iceland, "The Icesave issue – Key figures", (2010) *Factsheet*, 2; see also Institute of Economic Studies, University of Iceland, "The financial strength of the deposit guarantee schemes in the EU and Iceland", (2012), 6–7.

64. Case E-16/11, *EFTA Surveillance Authority v. Iceland (Icesave)*, 28 Jan. 2013, Judgment of the EFTA Court, paras. 32 and 42. See also Art. 10(1) Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes (its version before the 2009 amendment), O.J. 1994, L 135/5.

65. Demirgüç-Kunt, Karacaovali and Laeven, "Deposit insurance around the world: A comprehensive database", (2005) *World Bank*, 8, footnote 8.

66. Government of the Netherlands, "Amount paid to Icesave depositors recovered in full", (2014) *Newsletter*, at <www.government.nl/latest/news/2014/08/27/amount-paid-to-icesave-depositors-recovered-in-full>, (last visited 25 May 2017).

67. Pruyt and Hamarat, "The concerted run on the DSB bank: An exploratory system dynamics approach", (2010) *Proceedings of the 18th International Conference of the System Dynamics Society* (Seoul, Korea), 2.

68. *Ibid.*

69. *Ibid.*

70. Bijlsma and Van der Weil, "What awareness? Consumer perception of bank risk and deposit insurance", (2012) *CPB Netherlands Bureau for Economic Policy Analysis*, 5–6.

71. *Ibid.*, 6.

72. De Nederlandsche Bank, "Compensation for DSB customers: 93 percent of applicants have their money back", *Press Release* (15 Jan. 2010), at <www.dnb.nl/en/news/news-and-archive/persberichten-2010/dnb228162.jsp>, (last visited 25 May 2017).

respect to the scope of application of the DGS,⁷³ the payout period (which was perceived as much longer than it actually was in the Landsbanki and the DSB cases⁷⁴), and a general false belief that reimbursement of insured deposits was dependent on whether the defaulting bank was systemic or not.⁷⁵ Therefore, even the best constructed Deposit Insurance system will have a marginal effect on bank runs if the public is not aware of its exact parameters.

The second two examples are from the UK, namely the Northern Rock case (2007) and the UK perspective on the Landsbanki case (2008). Before embarking upon an analysis of the Northern Rock case, it should be noted that, in this instance, the DGS was never activated. However, the example provides an excellent insight both into the dynamics of a bank run and into the other potential courses of action in case of liquidity and solvency crises – namely the interrelationship between LOLR and deposit insurance.

The run on Northern Rock was the first bank run in the United Kingdom since the nineteenth century.⁷⁶ The crash came in September 2007 as a consequence of the US subprime mortgage crisis and the depletion of liquidity on the wholesale funding markets.⁷⁷ As a direct result of the foreclosure of its main channel of liquidity, Northern Rock had to request emergency liquidity support from the Bank of England (LOLR measure),⁷⁸ which was announced by the BBC on the evening of 13 September 2007.⁷⁹ The funding was provided against collateral the next day.⁸⁰ Although it is unclear whether the cause was the official announcement or the leak by the BBC the night before,⁸¹ the fact remains that on the same day (14 Sept. 2007), a bank run was initiated by Northern Rock's customers.⁸² In a later inquiry before the House of Commons, Mr Adam Applegarth (the former chief executive of Northern Rock) summarized that “[i]ronically, it was the announcements and the

73. Bijlsma and Van der Weil, op. cit. *supra* note 70, 18–19.

74. Ibid., 21.

75. Ibid., 21–22.

76. Treasury Committee House of Commons, “The run on the Rock”, 1 *Fifth Report of Session 2007-08* (2008), 5. Runs in 1866 and 1878 in England, 8–9.

77. Proctor, op. cit. *supra* note 61, p. 221, para 11.06; See also Treasury Committee House of Commons, Report cited *supra* note 76, 15, para 23. On the reliance of Northern Rock on the wholesale markets, see Singh and LaBrosse, op. cit. *supra* note 21, 58.

78. Treasury Committee House of Commons, Report cited *supra* note 76, 44, para 93; Bank of England, “Liquidity support facility for Northern Rock plc”, News release (14 Sept. 2007), final paragraph, at <www.bankofengland.co.uk/archive/Documents/historicpubs/news/2007/090.pdf>, (last visited 25 May 2017).

79. See <www.news.bbc.co.uk/2/hi/business/6994099.stm>, (last visited on 25 May 2017).

80. See Bank of England, News Release cited *supra* note 78.

81. For the discussion in that regard, see Treasury Committee House of Commons, Report cited *supra* note 76, 66, para 149.

82. Ibid., 65–66, paras. 147–148.

leaking of the [emergency liquidity support] that caused the retail run and it was the retail run that reduced our liquidity".⁸³ The culmination of the run was between 14 and 17 September 2007, with the following main determining factors: (i) depositors faced difficulties in withdrawing their money both electronically and over the counter,⁸⁴ (ii) the awareness on the part of depositors that, should the run continue, it could potentially lead Northern Rock into insolvency,⁸⁵ and (iii) the public realization that, at that time, deposits were guaranteed in full only up to 2000 GBP.⁸⁶ In just four days (two of which were during the weekend), retail depositors withdrew more than 3 billion GBP.⁸⁷ It must be noted that wholesale depositors played a crucial role⁸⁸ with internet banking accelerating the problem.⁸⁹ The only way to handle such mass panic was the full depositor guarantee covering both retail and wholesale depositors that was eventually implemented.⁹⁰

Several conclusions can be drawn from the Northern Rock example: (i) based on the parallel behaviour between wholesale and retail depositors, one can conclude that no substantively different information was available to these two groups, proving that the informational asymmetry is equally valid for all depositors; (ii) only full depositors' guarantee managed to bring the panic withdrawals to a halt; and (iii) the implementation of a LOLR measure has the potential to have a counterproductive effect as it signals to the public that a credit institution has liquidity problems.

The second case study is related to the UK's perspective of the Landsbanki failure. In this regard, it is germane to briefly outline the UK's angle and to examine how the UK's deposit insurance performed. At the time of Landsbanki's failure, its branch in the UK had 4.5 billion GBP in outstanding retail deposits.⁹¹ On 8 October 2008 (one day after the Landsbanki failure), a

83. See also *ibid.*, 17, para 27.

84. *Ibid.*, 66–67, paras. 150–151.

85. *Ibid.*, 67, para 153.

86. *Ibid.*, 67, para 153.

87. Banks, *Liquidity Risk, Managing Funding and Asset Risk*, 2nd ed. (Palgrave Macmillan, 2014), p. 146. For a breakdown of the composition of retail depositors see Song Shin, "Reflections on Northern Rock: The bank run that heralded the global financial crisis", 23 *Journal of Economic Perspectives* (2009), Figure 4, 109.

88. Song Shin, *op. cit. supra* note 87, Figure 3, 108.

89. Janson, "Internet banking and the question of bank run: Lesson from the Northern Rock bank case", 14 *Journal of Internet Banking and Commerce* (2009), 4.

90. Singh and LaBrosse, *op. cit. supra* note 21, 68; *SRM Global Master Fund LP and Others v. HM Treasury Commissioners* [2009] EWCA Civ 788, para 15; Proctor, *op. cit. supra* note 61, 221, para 11.07.

91. House of Commons Treasury Committee, "Banking crisis: The impact of the failure of the Icelandic banks" (2009), 19, para 35.

freezing order was issued with respect to the funds held by Landsbanki⁹² on the (somewhat dubious) legal basis of the Anti-Terrorism, Crime and Security Act 2001.⁹³ The UK's deposit insurance ultimately fully reimbursing all depositors⁹⁴ with a few exceptions where the applications were declined.⁹⁵ The actual payment took place in the last months of 2008.⁹⁶

What can be drawn as a conclusion from the Landsbanki case is that the principles of home State guarantee in the event of a secondary establishment in the form of a branch⁹⁷ and no State obligation to compensate⁹⁸ creates a framework of uncertainty as far as branch activities are concerned. This is because the majority of the depositors are not aware as to whether they are dealing with a branch or a subsidiary, nor the consequences thereof.⁹⁹ Thus, there were proposals for putting foreign branches under the host State DGS,¹⁰⁰ or even challenging the whole passporting system, advocating that States must be able to require foreign banks to operate only through fully capitalized subsidiaries.¹⁰¹ The first proposal cannot be supported, as it would lead to a situation where the host DGS (and eventually taxpayers) would bear the economic consequences of the prudential supervision failure of the home State (or the ECB for the Eurozone). However, the requirement for a fully capitalized subsidiary seems justified and proportionate, keeping in mind the bitter lessons learned from the Landsbanki example.

It must also be noted that, in both cases, only a full depositors' guarantee constituted an effective measure for calling a halt to the bank panic. Such a measure is no longer possible after 2011 when the deposit guarantee cap was fully harmonized.¹⁰² Therefore, the new framework might potentially bind the hands of Member States in handling bank panics, or, more probably, create a shift to implicit governmental guarantees through LOLR measures (the latter will be seen in the First Investment Bank case study in Bulgaria).

92. *Ibid.*, 273, para 13.14.

93. The legal basis was criticized by the Treasury Committee as it "stigmatizes those subject to it", see House of Commons Treasury Committee, report cited *supra* note 91, p. 23, para 51. With respect to the legal difficulties related to the interpretation of the order see McCormick, *Legal Risk in the Financial Markets*, 2nd ed. (OUP, 2010), p. 127, para 8.87.

94. Ministry for Foreign Affairs of Iceland, Factsheet cited *supra* note 63, 1.

95. Case E-16/11, *Icesave*, cited *supra* note 64, para 42.

96. *Ibid.*, para 42.

97. Enshrined in Art. 14(1) of Directive 2014/49.

98. See Recital 45 of Directive 2014/49, and Case E-16/11, *Icesave*, cited *supra* note 64, para 149.

99. Proctor, *op. cit.* *supra* note 61, p. 279, para 13.22.

100. *Ibid.*, p. 279, para 13.22;

101. House of Commons Treasury Committee, report cited *supra* note 91, 43, para 111.

102. See Recital 21 and Art. 6(1) of Directive 2014/49, and before that Art. 7a of Directive 94/19.

The last case study from the European Union concerns one of the “new” Member States – Bulgaria – and the failure of Corporate Commercial Bank (CCB) and the run on the First Investment Bank (FIB) in June 2014.

At the beginning of 2014, CCB was the fourth largest bank in Bulgaria in terms of its assets.¹⁰³ After numerous publications in the media regarding the state of the bank¹⁰⁴ and an alleged “concerted attack by powerful interests”,¹⁰⁵ a bank run began on 13 June 2014. To calm the general public, the Central Bank of Bulgaria, the Bulgarian National Bank (BNB) issued a press release on 17 June 2014, claiming that “the bank system, including CCB, is with high liquidity and solvency ratios, and functions normally.”¹⁰⁶ However, an anonymous letter sent to all the major Bulgarian media institutions accelerated the run on CCB the next day (18 June 2014), claiming that the Head of the Banking Supervision Authority was questioned by the prosecution office in relation to the supervision exercised over CCB.¹⁰⁷ The run continued until 20 June 2014, when the bank failed to be placed under conservatorship as its liquidity had been depleted.¹⁰⁸ From that day onward, all bank operations were suspended, including repayment of deposits¹⁰⁹ with the initial plan being to provide the necessary liquidity support and reopen the bank on 21 July 2014 (nearly a month later).¹¹⁰ As a consequence of the run, CCB had lost deposits of 1.2 billion BGN (about 600 million EUR), amounting to 20 percent of its deposit base.¹¹¹

The bank run spread on 27 June to the third largest bank – First Investment Bank – where 10 percent of the deposits were withdrawn in a single day.¹¹² This resulted in a new statement by BNB that “the Bulgarian banking system has good indicators and operates smoothly” while warning of an “organized attack against Bulgarian banks”.¹¹³ The statement gave little comfort, however, especially bearing in mind that CCB failed only three days after the

103. IMF Country Report No. 15/119, cited *supra* note 47, 42.

104. Bulgarian National Bank (BNB), report cited *supra* note 27, 13.

105. IMF Country Report No. 15/119, cited *supra* note 47, 42.

106. The press release was issued only in Bulgarian, available at <www.bnb.bg/PressOffice/POPressReleases/POPRDate/PR_20140617_BG>, (last visited 25 May 2017).

107. Bulgarian National Bank (BNB), cited *supra* note 27, 13–14.

108. Press release of BNB from 20 June 2014, available at <www.bnb.bg/PressOffice/POPressReleases/POPRDate/PR_20140620_EN>, (last visited 25 May 2017).

109. *Ibid.*

110. Press release of BNB from 22 June 2014, available at <www.bnb.bg/PressOffice/POPressReleases/POPRDate/PR_20140622_EN>, (last visited 25 May 2017).

111. IMF Country Report NO. 15/119, cited *supra* note 47, 42.

112. *Ibid.*

113. Press release of BNB from 27 June 2014, available at <www.bnb.bg/PressOffice/POPressReleases/POPRDate/PR_20140627_EN>, (last visited 25 May 2017). However, the latest stress test report (published on 13 Aug. 2016) shows worrying signs in terms of the asset quality review of the bank and the fact that in adverse scenario the bank’s own capital will

previous reassuring press release from the Central Bank. Hence, after consultations with the main political parties and competent institutions, the President of Bulgaria declared that all necessary measures would be implemented “to guarantee the bank stability in the country”,¹¹⁴ which in practice resulted in 3.3 billion BGN (around 1.6 billion EUR) liquidity assistance in the form of a governmental credit line¹¹⁵ approved by the European Commission.¹¹⁶ In order to maintain its liquidity, FIB received 1.2 billion BGN in State deposits,¹¹⁷ which proved effective in reassuring depositors, as on 30 June (Monday), there were only minor additional withdrawals.¹¹⁸ Thus, the LOLR measure was effective in handling an ongoing bank run in the case of FIB, as it was announced and perceived as a *de facto* full depositors’ guarantee.¹¹⁹

The turn of events for CCB was rather different. The initial plan for reopening the bank on 21 July was amended, as a report from 11 July 2014 showed serious problems in the credit portfolio of the bank¹²⁰ and potential related criminal activity.¹²¹ This eventually led to the revocation of the CCB’s banking licence a few months later on 6 November 2014¹²² and finally to the activation of the Bulgarian DGS, which compensated all eligible depositors for sums of up to 100 000 EUR effectively, as of 4 December 2014.¹²³ The fact nevertheless remains that depositors had no access to their deposits for a

become negative (-6.9%). See more on the individual results of First Investment Bank at <www.bnb.bg/bnbweb/groups/public/documents/bnb_download/bs_aqr_results_a2_en.pdf>, (last visited 25 May 2017).

114. Press release of the President of the Republic of Bulgaria from 29 June 2014, available at <www.president.bg/news2037/president-rosen-plevneliev-announced-the-position-of-the-political-parties-and-institutions-that-took-part-in-the-consultations-held-in-the-head-of-states-office.html&lang=en>, (last visited 25 May 2017).

115. IMF Country Report No. 15/119, cited *supra* note 47, 42.

116. European Commission, “State aid: Commission approves liquidity support scheme for Bulgarian banks”, Press Release from 30 June 2014, available at <www.europa.eu/rapid/press-release_IP-14-754_en.htm>, (last visited 25 May 2017).

117. IMF Country Report No. 15/119, cited *supra* note 47, 43.

118. *Ibid.*, 43.

119. However, from an EU law point of view, there is a notable difference between LOLR implicit guarantee and DGS explicit protection; while the DGS payouts to depositors are not State aid, any LOLR measures (through the DGS or directly from the government/central bank) will have to comply with the Union’s rules on State aid, and will have to be notified in advance to the European Commission. See COM(2015)586 final – 2015/0270 (COD), Proposal for a Regulation amending Regulation (EU) 806/2014 in order to establish a European Deposit Insurance Scheme, para 5.3.

120. Bulgarian National Bank (BNB), report cited *supra* note 27, 17.

121. BNB Press release from 11 July 2014, available at <www.bnb.bg/PressOffice/POPressReleases/POPRDate/PR_20140711_EN>, (last visited 25 May 2017).

122. *Ibid.*

123. Bulgarian Deposit Insurance Fund, “As of 4 Dec. 2014 via the branch network of 9 banks the Bulgarian Deposit Insurance Fund starts payout of guaranteed deposit amounts of

duration of more than five months – between 20 June 2014 and 4 December 2014. Such a delay in the payout can be related, *inter alia*, to the funding of the reimbursement. At the material time, the Bulgarian Deposit Insurance fund had assets in the amount of 2,516 billion BGN (forming a ratio of a little bit less than 4% of all deposits),¹²⁴ while its liabilities in relation to the CCB's failure were for the sum of 3.7 billion BGN.¹²⁵ Therefore, payout was possible only after the provision of a credit line from the government of nearly 1.5 billion BGN, the money for which first had to be borrowed by the government.¹²⁶

The examples of CCB and FIB make it clear that (i) no amount of ex ante funding that is economically viable could potentially deal with a failure of a systemic bank, and (ii) faced with the full harmonization of the guarantee cap, Member States will start turning to LOLR as a means to secure full depositors' guarantee. However, such a shift might be problematic with respect to the necessary promptness, bearing in mind that the State aid rules will require the notification and the approval of the European Commission before any liquidity can be provided, unlike full guarantee through the DGS which does not fall under the State aid rules, although has a psychologically similar effect for depositors.

3.2. *In the United States*

The study concerning the US will examine three instances of bank runs – the run on IndyMac (June and July 2008), and those on Washington Mutual and Wachovia, both occurring in September 2008. As the dynamics of the runs on Washington Mutual and Wachovia were similar, they will be examined together.

The first bank run and subsequent failure to be examined is that of IndyMac. The run on the bank started on 26 June 2008 after the public release

depositors with 'Corporate Commercial Bank' AD". Press Release from 24 Nov. 2014, available at <www.dif.bg/en/pr_20141124_1/>, (last visited 25 May 2017).

124. See the statistics under "Investment Activity" for 11/2014, available at <www.dif.bg/en/about-us/statistics/>, (last visited 25 May 2017). Regarding the total amount of deposits in the banking system by the end of Oct. 2014, see the statistical data available at <www.bnb.bg/BankSupervision/BSCreditInstitution/BSCIFinansReports/BSCIFRBankingSystem/BS_201410_EN> (last visited 4 Sept. 2017).

125. See the statistics under "Payout of covered deposits with banks with revoked licenses", Corporate Commercial Bank (2014), available at <www.dif.bg/en/about-us/statistics/>, (last visited 25 May 2017).

126. See Dec. 2014 statistics at <www.dif.bg/en/about-us/statistics/>, (last visited 25 May 2017). Here, one needs to note that the Bulgarian Central Bank operates as a currency board and, hence, its powers to provide liquidity to the commercial banks are severely limited, while lending to the government is completely prohibited.

of a letter expressing concerns about the financial viability of the bank,¹²⁷ thereby resulting in deposit withdrawals to the amount of 1.55 billion USD,¹²⁸ of an 18.5 billion USD deposit base.¹²⁹ The run, as well as other preexisting problems relating to the subprime mortgage crisis and the business strategy of the bank,¹³⁰ ultimately led to its closure on 11 July 2008 and to the activation of the US DGS.¹³¹ The deposit guarantee was implemented by the FDIC via a newly created IndyMac Federal Bank, which provided immediate access to all insured deposits, effective as of 14 July 2008¹³² (the next business day, as the bank was closed on Friday). FDIC also decided to pay an advance dividend with respect to all deposits, exceeding the coverage cap for 50 percent of the uninsured amount.¹³³ The estimated loss for FDIC stemming from the activation of the DGS was 10.7 billion USD.¹³⁴ Although the payout of insured deposits was timely and uninsured depositors received an advance payment of the estimated recovery value of their claims, this did not prevent the contagion from spreading to Washington Mutual, National City, and Sovereign banks,¹³⁵ leading to the conclusion that there is a relation between the severity of a systemic event and the deterring factor of Deposit Insurance with respect to the channels of contagion.

Our analysis will now turn to Wachovia and Washington Mutual, the two biggest mortgage lenders prior to the 2007–2008 crisis.¹³⁶ As both these banks were not allowed to fail due to the amount of their depositors' base (188 billion USD for Washington Mutual¹³⁷ and 429.6 billion USD for Wachovia¹³⁸ while the DGS fund at that time had only 45 billion

127. Department of the Treasury, "Safety and soundness: Material loss review of IndyMac Bank", (2009) *FSB, Audit Report*, available at <www.treasury.gov/about/organizational-structure/ig/Documents/oig09032.pdf>, (last visited 25 May 2017), 12.

128. *Ibid.*

129. Rose, *op. cit. supra* note 46, 30, Table 1.

130. For an overview of the causes of the failure, see Department of the Treasury, Report cited *supra* note 127, 6–13.

131. FDIC, "2008 Annual Report", available at <www.fdic.gov/about/strategic/report/2008annualreport/ARfinal.pdf>, (last visited 25 May 2017), 46.

132. FDIC, "FDIC establishes IndyMac Federal Bank, FSB as successor to IndyMac Bank, F.S.B., Pasadena, California", Press Release 11 July 2008, available at <www.fdic.gov/news/news/press/2008/pr08056.html>, (last visited 25 May 2017).

133. *Ibid.*

134. "2008 Annual Report", cited *supra* note 131, p. 54. The actual total loss is yet to be estimated: FDIC, "2015 Annual Report", 101.

135. Rose, *op. cit. supra* note 46, 30, Table 1.

136. Wang, "Bailouts and bank runs: Theory and evidence from TARP", 63 *European Economic Review* (2013), 177.

137. See FDIC Press Release from 25 Sept. 2008, available at <www.fdic.gov/news/news/press/2008/pr08085.html>, (last visited 25 May 2017).

138. Federal Reserve System, "Statement by the Board of Governors of the Federal Reserve System regarding the application and notices by Wells Fargo & Company to acquire Wachovia

USD¹³⁹), here the analysis will focus on the dynamics of the bank run itself as these dynamics are revealing with respect to the differences, introduced with electronic banking, and the importance of non-insured depositors for the liquidity risk.

In both cases, the banks experienced mainly a “silent” bank run (online withdrawal of deposits),¹⁴⁰ predominantly by big depositors who were uninsured.¹⁴¹ For example, during the first run on Washington Mutual in July 2008, 70 percent of the outflow came from uninsured deposits.¹⁴² The deposits’ structure in Wachovia was comparable, where, although deposit insurance only failed to fully cover 2 percent of the accounts, these uninsured deposits formed 47 percent of the total sums deposited.¹⁴³ The overall picture of the correlation between the insured deposit amounts and fully insured accounts was not materially different in the whole banking system in 2008 with 98.5 percent of fully insured accounts, but only 62.3 percent insured deposited sums.¹⁴⁴ The ratio of insured deposited sums has gone up to 78.38 percent with the increase of the insurance cap at 250 000 USD by the 2010 Dodd-Frank Act.¹⁴⁵

The above is proof that it is not the number of fully insured depositors that is relevant for the prevention of a liquidity crisis, but rather the ratio of fully insured deposit base. In the pre-electronic banking era it was perhaps indeed pertinent how many are the fully insured depositors, as nearly all operations were performed over the counter (which imposes some physical limitations as to the number of depositors’ requests that can be processed per working day). Nowadays, with the electronic banking and concentration of wealth in a few multinationals and high-net-worth individuals, a system for the prevention of bank runs that relies on a high percentage of fully-insured depositors is simply outdated.

Corporation and Wachovia’s subsidiary banks and nonbanking companies”, available at <www.federalreserve.gov/newsevents/press/orders/orders20081021a1.pdf>, (last visited 25 May 2017), 7.

139. United States Senate, Permanent Subcommittee on Investigations, “Wall Street and the financial crisis: Anatomy of a financial collapse, (2011) *Majority and Minority Staff Report*, 48.

140. Wang, op. cit. *supra* note 136, 177.

141. Rose, op. cit. *supra* note 46, 1.

142. *Ibid.*, 12.

143. *Ibid.*

144. *Ibid.*

145. See statistics on the total amount of domestic deposits, available at <www.fdic.gov/bank/statistical/stats/2012dec/industry.pdf>, (last visited 25 May 2017), and statistics on the covered deposits, available at <www.fdic.gov/bank/statistical/stats/2016mar/fdic.pdf>, (last visited 25 May 2017).

After examining these case studies and based on the theoretical framework that was presented in section 2, one can conclude that there are several key factors for a resilient deposit insurance:

- (i) adequate coverage level in relation to the total amount of the deposited sums that can be extended when necessary to full depositors' guarantee;
- (ii) a prompt payout period;
- (iii) the existence of reliable mechanisms for State support of the DGS fund when it cannot meet its obligations.

4. EU and US deposit insurance: Comparative analysis

Bearing the aforesaid in mind, the contribution will now turn to assessing the legal framework in the EU (Directive 2014/49) and compare it with the US (Federal Deposit Insurance Act (FDIA) of 1950). Following the above propositions regarding the key factors for a sound deposit guarantee system, the article will focus on: (i) the coverage, (ii) the time frame for repayment, and (iii) the funding arrangements. These comparators will be assessed sequentially hereunder. Each element will be followed by an analysis of the drawbacks in the EU system and recommendations for its improvement.

4.1. Coverage

In terms of coverage, the Basel Committee and the International Association of Deposit Insurers (IADI) advice on limited coverage shields the majority of the depositors, but simultaneously leaves a considerable amount of deposits out of the scheme, so that they remain subject to market discipline.¹⁴⁶ The idea is to offset the moral hazards that Deposit Insurance is supposed to entail to some degree. However, the present study argues that informational asymmetry is equally applicable to uninsured depositors as to insured depositors, since both groups have no timely access to accurate information. Therefore, all considerations related to capping the DGS must relate solely to the price of the scheme, rather than to market discipline, as exercising such discipline is impossible in practice. Good examples in that respect are the runs on Wachovia and Washington Mutual where the uncertainty of uninsured depositors played an important role, while both banks turned out viable at the end of the day.¹⁴⁷

146. Core Principles, cited *supra* note 55, 27.

147. See in that respect the minutes from the FDIC Technical Briefing on the Temporary Liquidity Guarantee Programme from 14 Oct. 2008:

Keeping the aforesaid in mind, there are two main elements when speaking about coverage: the eligibility of depositors and the coverage cap.

First, starting with the eligibility of depositors for protection, while in the US all depositors are covered in a non-discriminatory manner, regardless of whether they are individuals, legal entities, “professional investors” or a public body,¹⁴⁸ the EU framework contains a list of non-eligible depositors such as other banks, investment firms, financial institutions, pension funds, etc.¹⁴⁹ The differentiation rests on the assumption that companies in the financial sector are able to evaluate the risk accurately¹⁵⁰ and that public authorities have easier access to credit.¹⁵¹ Furthermore, it is argued that “[t]heir limited number compared to all other depositors minimizes the impact on financial stability in the case of a failure of a credit institution.”¹⁵² This represents a partial change in the regulatory regime, as under the old Directive (94/19), Member States had the possibility but not the obligation to introduce lists of non-eligible depositors¹⁵³, while Directive 2014/49 fully harmonizes the area.¹⁵⁴

However, one may argue that the change is counterproductive as all of its underlying assumptions have inherent logical flaws. First, the notion that undertakings in the financial sector are in a better position to evaluate the risks taken by a credit institution is incorrect. This study has demonstrated on several occasions, both theoretically and in practice, that the informational asymmetry is as true for “professional depositors” as for any other depositor – they have no insight into the exact exposure of a bank. Furthermore, when there are panic withdrawals, even if a depositor possesses accurate

“QUESTION: So I guess the question that I wanted to ask is, can you speak to the extent to which the deposits that were pulled out of Washington Mutual, out of Wachovia were in this category of deposits? To what extent does this address the runs that we have actually seen?”

MODERATOR MURTON [Arthur Murton – at that time Acting Chief Operating Officer at FDIC]: That’s a good question. I think the guarantee on the non-interest bearing transaction accounts is designed to address some of the liquidity problems that we have seen at certain institutions that are probably perhaps – well, are *viable and perhaps even healthy franchises* that can be subject to some of these liquidity pressures” (emphasis added).

148. See the answer provided by FDIC with respect to “Who is protected?” in the Q&A section, available at <www.fdic.gov/consumers/banking/facts/>, (last visited 25 May 2017).

149. Art. 5(1) of Directive 2014/49.

150. COM(2010)368, “Impact assessment. Accompanying document to the Proposal for a Directive on Deposit Guarantee Schemes [recast] and to the report from the Commission to the European Parliament and to the Council. Review of Directive 94/19/EC on Deposit Guarantee Schemes”, 38.

151. Recital 31, Directive 2014/49.

152. *Ibid.*

153. See Art. 7(2) of Directive 94/19.

154. Art. 5 of Directive 2014/49.

information and is sure of its soundness, in the absence of a guarantee, the rational choice is to withdraw, as the run itself can cause failure. Regarding public authorities, the argument put forward that they have easier access to credit¹⁵⁵ is hard to understand as the causal connection between whether or not a depositor has access to credit and its inclination to take part in a bank run, is unclear.

Moreover, the argument brought forward in the impact assessment and reproduced in Recital 31 of Directive 2014/49 that the limited number of non-eligible depositors compared to all other depositors minimizes the impact on financial stability makes even less sense, as it is the amount withdrawn that harms bank liquidity and not the number of depositors that are withdrawing. As can be seen from the data collected by the Commission itself, non-eligible depositors have a material portion of the bank deposits by holding nearly 30 percent of the total amount deposited.¹⁵⁶ The withdrawal of these resources can obviously have a significant impact on financial stability.

Regarding the coverage cap or the maximum amount protected per depositor per credit institution, in the EU it is capped 100 000 EUR without any margin of discretion for the Member States.¹⁵⁷ In that respect, the new Directive introduced nothing new, as the cap was fully harmonized already in 2011 under the old Directive.¹⁵⁸

The US model, by contrast, stipulates a much higher level of insurance, amounting to 250 000 USD¹⁵⁹ per depositor, institution, and account category. Hence in the US, a single client can be protected with a higher statutory cap, if, for example, he or she not only has a single account but also a joint account (where the coverage limit is also 250 000 USD per co-owner). Moreover, even for the uninsured amount (exceeding 250 000 USD), depositors may receive an advance payment calculated on the basis of the past average FDIC recovery experience (as was seen in the Indy Mac example).¹⁶⁰ On top of that, the FDIC has the discretion to make additional payments beyond the maximum amount of 250 000 USD if not providing protection would jeopardize financial stability, thereby creating the legal basis for a *de facto* unlimited deposit insurance, or the so-called “systemic risk exemption”.¹⁶¹ In 2012, this

155. Impact assessment, cited *supra* note 150, 38.

156. Cannas, Cariboni, Veisari and Pagano, “Updated estimates of EU eligible and covered deposits”, (2014) *European Commission JRC Technical Report*, 9, Table 3.

157. Art. 6(1) of Directive 2014/49.

158. See Art. 7(1)(a) of Directive 2009/14.

159. Section 11(a)(E) FDIA.

160. Section 11(d)(4)(B) FDIA. See also Bliss and Kaufman, “A comparison of US corporate and bank insolvency resolution”, (2006) *Economic Perspectives*, 51.

161. See Berger, Molyneux and Wilson, *op. cit. supra* note 15, p. 345.

framework resulted in 78.38 percent coverage of the deposited amounts in US banks.¹⁶²

The following deficiencies can be outlined with respect to the EU rules on the coverage cap. First, the significant differences in the operating environment of the different Member States make a measure tailored on a “one-size-fits-all” basis inappropriate and lead to major differences in coverage levels in the individual Member States.¹⁶³ Second, when determining the cap, the European Commission has focused on the ratio between covered and eligible deposits, while from a financial stability point of view, it is not the ratio between covered and eligible deposits which one should focus on, but rather the ratio between insured and uninsured deposited amounts, as this shows the true picture of the amounts that are the most susceptible to bank runs. Taking into account the latter ratio, the insured deposited sums in the EU were only 47.27 percent in 2012 (according to the most recent publicly accessible data), when the level of insurance was already capped at 100 000 EUR.¹⁶⁴ Likewise, the number of fully covered individual depositors used as a measure by the European Commission¹⁶⁵ is irrelevant with respect to liquidity risk, as the small percentage of uncovered depositors concentrate a vast proportion of the deposited sums. In that respect, it is striking to note that the Commission itself has estimated that a coverage of 100 000 EUR will cover only 71.8 percent of the eligible deposits (calculated as a total sum).¹⁶⁶ If one takes that together with the 30 percent that are held by non-eligible depositors, we end up in a system where more than 50 percent of all deposited amounts are not covered at all by a DGS. Hence, the EU model suffers from a mismatch between the goal to achieve financial stability and the ratios actually used to assess the effectiveness of the system (eligible to covered, rather than insured to uninsured deposits, and fully covered individual depositors, rather than covered deposited sums).

Therefore, the following amendments are needed for Directive 2014/49 to adequately perform its functions: (i) the abolition of the distinction between eligible and non-eligible depositors, (ii) an increase in the coverage cap to a level which will cover the substantial proportion of the deposited amounts,

162. For the purposes of an accurate comparison, although contemporary data exists, we took 2012 as a year of reference. Statistics on the total amount of domestic deposits and covered deposits, cited *supra* note 145.

163. See Kleftouri, “Rethinking UK and EU bank deposit insurance”, 24 EBLR (2013), 114.

164. The result of 47.27% was achieved by recalculating the data to express the relation between the total and insured deposited sums in Cannas, Cariboni, Veisari, and Pagano, *op. cit. supra* note 156.

165. Impact assessment, cited *supra* note 150, 32 and table on 105.

166. *Ibid.*, 104.

and (iii) introduction of a systemic risk exemption, allowing for a temporary unlimited guarantee.

4.2. Reimbursement

Besides a sufficient coverage level, a quick and reliable payout process is essential for trust in the deposit guarantee framework.¹⁶⁷ The Basel Committee and IADI advise that reimbursement must be prompt (i.e. within seven working days), except for certain types of deposits which require more time due to their relative complexity.¹⁶⁸

As of 2024, the time period in the EU is seven working days with a transitional period, whereby until 31 December 2018, the period is 20 working days, between 1 January 2019 and 31 December 2020 the period will be 15 working days, and from 1 January 2021 until 31 December 2023 it will be 10 working days¹⁶⁹ plus five days to determine whether a deposit is unavailable.¹⁷⁰ Thus, as the rules now stand, the *de facto* period is 25 working days with some deposits subject to an exception and no payout deadline.¹⁷¹ Moreover, not only is the EU system still lagging far behind the Basel Committee guidelines, but sometimes the real period for reimbursement is much longer and can take up to several months.¹⁷² Taking this into consideration, it is unclear why the transitional period with respect to faster payouts is so long, especially keeping in mind that according to one study transition to a 7 working days payout is possible within 18 months.¹⁷³

There is not a precisely formulated deadline in the US,¹⁷⁴ but the general practice is that payment will be made within 2 working days.¹⁷⁵ For particular types of deposit accounts that require further assessment (e.g. related to a trust

167. Hillrichs, "Deposit insurance: Reimbursement of depositors", 12 *DICE Report* (2014), 1. See also Colaert, "Deposit guarantee schemes in Europe: Is the Banking Union in need of a third pillar?", 12 *European Company and Financial Law Review* (2015), 394–395. Some authors even put the promptness of repayment and public awareness as the most important factors: Cariboni, Joossens, and Ubaldi, "The promptness of European deposit protection schemes to face banking failures", 11 *Journal of Banking Regulation* (2010), 205.

168. "Core principles", cited *supra* note 55, 39.

169. Art. 8 of Directive 2014/49.

170. Art. 3(2)(2) of Directive 2014/49. Directive 94/19 provided for 20 working days payout period (Art. 10) so except for the long transitional period, nothing else has substantively changed under the new regulatory regime.

171. Art. 8(5) of Directive 2014/49.

172. In the case of Corporate Commercial Bank in Bulgaria (2014), it took more than 5 months.

173. Ernst & Young, "Fast payout study – Final report", (2008), 8.

174. Section 11(f)(1) FDIA stipulates "as soon as possible".

175. "When can I expect to receive my money?", Q&A section available at <www.fdic.gov/consumers/banking/facts/payment.html>, (last visited 25 May 2017).

agreement), the FDIA notes that a longer period may apply depending on the customers' ability to provide the relevant documentation promptly.¹⁷⁶ Nevertheless, the fact that no specific maximum repayment period is stipulated in a legally binding manner might be considered a disadvantage for the US framework. However, the consistency of the administrative practice remedies this downside, with a good example being the Indy Mac payout that was discussed earlier on.¹⁷⁷

It is evident that the timeframe set out under EU law is considerably longer than that recommended by the Basel Committee and IADI (7 working days),¹⁷⁸ and goes far beyond the US example (usually the next working day),¹⁷⁹ with a maximum period of more than a calendar month as of the moment when access to deposits is in fact lost.¹⁸⁰ Thus, in terms of timeframe, the EU framework requires further and substantial improvement which could take the form of: (i) reimbursement of deposits as quickly as possible from the moment of their factual unavailability, but no later than seven days after, (ii) reimbursement of deposits subject to an exception immediately after the depositor has provided all necessary documents (depending on the exception ground), and (iii) the introduction of an 18-month transitional period.

4.3. Funding

According to the Basel "Core principles", the provision of funds for the DGS should be the responsibility of the banks operating within its framework, should be performed *ex ante*, and should depend on the banks' risk profiles.¹⁸¹ On the other hand, the fund should have sufficiently reliable arrangements in place to face any immediate liquidity needs.¹⁸² Although, no exact amount of pre-funding is specified, studies in the US have shown that a fund balance of 2 percent of the estimated insured deposits would have been enough to avoid negative fund balances during the two previous financial crisis periods¹⁸³ with

176. Ibid.

177. Hillrichs, *op. cit. supra* note 167, 63, Table 1.

178. "Core principles", cited *supra* note 55, 39.

179. Hillrichs, *op. cit. supra* note 167, Table 1, 63.

180. Five working days under Art. 3(2)(2) of Directive 2014/49 plus 20 working days under Art. 8(2)(a) of the Directive.

181. "Core principles", cited *supra* note 55, 29. However, some point out the difficulty in assessing accurately this risk profile – e.g. 97% of the banks in the US were classified in the lowest risk category before the crisis. See Clarke, *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar Publishing, 2015), p. 352.

182. "Core principles", cited *supra* note 55, 29.

183. Ellis, "Deposit insurance funding: Assuring confidence", (2013) *FDIC Staff Paper* (2013), 10, available at <www.fdic.gov/deposit/insurance/assuringconfidence.pdf>, (last

comparable ratios also being suggested as adequate in the EU.¹⁸⁴ Nonetheless, empirical evidence supports the view that no viable level of pre-funding is adequate in case of failure of a comparatively large credit institution. A good example in that regard was the failure of Corporate Commercial Bank in Bulgaria where the fund ratio exceeded the suggested 2 percent target substantially, but nevertheless the balance turned negative after the default of a single bank.

With regard to funding, one must bear in mind that adequate funding of the deposit guarantee scheme also contributes to the overall confidence of depositors in the Deposit Insurance.¹⁸⁵ Thus, proper pre-funding and, very importantly, a full guarantee that, in any event, the State will step in and provide liquidity to the DGS are crucial for the effectiveness of any such system. Keeping that in mind, as well as the fact that Directive 2014/49 introduces for the first time at EU level rules on the funding arrangements of national DGSs, this contribution will now examine the concrete parameters of the legal framework and test them against the above propositions.

The first matter to be discussed with respect to funding of the DGS is the framework of banks' contributions. The main principle is contained in Article 10(1) of Directive 2014/49, which stipulates that the Deposit Insurance Funds must be financed by the participating credit institutions and that the fund should have enough money to face its potential liabilities. The financing itself is set up in three layers – ex-ante contributions, ex-post contributions, should the amount due exceed the amount available in a particular payout instance, and additional arrangements.¹⁸⁶

However, the minimum fund ratio goal is set at a rather unambitious rate of 0.8 percent of the covered deposits by 2024 (Art. 10(2))¹⁸⁷ with certain exceptions for the Member States with highly concentrated financial markets

visited 25 May 2017). Note that it is argued that the EU should aim at 1.5% fund size: Schoenmaker and Gros, "A European deposit insurance and resolution fund", CEPS Working Document No. 364 (2012), 7.

184. Maccaferri, Cariboni and Schoutens, "Lévy processes and the financial crisis: Can we design a more effective deposit protection?", 4 *International Journal of Financial Research* (2013), 15; Sitkowska, "Setting the target fund size: Poland country case", (2015) *Bank Guarantee Fund*, 16 on <www.pdic.gov.pl/files/iadi/Session%201_Maria%20Sitkowska_presentation.pdf>, (last visited 25 May 2017), 16.

185. See also Colaert, op. cit. *supra* note 167, 399. The importance of government guarantee is stressed also in de Larosière Group, "The high-level group on financial supervision in the EU", (2009) de Larosière Report, 34, para 135; Hanten and Plaschke, "EU law impact on deposit protection in the financial crisis: *Icesave*", 51 *CML Rev.* (2014), 308.

186. Colaert, op. cit. *supra* note 167, 400.

187. However, the set target introduces minimum harmonization, as Member States are allowed to set a higher target level: EBA, "Guidelines on methods for calculating contributions to DGS", (2015), 11, para 21.

(Art. 10(6))¹⁸⁸ where the percentage is lowered to 0.5 percent. The initial proposal by the Commission was for coverage of 1.5 percent of the eligible deposits¹⁸⁹ while research has shown that a fund size of 2 percent of the eligible deposits would be able to cover up to 98.81 percent of its potential losses.¹⁹⁰

The ex-post funding is set at a level of up to 0.5 percent of the covered deposits (Art. 10(8)) should an insured event occur and the funds in the DGS prove insufficient, including the possibility for deferral of payment.

As any viable amount of funding by the banking industry will be insufficient to cover a default of a large credit institution or multiple failures of small or medium-sized banks,¹⁹¹ the “alternative funding arrangements”, although provided last (Art. 10(9)), are of crucial importance to the effectiveness of the system.

The typical and most common example in practice is a governmental credit line.¹⁹² However, in that respect the critical question is whether the State is under an obligation to provide funding to the DGS in case of insufficient funds. According to the EFTA Court’s ruling on the matter in its judgment on the *Icesave* case (connected to the Landsbanki failure that was discussed above), the answer is in the negative.¹⁹³ Recital 45 of the new Directive (2014/49) mirrors the EFTA Court’s reasoning and reaffirms the *Icesave* ruling.

Here, one might argue that the situation concerning the funding arrangements of the national DGSs might improve, at least for the countries in the Eurozone, after the (potential) introduction of the European Deposit Insurance Scheme (EDIS) as proposed by the European Commission in 2015.¹⁹⁴ This seems only partly true. First, the political plausibility of successful enactment of the proposed regulation is doubtful with both the German Federal Ministry of Finance and the banking industry in the country opposing some essential features of the scheme.¹⁹⁵ Second, the proposal keeps

188. Recital 28 of Directive 2014/49.

189. COM(2010)368 final, Proposal for a Directive on Deposit Guarantee Schemes [recast], 7.

190. Maccaferri, Cariboni and Schoutens op. cit. *supra* note 184, 15.

191. Colaert, op. cit. *supra* note 167, 402–403.

192. *Ibid.*, 408.

193. *Icesave*, cited *supra* note 64, para 135.

194. COM(2015)586 final, cited *supra* note 119. However, some Member States have expressed their concerns regarding the proposed amendments (notably Germany and Austria) which might stall the process.

195. Schuknecht, “An insurance scheme that only ensures problems”, Letter from the Chief Economist of the Federal Ministry of Finance (2016), available at <www.bundesfinanzministerium.de/Content/EN/Standardartikel/Topics/Featured/letter-from-the-chief-economist/2016-02-8-an-insurance-scheme-that-only-ensure-problems.html?nn=92202&view=pdf>.

the 0.8 percent ratio and aims to accumulate 43 billion EUR by 2024 with the main idea being to initially step up and provide liquidity support for national DGSs in case their funds are depleted, then share the financial burden of a payout, and finally (after 2024) take over all payouts. However, the proposal is vague as to the possibilities of the EDIS to receive additional financial resources for the insured amounts that go beyond its available funds, which is a situation easily imaginable in a full-scale financial crisis in the Eurozone or a failure of a big banking group. The proposed regulation provides the possibility for the fund to borrow from non-Eurozone DGSs (Art. 74(f)) and “institutions, financial institutions or other third parties” (Art. 74(g)) but no European institution, government or non-participating DGS is under the obligation to provide such funds if requested. Furthermore, if we can assume that national governments are under severe political pressure to provide liquidity to the national deposit insurance funds in case of need, it is hard to imagine a comparable public body with respect to the EDIS. Thus, without a “federal” sovereign in a position to back up the EDIS fund, one might wonder whether Europe will not be better off with the harmonized but separate responsibility of the Member States.

Having outlined the main characteristics of the funding mechanism of the EU deposit insurance scheme, the analysis will now highlight the key features of the US framework. The main source of income of its DGS fund is also based on ex-ante contributions by the banking industry and a mixture of hard and soft law fund size targets.¹⁹⁶ The hard law reserve ratio aim is stipulated in Section 7(b)(3)(B) of FDIA¹⁹⁷ and is set at 1.35 percent of the insured deposits. The soft law long-term reserve ratio goal is 2 percent¹⁹⁸ based on the analysis performed regarding the performance of the DGS during the last few decades.¹⁹⁹ The most recent data on the actual ratio accumulated in the U.S. is that it amounts to 1.13 percent of the insured deposits.²⁰⁰

However, unlike the EU system, a core additional funding arrangement is the statutory credit line provided by the Treasury under Section 14(a)(1) of FDIA with a cap of 100 billion USD. Temporary increases of that cap might be

(last visited 7 September 2017). The reaction of the banking industry is available at <www.bvr.de/Press/Press_releases/German_Banking_Industry_Committee_welcome_Esther_de_Lange_s_report_on_the_planned_European_Deposit_Insurance_Scheme_EDIS>, (last visited 7 Sept. 2017).

196. Ellis, op. cit. *supra* note 183, 3–5.

197. As amended by Section 334(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (2010), Pub. L. No. 111-203, 124 Stat. 1376.

198. Ellis, op. cit. *supra* note 183, 6.

199. *Ibid.*, 6 and chart on 10. However, studies in other countries show different results: e.g. Sitkowska, op. cit. *supra* note 184, where a 4.2% ratio is deemed sufficient in most periods, 16.

200. See the statistical data available at <www.fdic.gov/bank/statistical/stats/2016mar/fdic.pdf>, (last visited 25 May 2017).

authorized ad hoc, as was done during the period between 20 May 2009 and 31 December 2010 when the credit line was in the amount of 500 billion USD.²⁰¹

It is not difficult to see that the US example provides higher ratios and much stronger additional funding arrangements in the form of an explicit governmental credit line, set at an adequate level, which might vary depending on specific needs. On the contrary, the EU framework is rather unambitious, with a targeted reserve ratio well behind what studies have suggested as sufficient and a binding governmental guarantee left to the sole discretion of the Member States.

Therefore, the following amendments should be considered: (i) increase of the fund size goal to 2 percent in accordance with the studies in the field; (ii) abolition of the exception for countries with a concentrated banking sector, as this exception not only undermines financial stability but also creates an uneven playing field throughout the Union, with credit institutions from certain Member States making smaller overall contributions.²⁰² The justification for the exception being that the situation in the Member States with a concentrated financial market is different from the one in a Member State where this market is dispersed, cannot be upheld, as for the purposes of deposit guarantees, this is not the case. As it was seen, it makes little or no difference whether the financial institution is big or small when a bank run is triggered, and hence unequal treatment cannot be justified on the basis that the situations are not comparable;²⁰³ and (iii) the introduction of an obligation for the Member States to reimburse all deposits within the stipulated coverage, thus implicitly forcing the adoption of a governmental credit line. Unlike the LOLR, the last proposal will have no effect on the EU State aid rules as any funding of a DGS by the State, will fall outside the scope of State aid, as according to the current regulatory framework there is no market for DGSs.

5. Conclusion

Bearing in mind the latest stress test results of the banking system in the EU, which showed, generally speaking, its soundness,²⁰⁴ now is an opportune moment to build resilient DGSs around Europe designed to face the next

201. See Section 14(a)(3)(A) of FDIA.

202. See in that sense also Colaert, *op. cit. supra* note 167, 404.

203. See e.g. the case studies on the run on Wachovia and Washington Mutual which were systemic players on the market and the run on Corporate Commercial Bank and First Investment Bank (at that time the 4th and 3rd biggest banks in terms of their assets in Bulgaria).

204. See capital ratios at EBA, “2016 EU-wide stress test: Results”, 33–44, available at <www.eba.europa.eu/documents/10180/1532819/2016-EU-wide-stress-test-Results.pdf>, (last visited 25 May 2017).

period of economic distress. Nevertheless, it should also be noted that not all banks have shown the necessary reliability²⁰⁵ and that the stress test does not cover liquidity risks.²⁰⁶ As such, building a reliable third pillar of the Banking Union as soon as possible represents a necessary measure.

This contribution has pointed out that, from a substantive point of view, a sound deposit insurance in the EU will require wider overall deposit coverage, faster payout periods, and a higher DGS fund ratio, backed by a governmental guarantee.

In terms of the moral hazard that such a system will entail, it was already outlined that the ability of depositors (insured or otherwise) to exercise effective market discipline is largely overestimated, as they lack the necessary accurate information in order to evaluate the asset portfolio of credit institutions correctly. Thus, the financial safety net should rely on those who actually have the information and power to exercise discipline: the prudential supervisors.

205. See the individual results of Banca Monte dei Paschi di Siena S.p.A., whose Tier 1 capital goes negative in the adverse scenario, available at <www.eba.europa.eu/documents/10180/1519983/EBA_TR_IT_J4CP7MHCXR8DAQMKIL78.pdf>, (last visited 25 May 2017). See also the results in Bulgaria where the Tier 1 capital of several banks goes negative or falls under the minimum requirements of Regulation 575/2013 in the adverse scenario: individual results of First Investment Bank, Investbank, International Asset Bank, and Tokuda Bank available at <www.bnb.bg/bnbweb/groups/public/documents/bnb_download/bs_aqr_results_a2_en.pdf>, (last visited 25 May 2017).

206. See EBA, “2016 EU-wide stress test: Frequently Asked Questions”, 1–2, available at <www.eba.europa.eu/documents/10180/1532819/2016-EU-wide-stress-test-FAQ.pdf>, (last visited 25 May 2017).

CASE LAW

A. Court of Justice

Mutual recognition, extradition to third countries and Union citizenship: *Petruhhin*

Case C-182/15, *Aleksei Petruhhin*, Judgment of the Court of Justice of 6 September 2016, EU:C:2016:630

1. Introduction

The principle of mutual recognition has become a key element of the Area of Freedom, Security and Justice and the cornerstone of judicial cooperation in criminal matters (Arts. 67(3) and 82(1) TFEU).¹ The European arrest warrant is the first instrument that implemented the principle of mutual recognition and thereby replaced the traditional treaty-based extradition regime among EU Member States.² Under the new paradigm of mutual recognition, several traditional obstacles to extradition have been abolished (e.g. the exceptions for political, military and fiscal offences) or restricted (double criminality requirement).³ In particular, the Framework Decision has done away with the ban on extradition of own nationals that is deeply rooted in the constitutions of various Member States.⁴ Nevertheless, the executing Member State may subject the surrender of own nationals to the condition that the surrendered person is returned to his home country in order to serve the sentence there.⁵ This privilege, however, does not only apply to nationals, but also to residents of the executing Member State, and the Court has emphasized that the principle of non-discrimination (Art. 18 TFEU) prohibits the national legislature from limiting the scope of the corresponding refusal ground to its

1. See the Tampere European Council, Conclusions of the Presidency of 15/16 Oct. 1999 (No. 33).

2. Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, O.J. 2002, L 190/1.

3. See Recital (12) and Arts. 2(2) and 4(1) of the Framework Decision (cited *supra* note 2).

4. See e.g. Art. 16(2) of the German constitution (Grundgesetz – GG).

5. See Art. 5(3) of the Framework Decision (cited *supra* note 2).

own nationals.⁶ On the other hand, extradition to non-Member States is still subject to the international treaty framework that provides for an obstacle to extradition based on the nationality of the requested person. Even though the ban on extradition of nationals to third countries has not been affected by the European arrest warrant, it raises similar concerns as to its compatibility with the prohibition of discrimination on grounds of nationality. In *Petruhhin* the Court had to rule on whether Member States were still allowed to limit the scope of this exception to their own nationals or whether they were obliged to extend the protection from extradition to nationals of other Member States (i.e. to all EU citizens).

2. Background

Mr Petruhhin, an Estonian national, was subject to a criminal investigation for large-scale organized drug-trafficking in the Russian Federation. Due to an Interpol Red Notice, he was arrested in Latvia in September 2014. On request of the Russian authorities, the Latvian Prosecutor General granted Mr Petruhhin's extradition to Russia. In his appeal against the extradition decision, Mr Petruhhin argued that he enjoyed the same level of protection against extradition as a Latvian national. The Supreme Court of Latvia stated that according to national law (the Latvian Constitution and the Code of Criminal Procedure) as well as international law (the Agreement between the Republic of Latvia and the Russian Federation on Judicial Assistance and Judicial Relations), the exception to extradition applied to Latvian nationals only. In the eyes of the Supreme Court, however, the lack of protection of other Member States' nationals that have moved from their home country to the requested Member State was contrary to the essence of EU citizenship. Therefore, the Supreme Court made a preliminary reference to the Court of Justice and asked whether the principle of non-discrimination (Art. 18 TFEU) and the right to free movement (Art. 21 TFEU) were to be interpreted as meaning that a Member State that had received an extradition request from a non-Member State had to provide the nationals of another Member State the same level of protection against extradition as it guaranteed to its own nationals. In addition, the Supreme Court raised the question whether the court of the requested Member State had to apply the conditions for extradition of the Member State of which the requested person is a national or that in which he has his habitual residence. The third question was not related to the nationality exception, but to general human rights concerns and the

6. Case C-123/08, *Wolzenburg*, EU:C:2009:616; Case C-42/11, *Lopes da Silva Jorge*, EU:C:2012:517.

obligation of the requested Member State to verify that the requested person would not be exposed to a serious risk of being subjected to the death penalty, torture or inhuman or degrading treatment or punishment (Art. 19 EU Charter of Fundamental Rights, EUCFR).

3. Opinion of Advocate General Bot

In his Opinion, the Advocate General examined the two questions on the nationality exception together. He rejected the argument of several intervening Member States that the situation of Mr Petruhhin (extradition to third countries) did not fall within the scope of EU law and the provisions on EU citizenship in particular. Since Mr Petruhhin had exercised his right to free movement (Art. 21 TFEU) by travelling from one Member State (Estonia) to another (Latvia), a sufficient link to EU law had been established and the case of Mr Petruhhin could not be considered a wholly internal situation.⁷ Notwithstanding the fact that, in the absence of EU rules on the extradition to third States, the Member States had retained the competence to adopt such rules and conclude international extradition treaties to that end, they were obliged to comply with the obligations associated with the right to free movement and the principle of non-discrimination when exercising this competence.⁸

Having established the applicability of the principle of non-discrimination, the Advocate General stated that the applicable extradition law (national legislation and the international agreement with Russia) treated Mr Petruhhin (an Estonian national and EU citizen) differently from Latvian nationals, because only the latter enjoyed protection against extradition to a third country (Russia).⁹ Such different treatment, however, could be justified if it was based on objective considerations independent of the nationality of the persons concerned.¹⁰ In the eyes of the Advocate General, neither the lack of confidence in the criminal justice systems of third States nor the protection of own nationals from prosecution in a legal system they are not familiar with provide sufficient reasons to refuse extradition of nationals only and not to

7. Opinion of A.G. Bot of 10 May 2016, EU:C:2016:330, paras. 34, 39–40.

8. Opinion, paras. 41–43, referring to Case C-186/87, *Cowan*, EU:C:1989:47, para 19; Case C-274/96, *Bickel and Franz*, EU:C:1998:563, para 17; Case C-148/02, *Garcia Avello*, EU:C:2003:539, para 25; Case C-403/03, *Schempp*, EU:C:2005:446, para 19; Case C-135/08, *Rottmann*, EU:C:2010:104, paras. 39 and 41; Case C-522/10, *Reichel-Albert*, EU:C:2012:475, para 38; Case C-359/13, *Martens*, EU:C:2015:118, para 23.

9. *Ibid.*, para 47.

10. *Ibid.*, para 49.

extend such protection to nationals of other Member States.¹¹ Nevertheless, the Advocate General identified an objective reason to distinguish the situation of nationals of the requested Member State and nationals of any other Member States, namely to ensure that the person to be extradited would not escape from justice.¹² This reasoning was based upon a general principle under international law that conferred an obligation upon the requested Member State either to extradite or to prosecute and adjudicate the requested person (*aut dedere aut iudicare*).¹³ Thus, if extradition was refused, the requested Member State itself would be obliged to initiate criminal proceedings. To that end, the Latvian Code of Criminal Procedure established extraterritorial jurisdiction over crimes committed by Latvian citizens and permanent residents (principles of active personality and domicile).¹⁴ However, it did not allow Latvian courts to exercise extraterritorial jurisdiction over crimes committed by other foreigners such as Mr Petruhhin.¹⁵ Therefore, if the nationality exception were applied to Mr Petruhhin, he could neither be extradited to Russia nor prosecuted in Latvia, but would escape from justice. Accordingly, the Advocate General concluded, the different treatment of nationals of the requested Member State and other EU citizens such as Mr Petruhhin was justified in order to prevent impunity of the person sought for extradition.¹⁶

As to the third question, the Advocate General established the applicability of Article 19(2) EUCFR via Mr Petruhhin's exercise of his right to free movement (Art. 21 TFEU, see above).¹⁷ Referring to the case law of the European Court of Human Rights (ECtHR), the Advocate General opined that a Member State had to refuse extradition to a State in which the requested person would face a real risk of being subjected to treatment contrary to Article 3 ECHR.¹⁸ Furthermore, the Advocate General pointed to the obligation of the Member State executing a European arrest warrant to determine whether there are substantial grounds to believe that the person to be surrendered to the issuing Member State would run a real risk of being subject to inhuman or degrading treatment, within the meaning of Article 4

11. *Ibid.*, paras. 51–53, referring to the right to protection of the diplomatic and consular authorities of other Member States (Art. 20(2)(c) TFEU).

12. *Ibid.*, paras. 54–56.

13. *Ibid.*, paras. 58–62.

14. *Ibid.*, paras. 65–66.

15. *Ibid.*, para 67–68.

16. *Ibid.*, para 69.

17. *Ibid.*, para 75.

18. *Ibid.*, para 78; see ECtHR, *Soering v. United Kingdom*, Appl. No. 14038/88, judgment of 7 July 1989, para 88; *Trabelsi v. Belgium*, Appl. No. 140/10, judgment of 14 Sept. 2014, para 116.

EUCFR, and proposed that this approach should be applied to extradition to third States, too.¹⁹

4. The judgment of the Court

Like the Advocate General, the Court first addressed the questions related to the nationality exception and held that the situation of Mr Petruhhin fell within the scope of application of the Treaties (and Art. 18 TFEU in particular) because he had exercised his right to free movement (Art. 21 TFEU).²⁰ The Court established a different treatment of Latvian nationals and nationals of other Member States (such as Mr Petruhhin), but did not further elaborate on the principle of non-discrimination (Art. 18 TFEU); instead, it focused on the restriction of the right to free movement (Art. 21 TFEU) resulting from the unequal treatment which allowed the extradition of nationals of other Member States.²¹ Such a restriction could only be justified if it pursued a legitimate objective and complied with the principle of proportionality.²² In this respect, the Court followed the Advocate General's reasoning that preventing impunity of the requested person was a legitimate objective and that extradition of that person to the requesting non-Member State was an appropriate means to achieve the objective pursued.²³ The Court emphasized, however, that restrictions on the freedom of movement could be justified only insofar as they were strictly necessary, i.e. there is no alternative measure less prejudicial to the exercise of the right to free movement, but equally effective in achieving the objective of preventing impunity of the requested person.²⁴ Referring to the principle of sincere cooperation (Art. 4(3) TEU) and the new cooperation instruments implementing the principle of mutual recognition, the European arrest warrant in particular,²⁵ the Court held that there was a less intrusive means to avoid impunity of the requested person, namely to inform the Member State of which the requested person was a national and to afford that Member State (Estonia) the opportunity to issue a European arrest warrant. If the alleged offender was surrendered to his home country for prosecution, the objective of preventing impunity was achieved without

19. *Ibid.*, paras. 81–83; see Joined Cases C-404 & 659/15 PPU, *Aranyosi and Căldăraru*, EU:C:2016:198, paras. 98 and 104.

20. Judgment, paras. 30–31.

21. *Ibid.*, paras. 32–33.

22. *Ibid.*, para 34.

23. *Ibid.*, paras. 37, 39–40.

24. *Ibid.*, paras. 38 and 41.

25. *Ibid.*, paras. 42–43 and 47.

extradition to the third (Russia) State being necessary.²⁶ Therefore, a Member State that had been requested to extradite a national of another Member State to a third State had to inform the latter Member State and, upon request of that Member State (i.e. a European arrest warrant), surrender the alleged offender for prosecution in his home country.²⁷

In its answer to the third question, the Court followed the same line of reasoning as the Advocate General, but mainly referred to the case law on the European arrest warrant and Article 4 EUCFR rather than the case law of the ECtHR on Article 3 ECHR.²⁸

5. Comment

In its judgment, the ECJ for the first time addressed the question of whether or not the scope of the nationality exception in extradition law should be extended to EU citizens (first and second question) whereas the answer to the third question more or less confirmed the well-established case law of the ECtHR on extradition obstacles resulting from human rights violations and its reception by the ECJ. Therefore, the following comment will focus on the first issue.

5.1. *Extradition to a third State and the freedom of movement (Art. 21 TFEU)*

Whereas the Advocate General referred to the freedom of movement (Art. 21 TFEU) in order to establish a link to EU law and, thereby, to trigger the application of the principle of non-discrimination on the ground of nationality (Art. 18 TFEU, see 5.2. below), the Court's line of reasoning focused on Article 21 TFEU rather than Article 18 TFEU. The Court's assessment is based upon a broad concept of "restriction" that covers any legislation which places EU citizens at a disadvantage simply because they have exercised their freedom to move within the Union.²⁹ This extensive interpretation originates from the case law on the economic freedoms which evolved from a ban on discrimination to a general prohibition of any restriction on cross-border

26. *Ibid.*, paras. 48–49.

27. *Ibid.*, para 50.

28. *Ibid.*, paras. 53–59.

29. Case C-406/04, *De Cuyper*, EU:C:2006:491, para 39; Case C-499/06, *Nerkowska*, EU:C:2008:300, para 32; Case C-353/06, *Grunkin and Paul*, EU:C:2008:559, para 21.

economic activity.³⁰ As a consequence, Article 21 TFEU even applies to merely indirect obstacles to the exercise of the right to free movement, such as a divergence of laws governing naming rights that are liable to cause serious inconvenience to the person concerned.³¹

On the basis of this case law, it is hardly surprising that the Court held that Mr Petruhhin's surrender to the Russian Federation restricts his right to free movement. The risk of being extradited to a third State has a dissuasive effect on the exercise of the right under Article 21 TFEU and clearly causes "serious inconvenience" to the requested person. The risk of being subject to criminal prosecution has a chilling effect on the freedom of movement as the Court has stated before in its case law on the transnational effect of the *ne bis in idem* principle (Art. 54 CISA).³² Therefore, the lack of protection against extradition to a third State is an indirect restriction of the alleged offender's right under Article 21 TFEU.

In addition, Mr Petruhhin's extradition to Russia might even directly affect his right under Article 21 TFEU. In *Ruiz Zambrano*, the Court followed a similar line of reasoning on the concept of EU citizenship and the rights associated with this status. According to the Court, an expulsion of third country nationals whose children are EU citizens violated these children's rights as EU citizens (Art. 20 TFEU) because they would have to leave the territory of the Union in order to accompany their parents and, as a consequence, be unable to exercise the substance of the rights conferred by virtue of their status as EU citizens.³³ If these children are citizens of a Member State other than the Member State of residence, recourse to Article 20 TFEU is not necessary as Article 21 TFEU provides protection against expulsion of the minor EU citizens' parents.³⁴ The rationale of this case law also applies to Mr Petruhhin's extradition to Russia because, having been surrendered to Russia, he would no longer be able to reside and to move within the Union. Therefore, Mr Petruhhin's extradition to Russia must be considered a direct restriction of his right under Article 21 TFEU.

30. Opinion of A.G. Cosmas in Case C-378/97, *Wijsenbeek*, EU:C:1999:144, para 105.

31. Case C-353/06, *Grunkin and Paul*, para 23; Case C-208/09, *Sayn-Wittgenstein*, EU:C:2010:806, paras. 55, 70; Case C-391/09, *Malozata Runevic-Vardyn and Lukasz Pawel Wardyn*, EU:C:2011:291, para 76.

32. Case C-436/04, *van Esbroeck*, EU:C:2006:165, para 34; Case C-467/04, *Gasparini*, EU:C:2006:610, para 46.

33. Case C 34/09, *Ruiz Zambrano*, EU:C:2011:124, paras. 44–45; Case C-304/14, *CS*, EU:C:2016:674, para 26.

34. Case C-200/02, *Zhu and Chen*, EU:C:2004:639, paras. 26 and 45; Case C-165/14, *Rendón Marín*, EU:C:2016:675, para 52.

5.2. *The principle of non-discrimination (Art. 18 TFEU) and its scope of application*

Notwithstanding the focus on the freedom of movement, the Court based its assessment also on the principle of non-discrimination. As a violation of Article 18 TFEU can only be established if the discrimination occurs “within the scope of application” of the Treaty, the principle of non-discrimination does not apply to merely internal situations, but requires a link to EU law. The Court stated that such a link was established by Mr Petruhhin having entered Latvian territory and, thereby, having exercised his right to free movement. This assessment stands in sharp contrast to the recent case law of the German constitutional court, which considered Article 18 TFEU inapplicable and argued that the extradition of EU citizens to third States did not fall within the scope of EU law, but within the competence of the Member States.³⁵ It is, however, well-established case law that the scope of application of Article 18 TFEU does not correspond to the scope of the Union’s legislative powers, but may also cover matters for which the Member States have retained their competence (compensation of crime victims, criminal proceedings).³⁶ In particular, the Court has applied the principle of non-discrimination to extradition within the Union (i.e. surrender on the basis of a European arrest warrant).³⁷ In the latter case, the Court did not refer to the relevant EU legislation, but relied on the link established by the freedom of movement.³⁸ Thus, if the person concerned has exercised his right to move freely within the Union, he can invoke the principle of non-discrimination irrespective of whether the situation giving rise to unequal treatment has occurred inside or outside the Union.³⁹ In its rulings on the inapplicability of Article 18 TFEU to the constitutional ban on extradition of German citizens, the Constitutional Court did not discuss the aforementioned case law, but mainly confirmed the reasoning of the contested court’s decisions in extradition proceedings.⁴⁰ In the more recent decision, the Frankfurt Higher Regional Court argued that the ban on extradition of German nationals to third States forms part of the constitutional identity (Art. 4(2) TEU) and, thus, must be exempt from the

35. Decision of 28 July 2008 – 2 BvR 1347/08, *Bundesverfassungsgericht*, Official Court reports – Chamber Decisions (BVerfGK) vol. 14, p. 113 (117–118); Decision of 17 Feb. 2014 – 2 BvQ 4/14, *Bundesverfassungsgericht*, (2014) NJW 1945, 1946.

36. Case C-186/87, *Cowan*, EU:C:1989:47, paras. 15 and 20; Case C-274/96, *Bickel and Franz*, paras. 15–16; see also for the exercise of legislative powers in the sphere of nationality Case C-359/790, *Micheletti*, EU:C:1992:295, para 10.

37. Case C-123/08, *Wolzenburg*; Case C-42/11 *Lopes da Silva Jorge*.

38. Case C-123/08, *Wolzenburg*, para 46; Case C-42/11 *Lopes da Silva Jorge*, para 39.

39. See with regard to compensation claims of crime victims Case C-164/07, *Wood*, EU:C:2008:321, paras. 11–12.

40. Cited *supra* note 35.

application of the principle of non-discrimination on the ground of nationality.⁴¹ According to the German court's reasoning, the EU legislature had acknowledged the ban on extradition of German citizens as part of the constitutional *acquis* in the extradition agreement with the United States of America, providing that grounds for refusal were available pursuant to a bilateral extradition treaty.⁴² This line of argument seems hardly convincing. The ban on extradition of German citizens does not form part of the immutable core of the constitutional identity (Art. 79(3) *Grundgesetz*), but is subject to amendments adopted by the constitutional legislature. Moreover, even if the protection of German nationals against extradition were part of that constitutional identity, there is no compelling reason why this protection were to be limited to German citizens only (as "premium members") instead of extending its scope to all EU citizens.⁴³

5.3. *Justification and the international treaty framework (aut dedere aut iudicare)*

Neither unequal treatment on grounds of nationality nor a restriction of the right to free movement are *per se* breaches of Treaty provisions on EU citizenship (Art. 18 respectively Art. 21 TFEU), but can be justified by a legitimate objective. In this regard, the Advocate General referred to the obligations resulting from the maxim *aut dedere aut iudicare*.⁴⁴

A closer look at the applicable multilateral treaties, however, reveals that the maxim *aut dedere aut iudicare* is only binding on a State party that is requested for extradition of one of its own nationals.⁴⁵ In the absence of an obligation to establish extraterritorial jurisdiction over other suspects, the maxim *aut dedere aut iudicare* does not apply to other EU citizens.⁴⁶ Thus, a restriction of the right to free movement cannot be based upon an obligation

41. Higher Regional Court (*Oberlandesgericht*) Frankfurt, Decision of 22 Jan. 2014 – 2 Ausl A 104/13, (2014) *Neue Zeitschrift für Strafrecht – Rechtsprechungsreport* (NStZ-RR) 288 (290), referring to the constitutional court's ruling on the European arrest warrant, judgment of 18 July 2005 – 2 BvR 2236/04, *Bundesverfassungsgericht*, (2005) NJW, 2289, 2291.

42. *Ibid.*; see Art. 17 of the Agreement on extradition between the European Union and the United States of America of 25 June 2003, O.J. 2003, L 181/27.

43. See for a more detailed discussion Zimmermann, "Der Fall 'Pisciotti' vor dem EuGH oder: Vom Wert der Unionsbürgerschaft im Auslieferungsrecht", 220 *Zeitschrift für Internationale Strafrechtsdogmatik* (2017), 226–228.

44. Opinion, para 62.

45. Art. 6(2) European Convention on Extradition of 13 Dec. 1957 (E.T.S. no. 24); Art. 6(9)(a) UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 Dec. 1988, U.N.T.S., vol. 1582, p. 95.

46. Art. 6(9)(b) UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; see UN Commentary on the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1998, paras. 6.39–6.40.

resulting from this maxim. Instead, it is the Treaty obligation of the requested State to extradite the alleged offender that could serve as a basis for justification, because this obligation is not suspended by the nationality exception. Since the international agreement between Latvia and Russia governing (*inter alia*) extradition⁴⁷ had been ratified before Latvia acceded to the Union, the extradition obligation resulting from this treaty would even prevail over the obligations arising from EU law (Art. 351(1) TFEU).⁴⁸ Nevertheless, the international obligation to extradite is still subject to exceptions; in particular, the requested State may refuse extradition if the requested person is extradited to another State or if the requested State initiates domestic criminal proceedings with regard to the offence for which extradition is requested.⁴⁹ Thus, in the end, the situation comes close to those governed by the maxim *aut dedere aut iudicare*. Instead of extraditing the alleged offender to the requesting State, the requested State may surrender the alleged offender to another State or initiate domestic proceedings in order to avoid impunity. Therefore, it is the obligation *vis-à-vis* the requesting State (Russia) and the objective to prevent impunity of the requested person that may serve as a basis for justification.

5.4. Prosecution in the Union as less intrusive means?

Both Article 21 TFEU and Article 18 TFEU require a strict proportionality test. A restriction of the right to free movement (Art. 21 TFEU) is justified only if it is appropriate, necessary and proportionate to the objective.⁵⁰ The principle of non-discrimination (Art. 18 TFEU) requires that the unequal treatment is based on a legitimate objective and proportionate considerations,⁵¹ and according to recent case law the measure must not go beyond what is necessary in order to attain the objective pursued by the legislature.⁵² According to the Court, extradition to the requesting State appeared illegitimate because the Court considered prosecution in the home country of the requested person a less intrusive means to prevent impunity than extradition to a third State.

47. See *supra* note 2: Agreement between the Republic of Latvia and the Russian Federation on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters, 3 Feb. 1993.

48. Saluzzo, "EU law and Extradition Agreements of Member States: The *Petruhhin* Case", (2017) *European Papers*, 435–447; see also Art. 1 European Convention on Extradition.

49. Arts. 8 and 17 European Convention on Extradition; see also Arts. 63 and 65 of the bilateral Agreement between Latvia and Russia, cited *supra* note 47.

50. Case C-406/04, *De Cuyper*, EU:C:2006:491, paras. 40 and 42.

51. Case C-524/06, *Huber*, EU:C:2008:724, para 75.

52. Case C-123/08, *Wolzenburg*, para 69.

There are, however, two objections to this line of reasoning. First, priority of a less restrictive measure is subject to the condition that it is equally effective to attain the objective pursued. In this regard, the obligation to inform the other Member State in order to trigger the requested person's surrender to that State might give rise to time-consuming procedures and result in impunity if the requested person must be released when the maximum period for detention has expired. These concerns were confirmed by the proceedings in the present case where the Supreme Court of Latvia had annulled the decision to detain Mr Petruhhin for extradition purposes and Mr Petruhhin had seized the opportunity to leave Latvia.⁵³ Furthermore, there is no established mechanism for the new procedure and its implementation in court practice. What is the time-limit to issue a European arrest warrant? Which Member State shall be informed if the country of origin and the country of permanent residence differ? Thus, extradition to the third State may prove a more effective means to avoid impunity than the mechanism proposed by the Court and, thus, necessary as required by the proportionality test.

Secondly, there is another alternative to the solution presented by the Court which is the institution of criminal proceedings in the requested Member State (*iudicare*). The Court did not consider this option because the Latvian Code of Criminal Procedure did not provide a jurisdictional basis to prosecute and adjudicate Mr Petruhhin.⁵⁴ But even if we assume that there was such a basis, we have to consider once again that any alternative to extradition must be equally effective. Since the principle of territoriality is the primary basis for jurisdiction and most of the evidence will be available at the place where the crime has been committed, there are good reasons to prosecute and adjudicate the alleged offender in the third State that has requested for extradition.⁵⁵ Accordingly, extradition should be given priority to prosecution (*primo dedere secundo prosequi*).⁵⁶ In conclusion, extradition to the State where the crime has been committed usually appears the most appropriate and effective manner to ensure that justice will be done.

53. Judgment, paras. 17 and 21.

54. Judgment, para 39, referring to the Opinion of A.G. Bot, para 56. The lack of jurisdiction is addressed in paras. 57–58, 66–69.

55. See for a comparative overview Böse, Meyer and Schneider (Eds.), *Conflicts of Jurisdiction in Criminal Matters in the European Union. Volume I: National Reports and Comparative Analysis* (Nomos, 2013), p. 412.

56. See Final Report of the International Law Commission, “The obligation to extradite or prosecute (*aut dedere aut iudicare*)” (2014), available at <www.legal.un.org/ilc/texts/instruments/english/reports/7_6_2014.pdf>, (last visited 10 July 2017), para 39, referring to Henzelin, *Le principe de l’universalité en droit penal international* (Bruylant, 2000), p. 286.

5.5. *Balancing the interests of the requesting State and the EU citizen*

For the aforementioned reasons, it is not the availability of less restrictive means, but a matter of proportionality *stricto sensu* whether or not the restriction of the right to free movement and the different treatment of nationals of the requested State and other citizens can be justified. Thus, national legislation lowering the level of protection of EU citizens against extradition to third States must be based on a balancing of the requesting State's interest in effective law enforcement, but also the rights of the alleged offender (re-integration into society, effective exercise of defence rights). According to the Advocate General, there is no valid reason for the requested Member State to protect its own nationals against extradition to a third State, but not to afford this protection to other EU citizens.⁵⁷ The requesting State's interest to exercise its jurisdiction over crimes committed within its territory is outweighed by the individual interest of the alleged offender not to be tried abroad, but before a court of his home country. Therefore, the corresponding interest of any EU citizen should be given priority over the requesting State's interest, too.

Accordingly, nationals and permanent residents on the one hand, and other EU citizens on the other hand share the same interest in not being extradited, but having their trial within the Union, namely in their country of origin or residence. As far as its nationals and permanent residents are concerned, the requested Member State can set up the legal framework for criminal proceedings in the home country of the defendant. With regard to other EU citizens, the requested Member State can trigger criminal proceedings in the Member State of origin, but it cannot institute such proceedings on its own. This is why the Court limited the protection under Articles 18 and 21 TFEU to the obligation to inform the Member State concerned, and it is up to this Member State to decide upon whether or not to issue a European arrest warrant and to conduct criminal proceedings against the alleged offender. As a consequence, the protection of the requested person depends upon the Member State of origin. Even though the laws of most Member States ban the extradition of own nationals, this will not necessarily result in an obligation to issue a European arrest warrant in order to protect nationals against extradition from the requested Member State to a third State. In the end, this result had been anticipated by the Latvian Supreme Court's second question whether the requested Member State must apply the relevant extradition law of the Member State of which the requested person is a national (see section 2 above). According to this understanding, Latvian courts had to apply the conditions for the extradition of nationals under Estonian law. It is, however,

57. Opinion, para 53.

not up to the requested Member State to apply the standards of another Member State, but to comply with its own standard of protection in a manner that is in conformity with the principle of non-discrimination and the freedom of movement. If the domestic standard would ensure that the defendant is not extradited to a third State, but would be tried in his Member State of origin or residence, the requested Member State is under an obligation to provide this possibility to all EU citizens.

However, in terms of the maxim *aut dedere aut iudicare*, there are doubts whether the second option should be given absolute priority if the alleged offender originates from or resides in another Member State and, thus, has no particular interest in having his trial in the requested Member State. Whereas a national (as well as a permanent resident) of the requested Member State has a legitimate interest in being tried before domestic courts, because this will enable him to effectively exercise his defence rights and, in case of conviction, facilitate his social rehabilitation,⁵⁸ other EU citizens have no such interest and cannot legitimately expect to be tried in that State instead of being extradited to a third State. The varying degree of interest in standing trial and serving the sentence in the requested State might justify a different level of protection.⁵⁹ A different treatment of nationals and permanent residents on the one hand, and other EU citizens on the other may be considered legitimate if it is based on EU legislation specifying the scope and content of the principle of non-discrimination.⁶⁰ For this reason, the Court held that Article 18 TFEU did not prohibit a Member State from excluding other Member States' nationals from entitlement to social welfare in order to avoid exerting an unreasonable burden on the social assistance system of the host Member State.⁶¹ A Member State may even expel nationals of other Member States from its territory if certain conditions are met.⁶² In the present case, these provisions were not applicable, because Mr Petruhhin's surrender to Russia was not triggered by a public interest of Latvia to remove him from Latvian territory (to another country of his own choosing), but by the interest of the Russian Federation in prosecuting him for drug trafficking (and the

58. See e.g. Art. 8(1)(a) European Convention on the Transfer of Proceedings in Criminal Matters of 15 May 1972 (E.T.S. No. 73); *de lege ferenda* see Böse, Meyer and Schneider, op. cit. *supra* note 55, p. 411 et seq. (Art. 8 Model Rules).

59. See for the enforcement of sentences Case C-123/08, *Wolzenburg*, paras. 67–68 and 73.

60. Case C-333/13, *Dano*, EU:C:2014:2358, paras. 60–61, referring to Art. 24 Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, O.J. 2004, L 158/77, 2004 L 229/35, O.J. 2005, L 30/27, and O.J. 2005, L 197/34.

61. Case C-333/13, *Dano*, paras. 61–62 and 82–83; Case C-67/14, *Alimanovic*, EU:C:2015:597, para 63; Case C-299/14, *García-Nieto*, EU:C:2016:114, para 53.

62. Art. 27 et seq. Directive 2004/38/EC (*supra* note 50); see in this regard, Case C-165/14, *Rendón Marín*, paras. 57 et seq., with further references.

corresponding Latvian interest in effective international cooperation in criminal matters).

Thus, in contrast to expulsion and exclusion from social assistance schemes, extradition to third States is not regulated by EU legislation expressly providing for a different treatment of the host Member State's nationals and other EU citizens.⁶³ Nevertheless, the provisions on expulsion of EU citizens illustrate that the protection of a EU citizen against extradition may also depend upon on how long he has resided within the territory of the requested Member State.⁶⁴ In addition, the case law on social assistance schemes might suggest that an obligation to prosecute and adjudicate the alleged offender (*iudicare*) instead of extraditing him to a third State (*dedere*) would place an unreasonable burden upon the criminal justice system of the requested Member State. However, in contrast to the risk of a massive abuse of national social assistance schemes, it appears rather unlikely that EU citizens would move to another Member State in order to stand trial in that Member State instead of being extradited to a third State.⁶⁵ Although the bond of loyalty between the requested Member State and the alleged offender is not as strong as the bond to its own citizens, the requested Member State is more than a mere intermediary between the alleged offender and his home Member State, but bears responsibility itself for the person as an EU citizen. As can be inferred from the Member States' obligation to afford diplomatic and consular protection to other Member States' nationals where protection by the home Member State is not available (Art. 20(2)(c) TFEU)⁶⁶, there is an obligation to protect EU citizens which is subsidiary to the corresponding primary obligation of the home Member State. Hence, if the home Member State, for whatever reason, cannot provide effective protection and does not issue a European arrest warrant in due time, it is up to the requested Member State to close the gap and to prosecute the alleged offender on its own instead of extraditing him to the requesting third State.

Admittedly, this solution is only second best, because the trial is neither held in the home country of the alleged offender nor in the requesting third State where the crime has been committed. As to the latter, however, the result corresponds to the absolute protection by the ban on the extradition on nationals as provided by national law, and the essence of EU citizenship

63. Such a provision could be part of an extradition agreement between the Union and the third State, see for the extradition agreement with the USA *supra* notes 41 and 42. A general reference to extradition obstacles in bilateral treaties or constitutional principles, however, cannot be considered a rule specifying the principle of non-discrimination on the ground of nationality, see Zimmermann, *op. cit. supra* note 43, p. 227, with further references.

64. Art. 28(1), (2), (3)(a) Directive 2004/38.

65. Zimmermann, *op. cit. supra* note 43, p. 225.

66. Opinion, para 52.

guaranteed by EU law. In *Ruiz Zambrano*, the Court emphasized that a measure forcing an EU citizen to leave the territory of the Union deprived this person of the substance of the rights conferred upon him by virtue of his status as EU citizen.⁶⁷ Thus, the protection of EU citizens against surrender to third States is a core element of EU citizenship calling upon the requested Member State not to abandon the alleged offender to his fate if the home Member State does not issue a European arrest warrant. As an EU citizen, the alleged offender has a legitimate interest in being tried in a criminal justice system committed to a common standard of fundamental rights and procedural safeguards in criminal proceedings.⁶⁸ Furthermore, enhanced cooperation on the basis of the principle of mutual recognition provides the requested person with the opportunity to serve the sentence in his home Member State.⁶⁹ A ban on the extradition of EU citizens to third States would not contradict, but rather correspond to the waiver of the absolute ban on extradition of nationals within the Area of Freedom, Security and Justice.⁷⁰ Within the Union, there is no further need for the nationality exception because criminal proceedings in any Member State guarantee the effective exercise of defence rights in a manner equivalent to the Member State of origin, whereas in third States an equivalent protection cannot be taken for granted. Giving priority to criminal proceedings in a Member State over extradition of a EU citizen to a third State is a logical consequence of the principles of mutual trust and mutual recognition on which the Area of Freedom, Security and Justice is built (Arts. 67(3) and 82(1) TFEU).⁷¹ In the end, an obligation to establish a legal basis for the exercise of subsidiary jurisdiction (i.e. the vicarious administration of

67. Case C-34/09, *Ruiz Zambrano*, paras. 42–44.

68. Directive 2010/65/EU of 20 Oct. 2010 on the right to interpretation and translation in criminal proceedings, O.J. 2010, L 283/1; Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings, O.J. 2012, L 142/1; Directive 2013/48/EU of 22 Oct. 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, O.J. 2013, L 294/1; Directive 2016/343/EU of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings; Directive 2016/1919/EU of 26 Oct. 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, O.J. 2016, L 65/1.

69. Framework Decision 2008/909/JHA of 27 Nov. 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, O.J. 2008, L 327/27.

70. See *supra* notes 4 and 5.

71. See, most recently, Joined Cases C-404 & 659/15, *Aranyosi and Căldăraru*, EU:C:2016:198, paras. 77–78.

justice)⁷² will also serve the objective to avoid impunity in other cases. As the third question of the Latvian Supreme Court illustrates, there may be other legal obstacles to extradition to a third State (death penalty, inhuman or degrading detention conditions) where the requested State can only avoid impunity of the alleged offender by prosecuting him before domestic courts.

5.6. *The lack of a legal basis for prosecution under Latvian law*

Having established an obligation of the requested Member State not to extradite the alleged offender, but to prosecute and adjudicate him instead, we are again confronted with the lack of a jurisdictional basis in the Latvian criminal justice system (section 5.4. above). Apparently, the Court's reasoning implies that, if Mr Petruhhin cannot be surrendered to his Member State of origin nor prosecuted and adjudicated in the requested Member State, he must be extradited to Russia in order to prevent him from escaping justice. In contrast, applying an absolute ban on extradition of EU citizens would result in impunity, and this consequence would be hardly acceptable. On the other hand, it is up to the national legislature to adopt the amendments necessary to comply with the rights of EU citizens.⁷³ If there is a right of EU citizens to benefit from the ban on extradition of nationals to third States, this right cannot be made conditional on legislative choices of the Member States. If the lack of a jurisdictional basis to prosecute Mr Petruhhin justified his extradition, he would be placed at a disadvantage because the Latvian legislature did not comply with Mr Petruhhin's rights as EU citizen (Arts. 18 and 21 TFEU). This consequence would be incompatible with the primacy of EU law and the principle of effectiveness (*effet utile*).

However, the discrimination of Mr Petruhhin did not originate from Latvian law only, but also resulted from the international agreement with the Russian Federation that limited the scope of the traditional extradition obstacle to Latvian nationals. As has been mentioned above (section 5.3.), the provisions of this agreement might prevail over EU law (Art. 351(1) TFEU). A prior international treaty, however, can only deprive a provision of EU law (Arts. 18 and 21 TFEU) of its effect if it imposes an obligation upon the Member State concerned whose performance may still be required by the contracting third State.⁷⁴ Accordingly, a conflict between Latvia's treaty obligations towards

72. See e.g. Section 7(2) No. 2 German Penal Code; comparative overview in Böse, Meyer and Schneider (Eds.) op. cit. *supra* note 55, p. 411, (pp. 421–422 “representational jurisdiction”).

73. See with regard to the lack of a legal basis for the enforcement of sentences Case C-42/11 *Lopes da Silva Jorge*, paras. 39 and 50.

74. Case C-158/91, *Levy*, EU:C:1993:332, paras. 12–13; Case C-277/10, *Luksan*, EU:C:2012:65, para 61.

the Russian Federation and its obligations under EU law will arise only insofar as the international treaty establishes a binding obligation to extradite Mr Petruhhin. It is up to the national court to determine the obligation resulting from the bilateral agreement with the Russian Federation and to assess whether the exceptions to the obligation under this agreement could be interpreted in a manner that Mr Petruhhin's rights under Articles 18 and 21 TFEU could be maintained.⁷⁵ This objective might be achieved by extending the notion of "citizen of the contracting party" to EU citizens.⁷⁶ In any case, Latvia's obligation to extradite alleged offenders to the Russian Federation does not affect its obligation to establish extraterritorial jurisdiction over EU citizens in order to comply with both EU law (Arts. 18 and Art. 21 TFEU) and its international obligations under the bilateral agreement with the Russian Federation. In the end, the Court's approach in *Petruhhin* is a compromise trying to reconcile the rights of EU citizens with the third State's interest in avoiding impunity. Apparently, impunity of the alleged offender was too high a price for a consistent enforcement of the principle of non-discrimination and the freedom of movement. It remains to be seen whether the Court will give the EU citizens' rights more weight if the requested State has extraterritorial jurisdiction over crimes committed by any EU citizen.⁷⁷

Martin Böse*

75. Case C-13/93, *Minne*, EU:C:1994:39, para 18.

76. See also Case C-42/11, *Lopes da Silva Jorge*, paras. 48–49 and 54–55.

77. See e.g. Section 7(2) No. 2 German Penal Code (*Strafgesetzbuch*), and Case C-191/16, *Pisciotti* (reference of the District Court (*Landgericht*) Berlin for a preliminary ruling); see also Zimmermann, op. cit. *supra* note 43.

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The Common Foreign Security Policy after *Rosneft*: Still imperfect but gradually subject to the rule of law

Case C-72/15, *The Queen (PJSC Rosneft Oil Company) v. Her Majesty's Treasury*, Judgment of the Court of Justice (Grand Chamber), of 28 March 2017, EU:C:2017:236.

1. Introduction

Decisions in the area of the Common Foreign and Security Policy (CFSP) are of a political nature, and the principle of the separation of powers imposes limits on the judicial control of conduct of the executive.¹ This is the rationale at the basis of the restrictions imposed in the Treaties on the jurisdiction of the ECJ in this particular sector of EU law.² The Grand Chamber decision in *Rosneft*³ defines the scope of the two exceptions laid down by Article 275(2) TFEU to the Court's lack of jurisdiction with respect to the provisions of the CFSP. The judgment provides important clarifications on the kind of remedies available to control the legality of CFSP Decisions providing for restrictive measures *vis-à-vis* natural or legal persons, or other non-State entities: such a control can be exercised by means not only of the annulment action, but also of the preliminary ruling on the validity of such acts.

The remedy of Article 267(1)(b) TFEU is available to monitor respect of Article 40 TEU. This position is not revolutionary since the Treaty provisions already provide a wide margin of manoeuvre to justify such an interpretation. It was more difficult to define the scope of the notion of "review of legality" enshrined in Article 275(2) TFEU.⁴ *Rosneft* extends the principles deriving from *Foto-Frost*⁵ to CFSP for the first time,⁶ thus signalling a willingness of

1. See along these lines the point made in A.G. Wathelet's Opinion, EU:C:2016:381, para 52.

2. See Arts. 24(1) TEU and 275(1) TFEU.

3. For an interesting insight on the case see Butler, "A question of jurisdiction: Art. 267 TFEU preliminary references of a CFSP nature", (2017) EP, 1–8.

4. See section 5.4. *infra*.

5. Case 314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost*, EU:C:1987:452.

6. However, it is not the first time the possibility to apply the *Foto-Frost* principles in the context of the CFSP is raised. A.G. Wahl had argued that national courts cannot declare a CFSP act invalid since this would be against such principles. However, he concluded that since there is no EU court to which that issue could be brought, the national court could at most suspend

the EU judiciary to ensure the monopoly of the review of legality even in this field.⁷ However, there are still some limits.⁸ This is a crucial decision of principle, not least because it affects the management of prominent CFSP acts, such as those setting up restrictive measures. In the last couple of years, the scope of the Court's limited jurisdiction in the area of foreign affairs was defined in *Elitaliana*⁹ and *H*,¹⁰ clarifying the interpretation of Article 275(2) TFEU, introduced by the Lisbon Treaty. In these two judgments, it was understood that the exceptions defined in Articles 24(1) TEU and 275(1) TFEU to the general jurisdiction of the ECJ on the interpretation and application of EU law should be interpreted narrowly, despite the clear intention of the Treaty makers to screen CFSP as much as possible from the scrutiny of the EU judiciary. What is, then, the place of the CFSP in the EU legal order¹¹ after *Rosneft*? The preliminary ruling further eroded the immunity from jurisdiction for acts adopted in the field of CFSP and contributed to a progressive "legalization" of this sector.¹² The EU judiciary makes the oversight on EU sanctions¹³ more thorough, upholding the right to effective judicial protection – which is crucial in a Union based on the rule of law. It should be acknowledged that the ECJ recognizes that the Council has a wide margin of discretion in areas which involve political, economic and societal choices on its part.¹⁴ Most importantly, it gives its blessing to the political choice of increasing the costs to be borne by the Russian Federation for its actions undermining Ukraine's territorial integrity, sovereignty and independence by targeting a major player in the oil sector, which is in part owned by the Russian State.¹⁵ This is not surprising and is in line with the obligation to "practise mutual sincere cooperation," enshrined in the last

applicability of the act *vis-à-vis* the applicant and, where appropriate, award him damages. See Opinion of A.G. Wahl in Case C455/14 P, *H. v. Council*, EU:C:2016:212, paras. 102–103.

7. This is contrary to the suggestion made by A.G. Kokott in her View on Opinion 2/13, EU:C:2014:2475, para 100.

8. See sections 5.1, 5.6, 6 *infra*.

9. Case C-439/13 P, *Elitaliana v. Eulex Kosovo*, EU:C:2015:753.

10. Case C-455/14 P, *H. v. Council*.

11. This expression is borrowed from Van Elsuwege, "EU external action after the collapse of the pillar structure: In search of a new balance between delimitation and consistency," 47 CML Rev. (2010), 995.

12. See Cardwell, "The legalization of the European Union foreign policy and the use of sanctions", (2015) CYELS, 289–310, at 292 and 297–298; Smith, "Diplomacy by decree: The legalization of EU foreign policy", (2001) JCMS, 79–104, at 79.

13. "Sanctions" and "restrictive measures" are used interchangeably for convenience.

14. Case C-440/14 P, *National Iranian Oil Company v. Council*, EU:C:2016:128, para 77.

15. Judgment, para 147.

sentence of Article 13(2) TEU, which also applies to the ECJ in relation to the Council.¹⁶

2. Legal context and the questions referred by the High Court of Justice (England and Wales)

The key provision defining the ECJ's task in the Treaty is the second sentence of Article 19(1) TEU: to ensure that in the interpretation and application of the Treaties, the law is observed. The CFSP is *the* area in which the “masters of the Treaty” were willing to recognize only a limited form of judicial oversight. The general rule here is immunity from jurisdiction for the CFSP provisions, enshrined Article 24(1)(2) TEU.¹⁷ Article 275(1) TFEU elaborates on this rule: “The ECJ of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions.”

However, the last sentence of Article 24(1)(2) TEU and Article 275(2) TFEU identify two exceptions to the lack of review of CFSP acts: Article 24(1)(2) refers to the competence of the Court to “monitor compliance with Article 40 TEU” (the so-called “non-affectation clause”),¹⁸ and “to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union.” Article 275(2) TFEU re-states the first exception in identical terms and specifies the second one: the ECJ has jurisdiction to “rule in proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union.” The decisions referred to in Article 275 TFEU are generally adopted on the basis of Article 29 TEU, and when they provide for economic sanctions, the Council “shall adopt the necessary measures,” on the basis of Article 215(1) TFEU; these are usually regulations.

16. On the limits posed by Art. 13(2) TEU on the Court's role in interpreting the Treaties, see Horsley, “Reflections on the role of the ECJ as the motor of European integration: Legal limits to judicial law-making,” 50 CML Rev. (2013), 931–964.

17. “The Court of Justice of the European Union shall not have jurisdiction with respect to the . . . provisions [of the CFSP].”

18. This provision ensures that when implementing the CFSP, the Union does not affect the application of the procedures and the powers of the EU institutions in non-CFSP sectors. In addition, when the EU implements policies other than the CFSP, it must respect the application of the procedures and the powers of the EU institutions laid down by the Treaty for the exercise of the competence in the CFSP.

Rosneft is a legal entity active in the oil and gas sectors, controlled by a State-owned company. It was included in the list of bodies engaging in the sale or transportation of crude oil or petroleum products in September 2014.¹⁹ At that time, the EU decided to reinforce the first round of sanctions imposed on Russia, and on non-State actors such as banks, energy and defence industries, enacted in July 2014, with the aim of causing heavy costs to the Russian economy.²⁰ The restrictive measures at stake were adopted through CFSP Decision 2014/512²¹ (“the contested Decision”) and Regulation 833/2014 (“the contested Regulation”).²² They clearly affected Rosneft’s economic activities since they imposed on operators, coming within the jurisdiction of EU Member States, prohibitions or restrictions with respect to sensitive goods and technologies destined for deep water oil exploration and production, Arctic oil exploration and production, and shale oil projects. These measures included the obligation to subject the direct or indirect sale, supply, transfer or export of certain equipment suited to specific categories of exploration and production projects in Russia to prior authorization,²³ as well as the stipulation to prohibit associated services necessary for these projects.²⁴

Rosneft sought the annulment of selected provisions of the sanction regime in an action before the General Court, in October 2014.²⁵ Additionally, approximately one month later, an action was brought before the High Court of Justice of England and Wales by Rosneft’s subsidiary in the UK. In that context, the applicant questioned the legality of the national legislation implementing the provisions of the contested Regulation, which imposed on Member States the obligation to provide for criminal penalties for any breach of the latter act. The referring court considered that the action concerned the validity of EU law acts; it took the view that while the jurisdiction of the ECJ to examine the validity of CFSP measures falls outside the *Foto-Frost*²⁶ case law, CFSP measures could have a serious impact on natural and legal persons.

19. As of 8 Sept. 2014, Rosneft was included in the list of Annex III to Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia’s actions destabilizing the situation in Ukraine, O.J. 2014, L 229/13. On the context that led to strengthening the sanctions, see Krause, “Western economic and political sanctions as instruments of strategic competition with Russia – Opportunities and risks,” in Ronzitti, *Coercive Diplomacy, Sanctions and International Law* (Brill, 2016), p. 271 et seq., at p. 279.

20. <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/144158.pdf>, (last visited 15 June 2017).

21. Council Decision 2014/512/CFSP, cited *supra* note 19.

22. Council Regulation (EU) 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia’s actions destabilizing the situation in Ukraine, O.J. 2014, L 229/1.

23. Art. 4 of Decision 2014/512.

24. Art. 4a of Decision 2014/512.

25. Case T-715/14, *Rosneft v. Council*, pending.

26. Case 314/85, *Foto-Frost*.

Furthermore, the principle of access to a court to review the legality of acts of the executive is a fundamental right. In the light of these premises, the national judges raised three sets of questions: the first group asked whether the ECJ had competence to rule on the validity of some of the provisions of the CFSP Decision.²⁷ The second group raised doubts over the validity of the so-called “oil sector provisions”²⁸ and the “security and lending provisions”²⁹ of the CFSP Decision and of the contested Regulation, in addition to other provisions of these two acts.³⁰ In the referring order and written observations presented by Rosneft, it was argued that the contested provisions of both acts clash with Article 40 TEU, breach the Partnership and Cooperation Agreement between the EU and Russia³¹ and were tainted by other reasons of illegality.³² The third group questioned the interpretation of certain articles of the contested acts in the event that the Court considered the prohibitions or restrictions contained in the provisions to be valid.³³ The referring court justified its decision to seek clarification from the ECJ with the need to provide a uniform interpretation of the provisions at stake in the proceedings, which acknowledged the variations in the practices of the Member State national authorities in relation to the meaning of such provisions.³⁴

27. These are Arts. 1(2)(b) to (d) and 1(3), 4, 4a and 7 of the contested Decision and Annex III to this act, naming Rosneft amongst the addressees of restrictive measures.

28. Arts. 4, 4a of Decision 2014/512 and Arts. 3, 3a, 4(3) and (4) of, and Annex II to, Regulation 833/2014.

29. Arts. 1(2)(b) to (d) and 1(3) of, and Annex III to, Decision 2014/512 and Arts. 5(2)(b) to (d), 5(3) of, and Annex VI to, Regulation 833/2014.

30. Art. 7 of Decision 2014/512 and Art. 11 of Regulation 833/2014.

31. EU-Russia PCA, O.J. 1997, L 327/1.

32. I.e.: breach of the duty to state reasons; in addition, incompatibility of specific provisions of the contested acts relating to the oil sector with the principle of equal treatment; Council misuse of its power in adopting them; conflict with principle of proportionality, with the freedom to conduct one’s business and the right to property; failure of Regulation 833/2014 to give proper effect to Decision 2014/512; lack of clarity of the obligation to impose penalties by Member States for the breach of the content of the Regulation is contrary to the principles of legal certainty and *nulla poena sine lege certa*.

33. The doubts concern the meaning of “financial assistance” (Art. 4(3) of the Regulation), the scope of the prohibition of Art. 5 and the terms “shale” and “waters deeper than 150 meters” mentioned in the CFSP Decision and in the Regulation. Since this part of the ruling does not present special interest, no reference will be made to it in the summary of the case.

34. It is clear that the national court was very much aware of the fact that whereas there are no limitations to the Court’s competence on the interpretation and validity of a regulation, even if adopted in strict connection with a CFSP act, the grounds for its competence to interpret a decision, setting up restrictive measures, falling within Chapter 2 of Title V TEU, are less solid in the light of the letter of Art. 275(2) TFEU. The latter merely refers to “review of legality” of the CFSP acts providing for restrictive measures and does not explicitly envisage a competence to interpret these provisions. This is why almost all the interpretative questions concern the Regulation rather than the CFSP act.

3. Opinion of Advocate General Wathelet

Advocate General Wathelet's answer to the first (and most important) question raised by the referring court was that the EU judiciary could review the compliance with Article 40 TEU of all CFSP acts (either in an action for annulment or in preliminary ruling proceedings) as well as the legality of CFSP Decisions which provide for restrictive measures against natural or legal persons, again both in actions based on Article 263 and in those based on Article 267 TFEU.³⁵

In defining the scope and limits of the competence to review CFSP acts, Advocate General Wathelet referred to the "grands arrêts" of the ECJ as well as to Articles 24 TEU and 275 TFEU. Reference was made to *Les Verts*³⁶ (which famously stressed that the Treaty creates a complete system of legal remedies and procedures administered by the Court), and also to *Foto-Frost*.³⁷ On the basis of *Elitaliana*,³⁸ it was demonstrated that the ECJ's lack of competence in the sphere of the CFSP was an exception to its general competence under Article 19 TEU and, as such, the exception should be interpreted narrowly. However, most of the Opinion focuses on the wording of the "carve-out"³⁹ provisions of the Treaty, setting out the immunity from jurisdiction in the area of the CFSP and the "clawback"⁴⁰ provisions, defining the exceptions to the lack of jurisdiction. Advocate General Wathelet sought to identify a rule that would define the limits of the Court's jurisdiction, not only with respect to decisions setting up restrictive measures but, more broadly, to all CFSP acts producing legally binding effects.

Advocate General Wathelet claimed that the immunity from jurisdiction applied only to a CFSP act whose legal basis lies between Articles 23 and 46 TEU, and "its substantive content . . . falls within the sphere of CFSP implementation."⁴¹ In other words, it is not enough for an act to have its legal basis in the CFSP Treaty provisions to therefore fall outside the scope of the ECJ's jurisdiction. For Advocate General Wathelet, the clawback provisions should be interpreted keeping in mind the rationale behind excluding such jurisdiction: "CFSP acts are, in principle, solely intended to translate decisions of a purely political nature connected with the implementation of the

35. Para 65.

36. Case 294/83, *Les Verts*, EU:C:1986:166.

37. Case 314/85, *Foto-Frost*.

38. Case C-439/13 P, *Elitaliana*.

39. Art. 24(1)(2) TEU and Art. 275(1) TFEU.

40. The last sentence of Art. 24(1)(2) TEU and Art. 275(2) TFEU.

41. Opinion, para 49. The implication of the test identified by the A.G. to define the scope of the immunity from jurisdiction is that regulations adopted by the Council on the basis of Art. 215 TFEU fall outside the ambit of the "carve-out" provision.

CFSP, in relation to which it is difficult to reconcile judicial review with the separation of power.”⁴² The clawback provisions deprive CFSP acts of their immunity from ECJ oversight where they go beyond the bounds of the provisions of Title V, Chapter 2 of the Treaty. These Treaty Articles have not substantially altered the position from that which existed before the adoption of the Lisbon Treaty;⁴³ indeed, Article 47 EC also enabled the Court to patrol the borders between CFSP acts and other areas of law, although the clause was drafted so as to favour the choice of first pillar measures over second pillar ones, unlike Article 40 TEU.

Subsequently, the Advocate General analysed the ECJ’s specific competence regarding decisions providing for restrictive measures. He noted that while the two clawback provisions were worded in the same way as far as the competence under Article 40 TEU was concerned, this was not the case in the second exception to immunity. More precisely, according to Article 275(2) TFEU, the Court has jurisdiction “to rule on *proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty*, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union” (emphasis added). Thus, this strand of the Court’s limited competence in the sphere of the CFSP is defined in narrower terms than in the last sentence of Article 24(1)(2) TEU.⁴⁴ Article 275 seems to limit the possibility of challenging the legality of restrictive measures by non-State actors to direct actions, as well as implicitly excluding the competence to rule on these measures in the context of a preliminary ruling procedure. Yet, there is well-established case law providing authority to argue that the “review of legality mentioned in the last sentence of the second subparagraph of Article 24(1) TEU includes not only actions for annulment brought on the basis of the fourth paragraph of Article 263 TFEU, but also, and in particular, the preliminary ruling procedure provided for in Article 267 TFEU.”⁴⁵ In *Foto-Frost*, it is recognized that: “Requests for preliminary rulings, like actions for annulment, constitute means for reviewing the legality of acts of the [European Union] institutions.”⁴⁶ Further support for this conclusion is drawn from a textual analysis of the Treaty provisions dealing with the Court’s jurisdiction:

42. Opinion, para 52.

43. Opinion, para 56.

44. Indeed, this provision merely refers to “review of the legality of *certain decisions* as provided for by the second paragraph of Art. 275 TFEU” (emphasis added).

45. Opinion, para 62.

46. Opinion, para 16.

“... The ‘carve-out’ provision introduced by the first paragraph of Article 275 TFEU must, like any derogation, be interpreted narrowly, and since the scope of the ‘clawback’ provision cannot be broader than that of the ‘carve-out’ provision, . . . the ‘clawback’ provision in the second paragraph of Article 275 TFEU, which re-establishes the basic rule, must be interpreted broadly, with account being taken of the broader terms of the last sentence of the second subparagraph of Article 24(1) TEU.”⁴⁷

A further point supporting the Advocate General’s view is that the refusal to recognize a competence to give preliminary rulings in relation to any CFSP act⁴⁸ would be difficult to reconcile with Article 23 TEU, which provides that “the Union’s action on the international scene . . . shall be guided by the principles . . . laid down in Chapter 1, which include the rule of law and the universality and indivisibility of human rights and fundamental freedoms, . . . which unquestionably include the right of access to a court and effective legal protection”.⁴⁹

A separate section of the Advocate General’s Opinion was dedicated to the Court’s competence to interpret CFSP acts, which appears to be excluded by the second paragraph of Article 275 TFEU. He convincingly argued that preliminary rulings on interpretation can be given with respect to restrictive measures.⁵⁰

The Opinion also discussed whether the provisions of the contested CFSP Decision actually fall within the category of “decisions providing for restrictive measures against natural or legal persons.” Advocate General Wathelet gave a positive answer with respect to the challenge against Articles 1(2)(b) to (d) and (3), and 7, given that Rosneft, listed in Annex III, comes within their scope of application. He criticized the position of the General Court in *Sina Bank*⁵¹ and *Hemmati*,⁵² because in these judgments the concept of “restrictive measure against natural/legal persons” is blended with the criterion of being “individually concerned” by the measure in question.⁵³ He found such an interpretation incompatible with that of a different Chamber of the General Court in *National Iranian Oil Company*.⁵⁴ There, it was

47. Opinion, para 64.

48. As supported by A.G. Kokott in her View in Opinion 2/13, and also by the UK, Czech, German, Estonian, French and Polish Governments and by the Council in the case at hand.

49. Opinion, para 66.

50. See for further comments section 5.8.2. *infra*.

51. Case T-67/12, *Sina Bank*, EU:T:2014:348.

52. Case T-68/12, *Hemmati*, EU:T:2014:349.

53. Opinion, para 90.

54. Case T-578/12, *National Iranian Oil Company v. Council*, EU:T:2014:678, confirmed by the ECJ in its judgment Case C-440/14 P, *National Iranian Oil Company*.

recognized that “the fourth paragraph of Article 263 TFEU confers on *all* natural and legal persons standing to institute proceedings against acts of the EU institutions, provided that the conditions laid down in Article 263 TFEU are fulfilled”, (emphasis added).⁵⁵ Finally, the Advocate General rejected the restrictive interpretation advanced by the Commission, the Council and the Member States, since it would be incompatible with the system of judicial protection instituted by the TFEU and the right to an effective legal remedy. Additionally, it would render the “clawback” provision, in particular the possibility of raising a preliminary ruling procedure on CFSP Decisions, “chimeric in very many cases.”⁵⁶

A negative answer was however given with respect to the Court’s jurisdiction on Articles 4 and 4a of Decision 2014/512, for the reason that these provisions do not refer to *Rosneft*. They cannot qualify as measures containing restrictive measures against the Russian company, because they fall outside the scope of Article 275(2) TFEU and thus cannot trigger the Court’s competence to rule on their validity.⁵⁷ This conclusion was based on the General Court’s ruling in *Kala Naft*.⁵⁸ Here, the challenge to Article 4 of Council Decision 2010/413/CFSP,⁵⁹ which did not specifically refer to the applicant, was considered to fall outside the notion of “decision providing for restrictive measures against natural or legal persons,” enshrined in Article 275(2) TFEU. Articles 4 and 4a of the contested Decision were considered similar in wording to Article 4 of the 2010 Decision.⁶⁰ In concluding this part, Advocate General Wathelet took the view that the lack of competence of the ECJ does not leave a legal gap in the EU system of judicial remedies since the applicants may challenge the almost identically worded provisions of the contested Regulation.⁶¹

Finally, the Advocate General turned to the substance of the contested acts. In his view, the contested acts cannot qualify as legislative acts within the meaning of Article 289(3) TFEU; they are enacted on the basis of a non-legislative procedure. Since *Rosneft* did not allege that the contested measures should have been adopted on any legal basis other than Articles 29 TEU and 215 TFEU, the (implicit) conclusion is that they are valid since they do not affect the powers of the EU institutions in areas different from the CFSP,

55. Case T-578/12, *National Iranian Oil Company*, para 36.

56. Opinion, paras. 90–91.

57. Opinion, para 85.

58. Case T-509/10, *Manufacturing Support & Procurement Kala Naft v. Council*, EU:T:2012:201.

59. Council Decision 2010/413/CFSP of 26 July 2010 concerning restrictive measures against Iran and repealing Common Position 2007/140/CFSP, O.J. 2010, L 195/39.

60. Opinion, para 85.

61. Opinion, para 93.

in breach of Article 40 TEU. The Opinion also rejected the other pleas of invalidity, after a detailed analysis, with the exception of one: the second subparagraph of Article 3(5) of Regulation 833/2014 was considered invalid since it contradicts the contested CFSP Decision. The last part of the Opinion was devoted to the interpretation of terms used in the contested Regulation, while the contested CFSP Decision was not touched upon at all.

4. Judgment of the Court

4.1. Admissibility of the first question

According to the Council and the interveners,⁶² there was no need to raise a question on the validity of the contested CFSP Decision; the dispute at national level could be settled in the light of the contested Regulation only. The ECJ rejected these arguments. After recalling the limited number of cases in which a request for a preliminary ruling was held inadmissible, the Court underlined that the first question had a direct connection to the subject matter of the main proceedings. Its ruling on the validity of a CFSP Decision was necessary because, if the ECJ found itself not competent to deal with the matter, “it [would be] for the national court to ensure that there exist legal remedies sufficient to ensure effective judicial protection.” This obligation stemming from Article 19(1)(2) TEU also applies in the field of CFSP. In addition, limiting the ECJ’s legal analysis to the validity of the Regulation would have provided “inadequate answers to the concerns of the national court.”⁶³ A further point was that such an act is based on a CFSP Decision, and the validity of the latter is a prerequisite for that of the former. Finally, the last justification was that even if a regulation is declared invalid, this has no legal effects on the obligation of Member States to ensure that their national policies conform to the restrictive measures of the contested CFSP Decision. We return to the possibility of reviewing the Regulation *in lieu* of the CFSP act in the comments below.⁶⁴

4.2. Substance of the first question

In relation to the substance of the first question, a number of interveners⁶⁵ sided with the Council in holding that the EU judiciary did not have

62. The Estonian and Polish Governments and the Council.

63. Judgment, para 53.

64. See section 5.3. *infra*.

65. UK, Czech Republic, Estonia, France and Poland.

jurisdiction to rule on the validity of the contested Decision. By contrast, the Commission took the position that a preliminary ruling on the aforementioned act was not precluded by the Treaty provisions; nonetheless, the conditions⁶⁶ as defined by Article 275 (2) TFEU were not satisfied. The ECJ considered that the question referred by the national court required clarification of two issues: whether its jurisdiction could be exercised in the context of a preliminary ruling procedure under Articles 40 TEU and 275(2) TFEU.

4.2.1. *The preliminary procedure as a means to exercise jurisdiction under Article 40 TEU*

In a single paragraph, the Grand Chamber recognized the Court's jurisdiction to give a preliminary ruling concerning the compliance of Decision 2014/512 with Article 40 TEU.⁶⁷ The Treaties do not make provision for any particular means by which such judicial monitoring is to be carried out. Therefore, the general rule defining the ECJ's jurisdiction was applicable; Article 19(3)(b) TEU states that the EU judiciary gives preliminary rulings, at the request of national courts or tribunals, on, *inter alia*, the validity of acts adopted by the institutions of the European Union.

4.2.2. *The preliminary ruling procedure as a means to control the legality of CFSP Decisions providing for restrictive measures*

The second issue, concerning the jurisdiction with respect to restrictive measures, was more difficult. Although Article 275(2) TFEU seems to limit the ECJ's jurisdiction to review the legality of restrictive measures to annulment actions – given the reference to the competence to rule “on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 TFEU”, contained in this provision – three arguments were used to stretch it so as include the preliminary ruling procedure on the validity of these measures. First, the task of carrying out such a review of EU acts relies on two complementary judicial procedures that are couched in a system of legal remedies which is complete. Recalling a well-known dictum in the *Francovich* ruling,⁶⁸ the Court further argued:

“It is inherent in that complete system of legal remedies and procedures that persons bringing proceedings must, when an action is brought before a national court or tribunal, have the right to challenge the legality of

66. These are: a) the applicant in the main proceedings must satisfy the conditions laid down in Art. 263(4) TFEU; and b) the aim of the proceedings is to examine the legality of restrictive measures against natural or legal persons.

67. Judgment, para 62.

68. Here the Court recognized that the principle of State liability was inherent in the system of the Treaty. See Joined Cases C-6 & 9/90, *Francovich and others*, EU:C:1991:428.

provisions contained in European Union acts on which a decision or national measure adopted in respect of them is based, pleading the invalidity of that decision or measure, in order that the national court or tribunal, having itself no jurisdiction to declare such invalidity, consults the Court on that matter by means of a reference for a preliminary ruling, unless those persons unquestionably had the right to bring an action against those provisions on the basis of Article 263 TFEU and failed to exercise that right within the period prescribed.⁶⁹

The Court recalled the *Foto-Frost* principles: the preliminary ruling procedures are intended to ascertain the validity of a measure and constitute, like actions for annulment, a means to review the legality of EU acts. The Court went on: “That essential characteristic of the system for judicial protection in the European Union extends to the review of the legality of decisions that prescribe the adoption of restrictive measures against natural or legal persons within the framework of the CFSP.”⁷⁰ Subsequently, the Court signalled that Article 275(2) TFEU did not prevent the proposed interpretation:

“Neither the EU Treaty nor the FEU Treaty indicates that an action for annulment brought before the General Court, pursuant to the combined provisions of Articles 256 and 263 TFEU, constitutes the sole means for reviewing the legality of decisions providing for restrictive measures against natural or legal persons, to the exclusion, in particular, of a reference for a preliminary ruling on validity.”⁷¹

At this juncture, the Court had a closer look at the text of the last sentence of Article 24(1)(2) TEU and Article 275(2) TFEU. They are drafted in such a way as to allow the EU judiciary a comfortable margin of interpretation. It argued that: “[They] determine not the type of procedure under which the Court may review the legality of certain decisions, but rather the type of decisions whose legality may be reviewed by the Court, within any procedure that has as its aim such a review of legality.”⁷²

Next, the Court emphasized the essential role played by the preliminary ruling procedure in ensuring effective judicial protection, given that the implementation of a decision providing for restrictive measures against

69. Judgment, para 35.

70. Judgment, para 69.

71. Judgment, para 70.

72. *Ibid.*

natural or legal persons falls on the Member States. The fact that the latter have an obligation to comply with the Union position, enshrined in Council decisions, makes access to judicial review of those acts indispensable for natural or legal persons targeted by restrictive measures.

The Grand Chamber then turned to the EU's founding values, with particular focus on the rule of law. These are recalled in the common provisions of the EU Treaty and are referred to, albeit more obliquely, as guiding principles of the Union (when it is involved in actions on the international stage) in Article 23 TEU defining the common principles of the EU external action. The principle of effective judicial review, as embodied in Article 47 of the EU Charter of Fundamental Rights, was invoked to support the interpretation that the exclusion of the ECJ's jurisdiction in the CFSP should be interpreted restrictively.⁷³ It was argued that excluding the possibility that courts and tribunals of Member States may use Article 267 TFEU to question the validity of Council Decisions as envisaged in Article 275(2) TFEU would conflict with the tasks assigned to the Court by Article 19(1) TEU and with the principle of effective judicial protection. Given that the ECJ has jurisdiction *ratione materiae* over CFSP Decisions providing for restrictive measures, it would be inconsistent with the "system of effective judicial protection"⁷⁴ established by the Treaties to interpret the latter provision as excluding the possibility that the courts and tribunals of Member States may refer questions to the Court on the validity of Council decisions prescribing the adoption of such measures.

The Court, drawing once again on the *ratio decidendi* of *Foto-Frost*, explained that the necessary coherence of the system of judicial protection requires that when the validity of acts of the EU institutions is raised before a national court or tribunal, the power to declare such acts invalid should be reserved to the Court under Article 267 TFEU.⁷⁵ The same conclusion was imperative with respect to decisions in the field of CFSP where the Treaties confer jurisdiction on the Court to review their legality. Finally, the idea that national courts can rule on the validity of CFSP Decisions was rejected on the ground that the ECJ is better placed than national courts to perform such a task. Indeed, it is open to the ECJ, within the preliminary ruling procedure, on the one hand, to obtain the observations of Member States and the institutions of the Union whose acts are challenged; and, on the other, to request that the mentioned entities, bodies or agencies of the Union which are not parties to

73. Judgment, para 75. The Court is very much aware of the limits posed by the principle of conferral, though. Para 74 starts: "... admittedly, Art. 47 of the Charter cannot confer jurisdiction on the Court ..."

74. Judgment, para 76.

75. Judgment, para 78.

the proceedings provide all the information that it considers necessary for the purposes of the case before it.⁷⁶

An additional reason to centralize control of the assessment of the validity of CFSP Decisions was that “a different interpretation would be liable to jeopardize the very unity of the European Union legal order and to undermine the fundamental requirement of legal certainty.”⁷⁷

4.3. *Substance of the second question: The relation between the CFSP Decision and the Regulation on the basis of Article 215 TFEU and the discussion on “legislative measures” in the area of CFSP*

The second group of questions listed a number of grounds for the invalidity of the selected provisions of the contested measures.⁷⁸ The most interesting one concerns the breach of Article 40 TEU. Rosneft considered that the Council infringed the non-affectation clause for two reasons: first, by adopting Decision 2014/512, the EU position on the restrictive measures at issue in the main proceedings was defined with excessive detail, thereby encroaching on the powers of the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, as provided for by Article 215(1) TFEU. Second, the contested Decision may be qualified as a legislative measure while the adoption of legislative acts is excluded by the Treaty in this field.

The Court rejected both arguments, taking the view that, first of all, targeted restrictive measures are clearly technical in nature (they concern access to capital markets, defence, dual-use goods and sensitive technologies, particularly in the energy sector). The Council enjoys a broad discretion in determining the persons and entities to be sanctioned. Article 215 TFEU, the legal basis for the contested Regulation, serves as a bridge between the objectives of the EU Treaty in CFSP matters and the actions of the Union involving economic measures falling within the scope of the TFEU. Such an act also ensures their uniform application across all Member States. The ECJ acknowledged that the two acts have different functions; however, the fact that the Decision describes in detail the persons and entities subject to the restrictive measures could not, as a general rule, be regarded as encroaching on the procedure laid down in Article 215 TFEU for the implementation of that Decision. In particular, when the measures relate to a field where there is a degree of technicality,⁷⁹ it may prove appropriate for the Council to use detailed wording when establishing restrictive measures. In such

76. Judgment, para 79.

77. Judgment, para 80.

78. Judgment, paras. 28–30.

79. Judgment, para 90.

circumstances, this institution could not be criticized for having predetermined, by the adoption of Decision 2014/512, part of the content of Regulation 833/2014.

The ECJ rejected the argument that Article 40 TEU was breached because the impugned Decision constituted a “legislative act”, while the adoption of legislative acts is prohibited by Article 24(1) TEU. The Court based this finding on the fact that according to Article 289(3) TFEU, legal acts adopted by legislative procedure constitute legislative acts. It added that the exclusion of the right to adopt legislative acts in the area of the CFSP “reflects the intention that that policy should be subject to specific rules and procedures as it is clear from Article 24 TEU”.⁸⁰ The other arguments raised against the validity of contested acts were also considered to be unfounded.⁸¹

5. Comment

5.1. *An audacious judgment making CFSP, almost, but not quite, perfect*

These comments focus on the ECJ’s answers to the admissibility and substance of the first and second group of questions.⁸²

First of all, it may be observed that there are many similarities between the Advocate General’s Opinion and the Grand Chamber ruling. Both of them give a positive answer to the first question, concerning the competence to rule on the validity of a CFSP Decision, on condition that the request for preliminary ruling concerns respect of Article 40 TEU or one of the mentioned acts providing for restrictive measures against natural and legal persons. Thus, the national court may raise doubts on whether the contested CFSP Decision went beyond the sphere of foreign affairs and thus breached Article 40 TEU. It is also possible to ask for a preliminary ruling on the validity of the inclusion of Rosneft in the list of operators of Annex III of the contested CFSP Decision, given that such an Annex is part of that act.

The ECJ followed Advocate General Wathelet’s position in declaring itself not competent to review the legality of certain of the so-called “oil sector provisions” (Arts. 4 and 4a) of the impugned Decision. The reasons are

80. Judgment, para 91.

81. These are the breach of the EU-Russia PCA, and of a number of obligations, including respecting fundamental rights.

82. The remainder of the judgment (paras. 108–196) will not form the object of any comments.

similar.⁸³ Finally, on the substance, Advocate General Wathelet and the ECJ concur in holding that the contested acts were not affected by invalidity.⁸⁴

The most important difference between the Opinion and the judgment concerns the competence to interpret a CFSP Decision, which was admitted by the Advocate General, whereas the ECJ did not approach this issue.⁸⁵ The interpretation techniques are also different: Advocate General Wathelet based himself on the wording of the Treaty provisions⁸⁶ whereas the core of the Court's ruling was based on the principle of effective judicial protection.

The ECJ judgment sheds light on the boundaries of its limited jurisdiction in CFSP matters:⁸⁷ the Court interpreted its competence to examine the legality of restrictive measures widely and made clear that its power of review in this area is subject to the same principles as those applicable to non-CFSP areas. In earlier cases, particularly *Segi*,⁸⁸ the Court also provided a wide interpretation of the right to make a reference to the ECJ for a preliminary ruling with respect to common positions.⁸⁹ However, in *Rosneft* the Grand Chamber was even more audacious than in *Segi* concerning counter-terrorist sanctions: whereas former Article 35(1) TEU provided for the competence of the Court to rule on the interpretation and validity of selected third pillar acts in the context of the preliminary rulings, Article 275 TFEU did not explicitly envisage the possibility of using that remedy.⁹⁰

Given that the ECJ has interpreted the scope of the CFSP extensively (also to the detriment of the provisions of the area of freedom, security and justice),⁹¹ the wide interpretation of the means available to control the legality

83. Judgment, paras. 95–99 and Opinion paras. 81–85.

84. However, there is a difference between the position of A.G. Wathelet and that of the Court. In comparing the wording of Art. 4(4) of Decision 2014/512 and Art. 3(5) of Regulation 833/2014, A.G. Wathelet found that the act based upon Art. 215 (2) TFEU is invalid whereas the Court confirms its validity.

85. However, this difference may be a minor one considering that it would be impossible to rule on the validity of the contested act without interpreting it.

86. Sometimes, it is not easy to recognize the interpretation technique used by A.G. Wathelet to achieve his conclusions. For example, it is not clear in para 64 of his Opinion why the exception to the exception to the immunity from jurisdiction for the CFSP provisions should be construed broadly.

87. Opinion 2/13, *ECHR*, EU:C:2014:2454, para 251.

88. This case concerned sanctions with a counter-terrorism purpose falling at the time of this ruling within the third pillar. C-355/04 P, *Segi and others*, EU:C:2007:116.

89. *Ibid.*, para 54.

90. This point was made by the French Government in Opinion 2/13, see para 134.

91. The ruling of the ECJ on the EU-Tanzania Agreement (Case C-263/14 P, *Parliament v. Council*, EU:C:2016:435) is the last example of this judicial trend (see also Case C-658/11, *Parliament v. Council*, EU:C:2014:2025). Here, the ECJ considered that the agreement in question, enabling Member States to transfer pirates caught during the operation *Atalanta* to Tanzania, in view of their prosecution, falls predominantly within the CFSP, despite its containing clauses concerning the area of freedom, security and justice that could have justified

of a subset of CFSP acts can be considered a welcome compensation. The incursion of the EU judiciary into the CFSP, as a result of post-Lisbon case law, is significant. In the judgment, the ECJ interpreted the provisions of the Treaty limiting its jurisdiction in CFSP narrowly,⁹² in the name of the principle of effective judicial protection. This adds to *Elitaliana*⁹³ and *H*,⁹⁴ which respectively concerned the legality of acts of an administrative nature necessary to carry out the Eulex mission⁹⁵ and that of a decision⁹⁶ concerning the management of staff seconded to an EU mission. These acts were thus merely set in the “context of the CFSP.” In both those appeals, the ECJ considered itself competent.⁹⁷ The *EU-Tanzania Agreement* case⁹⁸ is also noteworthy in this context; here, the Court interpreted the exception to its lack of jurisdiction with respect to the provisions of the EU Treaty related to the CFSP as including its competence to monitor whether an international agreement adopted to implement a CFSP act “does not impinge upon the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union’s competences under the FEU Treaty.”⁹⁹ The ECJ is therefore empowered to verify whether Article

reliance on Arts. 82 and 87 TFEU in addition or instead of Art. 37 of TEU. The ECJ took the view that such an agreement pursues the objectives of the operation Atalanta, set up to preserve international peace and security, in particular by making it possible to ensure that the perpetrators of acts of piracy do not go unpunished (para 54). An earlier notorious ruling is that in Case C-130/10, *Parliament v. Council*, EU:C:2012:472. This time internal measures, in particular, restrictive measures of UN origin, enacted for counter-terrorism purposes, are deemed to fall within the CFSP. The Court excludes they can be based on Art. 75 TFEU, concerned with the prevention of fighting of terrorism in the context of the provisions of the AFSJ.

92. Case C-439/13 P, *Elitaliana*, para 49 and Case C-455/14 P, *H. v. Council of the European Union*, paras. 55–59.

93. *Ibid.*, Case C-439/13 P, *Elitaliana*.

94. Case C-455/14 P, *H. v. Council*, paras. 42–44. See the comments on this ruling by Van Elsuwege, “Upholding the rule of law in the Common Foreign and Security Policy: *H v. Council*,” 54 CML Rev. (2017), and Verellen, “*H v. Council*: Strengthening the rule of law in the sphere of the CFSP, one step at a time,” (2016) EP, 1–13.

95. In particular, a decision to award a contract for a service necessary to the Eulex mission as provided for by the rules of the Financial Regulation applicable to the general budget of the EU, including expenditures in the area of the CFSP. See Case C-439/13 P, *Elitaliana*, para 63.

96. In particular, a decision by national authority to re-locate a staff member seconded to the EU Police Mission in Bosnia and Herzegovina.

97. In *Elitaliana* the applicant’s annulment action was rejected by the General Court (Case T-213/12, *Elitaliana v. Eulex Kosovo*, EU:T:2013:292) and the appeal against the General Court’s order was upheld by the ECJ in Case C-439/13 P, *Elitaliana*.

98. Case C-263/14 P, *Parliament v. Council*.

99. *Ibid.*, para 42.

40 TEU was breached by the EU Agreement at stake. This was an important decision of principle, although the Court could not review the concerned act on the substance.

With its broad construction in *Rosneft* of judicial oversight of selected CFSP acts, the ECJ does not empty the general rule on its lack of jurisdiction with respect to CFSP measures (laid down in Article 24(1)(2) TEU) of all content. Rather it applies principles stemming from its case law (and relating to non-CFSP areas) to specific CFSP acts which fall within its competence *ratione materiae*, as a result of the Treaty itself. In light of the above-mentioned considerations, it is possible to argue that the Court advanced the process of transition of this field towards the fuller integration into the mainstream of European Union law¹⁰⁰ while respecting the boundaries of the competence conferred on this institution by the Treaty drafters.

Yet, the CFSP is not fully part of the EU legal order as far as judicial review is concerned: access to justice in this field is still limited; for instance, natural and legal persons cannot challenge the so-called “oil sector provisions” of the CFSP Decision impugned by the applicant in the present case; nor are the CFSP acts, distinct from those imposing sanctions, generally subject to the Court’s jurisdiction. For example, if an EU mission set up through a CFSP Decision were to breach human rights, the ECJ could not examine the legality of the EU’s action in the context of the Common Security and Defence Policy,¹⁰¹ which is part of the CFSP. This area is therefore still *lex imperfecta*.¹⁰² It may be concluded that the scope of judicial review in the area remains limited and the exercise of EU powers in many areas of this sector continues to be screened from judicial oversight. If the Commission were to ask an Opinion under Article 218(11) TFEU on the EU’s accession to the ECHR, as it did in 2013, the ECJ’s answer would still be that an accession treaty cannot be concluded, insofar as the European Court of Human Rights would be able to review CFSP acts which are not subject to the jurisdiction of the ECJ.¹⁰³

100. Gosalbo Bono, “Some reflections on the CFSP legal order,” 43 CML Rev. (2006), 337–394, at 394.

101. For a more detailed examination of this issue, see Øby Johansen, “Accountability mechanisms for human rights violations by CSDP missions: Available and sufficient?,” (2017) ICLQ, 181–207. See also Section 6 *infra*.

102. See A.G. Wahl’s Opinion in Case C-455/14 P, *H.*, paras. 38–40.

103. On the characteristics of judicial review in CFSP matters see Opinion 2/13, paras. 249–259.

5.2. *Domestic courts and their review of CFSP Decisions implementing a UN Security Council Resolution in the light of Rosneft (ECJ) and Al-Dulimi (ECtHR)*

Notably, the Council Decision impugned in *Rosneft* instituted autonomous EU sanctions. However, there is no reason to believe that the outcome of the case would have been different had the EU restrictive measures implemented a United Nations Security Council (“UNSC”) resolution, obliging UN members to freeze the assets of natural or legal persons. The need to provide effective judicial protection, in a Union based on the rule of law, applies equally to sanctions adopted in the UN context, given the absence of an independent judicial review mechanism.¹⁰⁴ If national courts in the EU doubt the validity of the act providing for restrictive measures, they *may refer* a question to the ECJ which will exercise its jurisdiction, following *Rosneft*.¹⁰⁵ However, it is possible that domestic courts will give effect to the freezing order and refuse to question the legality of the sanction, thus escaping the ECJ’s review. In such a situation, the ECtHR could find that such a refusal breaches Article 6(1) ECHR, as was the case in *Al-Dulimi* in 2016.¹⁰⁶ In this judgment, the Grand Chamber of the ECtHR held that Switzerland violated the right of access to a court because its judicial authorities refused to review on the merits the national measure confiscating Mr Al Dulimi’s property, in compliance with a UNSC resolution of 2003. The view of the ECtHR was that the domestic court should have carried out a judicial review for the purpose of avoiding arbitrary designations by the UNSC.¹⁰⁷ The reasoning underlying the

104. See Joined Cases C-584, 593 & 595/10 P, *Commission v. Kadi*, EU:C:2013:518. Autonomous sanctions and sanctions of UN origin are subject to the same standards of judicial review as well as procedural standards, including the obligation to state reasons for the Council. For an interesting case on this issue, see Case T-681/14, *El-Qaddafi v. Council*, EU:T:2017:227. The GC confirmed that even if in an EU act the summary of reasons, justifying the inclusion in the blacklist of a person, is motivated in identical terms to that of the UNSC resolution which the concerned EU act must implement, the EU Council is not relieved of its obligation to ascertain whether those reasons comply with the principles of the case law on Art. 296 TFEU (see para 66).

105. The ECJ in *Rosneft* does not state in clear and unequivocal terms that domestic courts are obliged to refer to the ECJ in case of doubts. The use of the terms “may refer” in para 76 and the expression “should refer” (instead of “shall”) lead to the conclusion that domestic courts are not obliged to turn to the ECJ.

106. ECtHR, *Al-Dulimi and Montana management inc. v. Switzerland*, Appl. No. 5809/08, judgment of 21 June 2016. For insightful comments on *Al-Dulimi* and also on the inconsistencies in the ECtHR’s case law on access to justice, see Peters, <www.ejiltalk.org/the-new-arbitrariness-and-competing-constitutionalisms-remarks-on-ecthr-grand-chamber-al-dulimi/>, (last visited 20 Aug. 2017).

107. In *Al-Dulimi*, Switzerland was found to breach Art. 6(1) ECHR since in 2008 the Swiss Federal court refused to examine the merit of the action brought by a number of former officials of the Iraqi Government against the confiscation of their properties, enacted by

interpretation of Article 6(1) ECHR in *Al Dulimi* and the justification leading the ECJ to assert its jurisdiction in *Rosneft* (in the light of Art. 47 of the EU Charter of fundamental rights), is similar. On the one hand, for the ECtHR access to justice must be made available to persons listed by a UNSC resolution in order to avoid arbitrariness, since “[o]ne of the fundamental components of European public order is the principle of the rule of law ...”;¹⁰⁸ the denial of any substantive review undermines “the very essence of the applicant’s right of access to a court”.¹⁰⁹ On the other hand, for the EU judiciary, “any person whose rights and freedoms guaranteed by EU law are violated should have the right to an effective remedy before a tribunal in compliance with the conditions laid down in [Art. 47 of the EU Charter]. It must be recalled that the very existence of effective judicial review designed to ensure compliance with provisions of EU law is of (sic) the essence of the rule of law”.¹¹⁰ Although the *Al Dulimi* ruling concerns access to justice (Art. 6 ECHR) and not the right to an effective remedy (Art. 13 ECHR), which was at stake in *Rosneft*, there are similarities in the language used by the two

Switzerland to implement a UNSC Resolution of 2003. The reason leading the domestic court to take such a decision was that under Art. 103 of the UN Charter the obligations deriving from the latter Treaty prevail over other those stemming from other sources of international law, except for *jus cogens*. In addition, the UNSC resolution at stake did not leave any degree of flexibility to national authorities. The ECtHR excluded that there was a conflict of obligations between the UN Charter and the ECHR. There was no need to apply the equivalent protection test. The examination of the text of the UNSC resolution led to conclusion that: “... where a [UNSC] resolution ..., does not contain any clear or explicit wording excluding the possibility of judicial supervision of the measures taken for its implementation, it must always be understood as authorizing the courts of the respondent State to exercise sufficient scrutiny so that any arbitrariness can be avoided” (para 146). The ECtHR went on to state that: “Any State Party whose authorities give legal effect to the addition of a person – whether an individual or a legal entity – to a sanctions list, without first ensuring – or being able to ensure – that the listing is not arbitrary will engage its responsibility under Art. 6 of the Convention.” See for a comment, Tzevelekos, “The *Al-Dulimi* case before the Grand Chamber of the European Court of Human Rights: Business as usual? Test of equivalent protection, (constitutional) hierarchy and systemic integration,” 38 *Questions of International Law* (2017), 5–34.

108. Judgment, para 145.

109. Judgment, para 151.

110. Judgment, para 73. The reference to the rule of law emerges even more clearly in A.G. Wathelet’s Opinion. He stresses that the refusal to recognize a competence to give preliminary rulings in relation to any CFSP acts “would be difficult to reconcile with Art. 23 TEU, which provides that ‘the Union’s action on the international scene . . . shall be guided by the principles . . . laid down in Chapter I, which include the rule of law and the universality and indivisibility of human rights and fundamental freedoms, . . . which unquestionably include the right of access to a court and effective legal protection’” (para 66). It seems that Art. 47 of the Charter, which is at the centre of the ECJ’s ruling, offers a more solid ground than Art. 23 TEU (with its indirect link to the rule of law) to impose on the EU institutions respect of the principle of effective judicial protection. For a different view on the importance of Art. 23 TEU, “which forms the linchpin between the CFSP and the EU’s general principles and values,” see Van Elswege, *op. cit. supra* note 94.

courts.¹¹¹ It is submitted that the legal avenues offered to individuals wishing the challenge restrictive measures are therefore strengthened as a result of the two rulings, and the ECJ and the ECtHR play complementary roles in providing human rights scrutiny. Indeed, if an EU domestic court does not question the validity of a CFSP decision implementing an UNSC resolution, the victim of a possible breach of a right protected by the ECHR, may turn to the ECtHR. It should be noted that from the perspective of an individual affected by a CFSP decision imposing restrictive measures implementing a UNSC resolution in an EU member State, it is preferable that a national court starts a preliminary ruling procedure. The rule on the previous exhaustion of domestic remedies, applicable in context of the ECHR,¹¹² will inevitably delay a judgment of the ECtHR, whereas in the EU, following *Rosneft*, all national courts may raise a question on the validity of CFSP Decisions providing for restrictive measures and they are likely to receive a relatively prompt answer.¹¹³

5.3. *Is the ECJ's answer on the admissibility of the first question convincing?*

Could the ECJ have limited itself to ruling on the validity of the impugned Regulation, considering that its competence was uncontested, without tackling the problem of the legality of the CFSP Decision at all? This issue was raised by several interveners,¹¹⁴ and the ECJ, unlike the Advocate General, dwells on it at length. It is submitted, that in principle, the EU judiciary could have ruled on the validity of the act adopted under Article 215 TFEU (the Regulation), given that this measure largely reflects the content of the contested CFSP Decision. The Advocate General's Opinion lends indirect support for this position, making the point that if the impugned Regulation is declared invalid, the Council would be required to take the necessary measures to make the equivalent provisions of CFSP Decision compatible

111. It is striking that there is no reference to *Al Dulimi* in *Rosneft*. This absence may be interpreted as meaning that the ECJ has chosen to give to Art. 47 of the Charter an interpretation which is autonomous from that provided by the ECtHR with respect to Art. 6(1) or Art. 13 ECHR. For a discussion of the usefulness of Art. 47 of the EU Charter, see Lebrun, "De l'utilité de l'art. 47 de la Charte de droits fondamentaux de l'Union européenne", (2016) *Revue Trimestrielle de droits de l'homme*, 433–459.

112. Art. 35(1) ECHR.

113. The High Court of England and Wales referred its questions to the ECJ on 9 Feb. 2015, and the ECJ *Rosneft* judgment was given on 28 March 2017. The notion of effective judicial protection entails also the notion of reasonably speedy protection. For this point, see Spaventa, annotation of Case T-256/07, *People's Mojahedin Organization of Iran v. Council*, 46 CML Rev. (2009), 1239–1263, at 1258.

114. Estonian and Polish Governments and the Council.

with the Court's judgment; this follows from Article 266 TFEU.¹¹⁵ His point is convincing and it is regrettable that it is not reflected in the judgment. This shows that, on the one hand, the ECJ did not wish to side-step the thorny issue of the scope of the exception to the derogation from its general jurisdiction with respect to decisions providing for restrictive measures, and that it attached little importance to the fact that private parties could unquestionably have challenged the validity of the Regulation. The Court emphasized the reasons why it had to answer the question raised by the national court on its competence to examine the validity of a CFSP Decision. Three points were mentioned: first, the impossibility of challenging such an act would undermine the fundamental right of access to justice; second, a prerequisite for the validity of a regulation adopted under Article 215(2) TFEU is the prior adoption of a valid CFSP Decision (which is why it was relevant for the referring national judicial authority to ask the ECJ a question on the latter act rather than the former one). These two arguments are generally convincing. As a third argument, the Court stated that, even if the Regulation were to be declared invalid, this can

“as a matter of principle, have no effect on the obligation of Member States to ensure that their national policies conform to the restrictive measures established pursuant to Decision 2014/512. Accordingly, to the extent that the Court has jurisdiction to examine the validity of Decision 2014/512, such an examination is required in order to determine the scope of the obligations resulting from that decision, irrespective of whether Regulation 833/2014 is valid.”¹¹⁶

This argument is not easy to grasp. The ECJ undermines the idea that if the Regulation is illegal, such illegality also taints the CFSP Decision. In addition, the fact that CFSP decisions are binding for Member States does not explain why it is necessary for the Court to determine the scope of the obligations laid down by them, in the absence of a competence to interpret them.

An additional argument supporting the Court's first two justifications is that it is not always possible to challenge a regulation. For example, the provisions of a CFSP Decision setting up admission restrictions are implemented at national level. There are no acts whose legality could be questioned by the addressees of such measures. These persons would have to go to national courts and attack the denial of entry in the territory of the Member State concerned. Since it would not have been possible to contest the validity of the CFSP Decision providing for the restrictive measure, the

115. Opinion, para 93.

116. Judgment, para 56.

national court concerned would have had to take the final decision without being able to consult the ECJ. In consideration of the impossibility to challenge all aspects of regulations, it may be concluded that the decision to answer the first preliminary ruling question is welcome.

5.4. *The scope of the ECJ's limited jurisdiction: The strengthening of the position of individuals as subjects of restrictive measures*

These comments now address the ECJ's reasoning in order to define the scope of its jurisdiction under Article 275(2) TFEU. As regards the jurisdiction to monitor compliance with Article 40 TEU, the Treaty provisions are sufficiently open to support the interpretation that the Court's task can be performed through all legal remedies available in the Treaty. It is therefore straightforward to recognize a competence under Article 267 TFEU on the basis of a literal interpretation of the Treaty.¹¹⁷ The exceptional circumstances in which the ECJ can rule in the area of the CFSP are set out in Articles 24(1) TEU and 275(2) TFEU. Where a *ratione materiae* competence exists and there are no limitations in the Treaty as to the kind of procedures which may be used in order for the Court to carry out its tasks, this must mean that this institution is free to use all the remedies at its disposal. There was little doubt that the ECJ could make full use of its powers to police the boundaries between CFSP and non-CFSP acts.

There were a number of hurdles to overcome, however, in order to interpret the relevant Treaty provisions in support of its competence to make preliminary rulings on the validity of restrictive measures. Indeed, Article 275(2) specifies that the Court has jurisdiction: "... to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural and legal persons ..." (our emphasis added); this means that the Court is competent to assess the legality of those Decisions in a specific type of procedure, namely, annulment actions. Had the Treaty drafters meant to include the preliminary ruling procedure, arguably they would have drafted Article 275(2) TFEU as follows: "to rule on proceedings reviewing the legality of decisions providing for restrictive measures against natural and legal persons." However, this argument is not sufficient to exclude the preliminary ruling procedure from the notion of

117. The General Court has also recognized this competence: "It is only on an exceptional basis that, under the second paragraph of Art. 275 TFEU, the Courts of the European Union are to have jurisdiction in matters relating to the CFSP. *That jurisdiction includes review of whether Art. 40 TEU has been complied with . . .*" (emphasis added). Case T-328/14, *Jannathian v. Council*, EU:T:2016:86, para 30.

“review of legality”. In fact, one could also argue that, had the Treaty drafters wanted to exclude this particular competence, they would have made the exclusion explicit. This is all the more convincing since the expression “review of legality”, in Article 275(2), encompasses both annulment actions and the preliminary ruling procedure, as has also been stressed by legal scholars.¹¹⁸

The Court is right to hold that Articles 24(1) TEU and 275(1) TFEU do not determine the type of procedure under which the EU judicature may review the legality of certain decisions, but rather the type of decisions whose legality may be controlled by the Court. Opening up the possibility of asking for a preliminary ruling in the name of the right to an effective judicial protection is convincing. The same holds for arguments supporting the position that the ECJ is better placed than domestic courts to assess the validity of those measures.¹¹⁹ By contrast with classic CFSP Decisions, establishing the position of the EU on a certain thematic or geographic issue and thus affecting the position of third countries, individual sanctions touch directly upon the rights of non-State actors. In a system of remedies such as that on which the EU is founded, these measures should be subject to judicial review, either in direct or indirect actions. Therefore, there is no logical reason to allow applicants to challenge sanctions in annulment actions but not in preliminary ruling procedures, once the political choice is made to provide non-State actors with the opportunity to contest the legality of CFSP Decisions. By enabling private applicants to contest restrictive measures, the Lisbon Treaty contributed to turning non-State actors from objects to subjects of EU law.¹²⁰ The ECJ has now simply reinforced their position as litigants in relation to restrictive measures. It has been suggested that “it should now be up to the

118. Hillion, “A powerless Court? The European Court of Justice and the Common Foreign and Security Policy”, available at <ssrn.com/abstract=2388165>, (last visited 15 June 2017); Tridimas, “The European Court of Justice and the draft constitution: A supreme Court for the Union?”, in Tridimas and Nebbia (Eds.), *European Union Law for the Twenty-First Century: Rethinking the New Legal Order*, Vol. 1 (Hart Publishing, 2004), p. 128.

119. It should be noted that since the Court will be able to have access to “all information that the Court considers necessary for the purposes of the case before it” this may imply that the Council will be able to provide the ECJ with confidential information without disclosing it to the other party, as a result of the new rules of procedure of the General Court and the ECJ (see Art. 105 of the Rule of procedure of the General Court and Art. 190a of the Rules of procedure of the ECJ). This entails that legal and natural persons targeted by restrictive measures and wishing to challenge them may not necessarily benefit from the fact that the ECJ will have access to “all the information available.”

120. Although they do not have all legal remedies at their disposal as any other subject of EU law wishing to challenge a non-CFSP measure. For further thoughts on this, see Poli, “The turning of non-State entities from objects to subjects of EU restrictive measures,” in Fahey and Bardutzky (Eds.) *Framing the Subjects and Objects of EU Law* (Edward Elgar, 2017), pp. 158–181.

Member States to reflect the clarification of the Court of the Justice in the Treaty.”¹²¹ However, since the Court has simply clarified the wording of the Treaties, it is probably not necessary to change primary law.

5.5. *The relationship between the annulment action and the plea of illegality*

Given the Court’s competence to review CFSP Decisions of the kind at stake in *Rosneft*, in the context both of an annulment action and a preliminary ruling procedure, it is necessary to examine how *TWD*¹²² (which limits the latter remedy, depending on the standing of the applicants under Art. 263 TFEU) operates in the context of challenges to restrictive measures. The *TWD* ruling enables a private applicant to plea the illegality of an act of a general nature, even if he has not brought an annulment action against the measure in question within the available time limit, provided that it is uncertain that he would have had standing to challenge such a measure in an annulment action.¹²³ Is the plea of illegality available to natural or legal persons only if they have previously submitted an action for annulment before the General Court, or also where they have not done so, provided it is not undisputed that they would have standing to directly challenge the CFSP Decision? The ECJ did not tackle this issue directly in *Rosneft*. In fact, the Russian company had first brought an annulment action before the General Court¹²⁴ and had later sought judicial review at national level primarily against the national legislation imposing criminal penalties for breach of the restrictive measures. The ECJ’s judgment supports the view that an applicant like *Rosneft* was required to bring a prior annulment action before the General Court,¹²⁵ since it is clear that it had standing to challenge the CFSP Decision. This interpretation finds an indirect confirmation in *A and others*, given 14 days before *Rosneft*, which concerned the inclusion of the Tamil Tigers on a list of entities subject to

121. An advocate of this solution is Verellen, op. cit. *supra* note 94, 12.

122. Case C-188/92, *TWD Textilwerke Deggendorf*, EU:C:1994:90.

123. *Ibid.*, para 17. This principle continues to be relevant after the entry into force of the Treaty of Lisbon. See A.G. Sharpston’s Opinion in Case C-158/14, *A and others*, EU:C:2016:734, para 68.

124. See Section 2 *supra*.

125. Judgment, para 67: “... persons bringing proceedings must, when an action is brought before a national court or tribunal, have the right to challenge the legality of provisions contained in European Union acts on which a decision or national measure adopted in respect of them is based, pleading the invalidity of that decision or measure, in order that the national court or tribunal . . . consults the Court on that matter by means of a reference for a preliminary ruling, unless those persons unquestionably had the right to bring an action against those provisions on the basis of Art. 263 TFEU and failed to exercise that right within the period prescribed” (emphasis added).

counter-terrorism sanctions, where the Court stated that: “a request for a preliminary ruling concerning the validity of an act of the European Union can be dismissed only in the event that, although the action for annulment of an act of the European Union would *unquestionably* have been admissible, the natural or legal person capable of bringing such an action abstained from doing so within the prescribed period and is pleading the unlawfulness of that act in national proceedings in order to encourage the national court to submit a request for a preliminary ruling to the ECJ concerning the validity of that act, thereby *circumventing the fact that that act is final as against him once the time limit for his bringing an action has expired*” (emphases added).¹²⁶

Combining *Rosneft* and *A and others*, it is possible to argue that a preliminary ruling on the validity of a CFSP Decision is admissible only if the addressee of a restrictive measure, who has standing to directly challenge that measure, has previously sought to impugn such an act within the prescribed time limit. The implication of the two cases is that natural and legal persons identified by a CFSP decision will have an incentive both to apply for the annulment of the contested measure before the General Court and to make use of the preliminary ruling to question the validity of a CFSP measure. The General Court will, most likely, suspend its ruling, pending the ECJ’s reply, as it did in *Rosneft*.¹²⁷ By contrast, whenever natural and legal persons are not sure whether they would have standing to question the legality of a CFSP measure in an annulment action, they will most likely seek justice at a national level hoping that the national court has doubts on the validity of the CFSP act and decides to refer the case in the context of a plea of illegality, which the Court will consider admissible. As a result of this state of the law, the EU judiciary will see an increase in its case load on restrictive measures due to the rise in number of actions under Articles 267 and 277 TFEU.

5.6. *The narrow interpretation of “restrictive measures against natural and legal persons”*

In *Rosneft*, the Court gives a narrow reading of the provisions of a CFSP Decision providing for restrictive measures whose legality may be questioned by natural and legal persons: only the provisions of a CFSP Decision individually concerning the applicant can be challenged. This position does not sit comfortably alongside the preliminary ruling in *A and others*, enabling

126. Case C-158/14, *A and others*, para 70.

127. By order of 26 March 2015, the President of the Ninth Chamber of the General Court stayed the proceedings in Case T-715/14, pursuant to Art. 54(3) of the Statute of the ECJ and Art. 77(a) of the Rules of Procedure of the General Court of 2 May 1991, pending delivery of the judgment in the preliminary ruling.

private parties to challenge the validity of the provisions of a CFSP Decision providing for restrictive measures against a designated terrorist group, despite the fact that they were not listed by that act.

The Court states in *Rosneft* that: “By establishing the criteria laid down in Article 1(2)(b) to (d) of Decision 2014/512, allowing the identification of Rosneft, and by naming that company in Annex III to that decision, the Council adopted restrictive measures against the legal person concerned.... If the legality of these measures is challenged, it must be possible for those measures to be subject . . . to judicial review.”¹²⁸ Here, the Court recognizes that it is the individual nature of the Decision providing for restrictive measures against natural and legal persons that enables the latter to contest the concerned act even in the context of a preliminary ruling. This issue was raised for the first time, before the entry into force of the Lisbon Treaty, with respect to regulations in *Kadi I*¹²⁹ and with respect to Council Decisions in *Gbagbo*.¹³⁰ Later, in the *Sina Bank*¹³¹ and *Hemmati*¹³² rulings the General Court applied the same interpretation.

Therefore, if the challenged provisions of the measures are applicable generally to all operators involved in the sale, supply, transfer or export of certain technologies, as in the case of the prohibitions contained in Articles 4 and 4a of Decision 2014/512, Rosneft, as well as the other companies, coming within the scope of the mentioned act, lack *locus standi* to challenge them. The justification is that these provisions do not constitute “restrictive measures against natural and legal persons” within the meaning of Article 275(2) TFEU, but rather measures of general application.¹³³

Thus, only if the applicant falls within the scope *ratione personae* of the restrictive measures *and* is listed in annexes of the CFSP Decision, does a sanction against a natural and legal person fall within the definition of Article 275(2) and may be subject to judicial review. In contrast, private parties cannot bring an action against the provisions of the Decision that identify the target by reference to objective criteria and are applicable generally. The implication is that the ECJ cannot review the provisions of the CFSP Decision that determine in an abstract and general manner a category of persons and impose on them a trade ban or restriction, not even if the listed persons are those directly affected by these measures. This exclusion is based on a narrow reading of the expression “restrictive measures against natural and legal

128. Judgment, para 104.

129. Joined Cases C-402 & 415/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission*, EU:C:2008:461, paras. 241–244.

130. Case C-488/11 P, *Gbagbo*, EU:C:2013:258, para 57.

131. Case T-67/12, *Sina Bank*.

132. Case T-68/12, *Hemmati*.

133. Judgment, para 98.

persons” enshrined in Article 275 TFEU and is not supported by any apparent justifications. Hence, the power to review CFSP Decisions providing for restrictive measures *vis-a-vis* non-State actors has a limit that the Court has set for itself; it is not imposed by the wording of the relevant Treaty provision. As Rosas reminds us, “judicial review contributes to keeping sanction decisions especially those against private persons and companies within reasonable limits, in other words that they are not taken in a completely arbitrary haphazard and disproportionate manner.”¹³⁴ However, this is only possible if private parties have access to justice.¹³⁵ In the light of this, it may be thought that natural and legal persons should be able to seek judicial review before the ECJ whenever they are listed and are affected by the provisions of the Decision, in parallel with the second paragraph of Article 263(4) TFEU. The Court could of its own motion interpret Article 275(2) TFEU in such a manner.

Furthermore, the Grand Chamber’s position on the inadmissibility of Rosneft’s challenge of Articles 4 and 4a of the Decision is not easily reconcilable with the ruling in *A and others*,¹³⁶ concerning a sanction enacted in order to combat terrorist organizations. Under the latter judgment, it is possible for persons not listed by a restrictive measure to challenge the act providing for such measures via the preliminary ruling procedure, despite the fact that they were not included in the list of targeted persons. If third parties can contest the legality of restrictive measures, why then, can Rosneft, which is listed in the contested Decision, not impugn an export prohibition that directly affects its activity? A possible explanation is that there is an ontological difference in the structure of counter-terrorism sanctions (at stake in *A and others*) and in that of sanctions against third country regimes,¹³⁷ despite the fact that neither Article 215 nor Article 275 TFEU makes a distinction between these two categories of measures. Individuals targeted by the former can simply challenge the listing Decision; non-State actors blacklisted by the latter have additional hurdles to climb. Indeed, the Council may decide to impose prohibitions designed to isolate the concerned third country and may define in a general and abstract manner the categories of

134. Rosas, “EU restrictive measures against third States: Value imperialism, future gesture politics of judicial extravaganza,” (2016) *Dir. Un. Eur.*, 650.

135. The need to provide “sufficient scrutiny so as to avoid arbitrariness” by national courts when they assess the legality of freezing orders enacted by UN members to implement a Security Council Resolution is also recognized by ECtHR in *Al-Dulimi*, Appl. No. 5809/08, para 146.

136. Case C-158/14, *A and others*.

137. For an in-depth study comparing sanctions on third country regimes and sanctions countering terrorism, see Eckes, “EU restrictive measures against natural and legal persons: From counterterrorist to third country sanctions,” 51 *CML Rev.* (2014), 869–905.

persons hit by the sanction. The ECJ cannot interfere with the Council's discretion. That is why individuals affected by sanctions concerning a third country are in a worse position than suspected terrorists when they seek to challenge their listing; and even if they are included in the blacklist, they are prevented from contesting the prohibitions enshrined in the CFSP Decision. This situation is not satisfactory for individuals from the perspective of the right of access to justice.

5.7. *No limits to the challenge of regulations based on Article 215 TFEU and the uncertainty as to the legal standing conditions operating on natural and legal persons' challenges of these acts*

Rosneft clarifies that the ECJ has the full power to review regulations adopted under Article 215 TFEU in annulment actions, as well as under pleas of illegality, despite the adoption of the act being contingent on the adoption of a CFSP decision. In contrast to CFSP decisions providing for restrictive measures, the challenge to regulations is in no way restricted by Article 275(2) TFEU, as they are acts adopted on the basis of the TFEU. There is some uncertainty, though, as to the conditions to which the challenge of a regulation under Article 215 TFEU is subject. In *Sina Bank*¹³⁸ these conditions seem to be that the provisions of the regulation have to be of individual and direct concern, as in the case of any measure of general nature. In *Bank Mellat*,¹³⁹ the General Court agreed to qualify a regulation adopted under Article 215(2) TFEU as a "regulatory act", thus making it possible for private parties to challenge it without proving any individual concern. They have to show that such an act directly affects them and does not entail implementing measures. It is not clear what standing conditions private parties should therefore satisfy in direct actions. In contrast to annulment actions, the plea of illegality does not impose an obligation on private parties to fulfil any standing requirements.¹⁴⁰

5.8. *Unsettled issues*

Three legal issues were not addressed in *Rosneft*.¹⁴¹ The first concerns the application of *Foto-Frost* to CFSP acts other than those providing for

138. Case T-67/12, *Sina Bank*.

139. In *Bank Mellat* the General Court considered as partially admissible an annulment action against a provision of a regulation, prohibiting certain transfers to banks. See Case T-160/13, *Bank Mellat v. Council*, EU:T:2016:331, para 66.

140. However, the *TWD* principle, limiting the availability of the plea of illegality to applicants whose standing in annulment actions is not undisputed, should operate also in this context.

141. The Court did not need to do so in the context of the ruling at hand.

restrictive measures. The second is whether the ECJ is competent to hear a preliminary ruling on the interpretation of a CFSP Decision, in addition to its competence under Article 267(1)(b) TFEU. The third concerns actions for failure to act, and actions for damages available to natural and legal persons, challenging the Decisions referred to in the “clawback” provision in the last sentence of Article 24(1)(2) TEU and Article 275(2) TFEU.

5.8.1. *Can domestic courts refer to the ECJ in case of doubts on the validity of all CFSP decisions?*

It is not clear whether, after *Rosneft*, the possibility for a national court to ask for a preliminary ruling on validity applies only in relation to the CFSP Decisions referred to in Article 275(2) TFEU or to *any* CFSP act. The ruling commented here does not address this issue. Of course, the arguments made by the Court to support its competence under Article 267(1)(b) TFEU in relation to restrictive measures could also apply to any CFSP Decision which affects the position of individuals. For example, the ECJ, is in principle, better placed than domestic courts to rule on the validity of CFSP Decisions; the objective of ensuring a uniform application of EU law would be better served.¹⁴² However, it is submitted that the Treaties, as they stand, provide an insurmountable obstacle to such an interpretation. Article 275(2) TFEU, in specifying that the CFSP Decisions referred to in Article 24(1) TEU are subject to the control of legality of the ECJ, refers to “decisions providing for restrictive measures”, which are a subset of all CFSP Decisions. Finally, although the principle of effective judicial protection enables a strict interpretation of the exclusion of the Court’s jurisdiction in the CFSP, Article 47 of the Charter (enshrining that principle), cannot confer jurisdiction on the EU judiciary when the Treaty excludes it – as stressed by the ECJ in *Rosneft*.¹⁴³

5.8.2. *Uncertainty as to the existence of a competence to rule in a preliminary ruling on the interpretation of a CFSP Decision*

The ECJ has recognized its competence to rule on the validity of a CFSP decision providing for a restrictive measure, while it has not touched upon its competence to interpret this act. The latter category of competence is no less important than the former, in relation to ensuring the uniform application of EU law and the coherence of the system of remedies. The national court, in all

142. Judgment, paras. 79–80.

143. Judgment, para 74. See also, along these lines, C-583/11 P, *Inuit Tapiriit Kanatami v. Parliament*, EU:C:2013:625, paras. 97–98.

likelihood, will need the ECJ's guidelines on the interpretation of CFSP decisions, especially when the latter are not accompanied by regulations giving effect to them. However, all this does not guarantee that the Court would rule in favour of preliminary rulings on such interpretation. On the one hand, in addition to the principle that its jurisdiction is excluded under Article 24(1) TEU, it should be noted that the types of actions envisaged by Article 275(2) TFEU refer to "review of legality" thus making it difficult to stretch the meaning of this expression to include a preliminary reference on interpretation.

Yet, Advocate General Wathelet's argument that the possibility of questioning the validity of a CFSP decision *a fortiori* implies the competence of the ECJ to interpret this act, is convincing; the link between interpreting a measure and assessing its validity was recognized in *Busseni*,¹⁴⁴ with regard to the ECSC Treaty, which is also quoted in *Rosneft*. In *Busseni*, it was explicitly stated that in the context of that Treaty, the requirement of ensuring uniformity in the application of the law is as cogent and obvious as it is in the EEC and Euratom Treaties.¹⁴⁵ Furthermore, it would be contrary to the objectives and the coherence of the Treaties to "leave responsibility for determining the meaning and scope of rules derived from the ESC Treaty exclusively in the hands of the national courts, thereby depriving the ECJ of any power to ensure they were given a uniform interpretation."¹⁴⁶ The reasoning requiring the Court to provide the definitive interpretation of EU secondary law instead of leaving this to the ECtHR in the prior involvement procedure¹⁴⁷ could apply to the relationship between the ECJ and national courts. Drawing from Opinion 1/09, "it should . . . be recalled that Article 267 TFEU, which is essential for the preservation of the Community character of the law established by the Treaties, aims to ensure that, in all circumstances, that law has the same effect in all Member States".¹⁴⁸

A further justification for extending the competence of the EU judiciary to include interpretation of a CFSP decision is that this may be necessary in order to elucidate the meaning of other provisions, such as those of a regulation if adopted.¹⁴⁹

144. Case C-221/88, *Busseni*, EU:C:1990:84.

145. *Ibid.*, para 15.

146. Arnulf, *The European Union and its ECJ* (OUP, 2006), p. 52.

147. Opinion 2/13, paras. 243–247.

148. Opinion 1/09, *Patent Court*, EU:C:2011:123, para 83.

149. The ECJ's competence to issue a preliminary ruling on the interpretation of the provisions of a regulation, is uncontested, as demonstrated in Case C-314/13, *Užsienio reikalų ministerija*, EU:C:2014:1645, concerning the freezing of funds of a Belarusian citizen.

5.8.3. *Are actions for damages available to natural and legal persons affected by a CFSD decision providing for restrictive measures?*

One of the arguments underlying the Court's interpretation of Article 275(2) TFEU in *Rosneft* was that annulment actions and preliminary ruling procedures can have the aim to review the legality of a CFSP decision.¹⁵⁰ Article 275(2) TFEU does not provide for a competence to hear actions regulated by Articles 265 TFEU (failure to act) or 340 TFEU (liability of the Union), which has been conceived as an autonomous form of action, independent of annulment proceedings.¹⁵¹ Therefore, in principle, a Treaty revision would be needed to change the state of the law. In terms of practice, the General Court's ruling in *Jannathian* may be mentioned, which denies the existence of a competence to hear or determine any kind of claim for compensation in connection with a CFSP decision.¹⁵² In contrast to this position, Advocate General Wathelet, in a footnote to his Opinion, denied that the two actions are available against CFSP decisions against natural and legal persons, without providing any further guidance.¹⁵³

Focusing only on the remedy under Article 340 TFEU, so far the CJEU has examined a number of actions in damages brought by applicants against regulations giving effect to CFSP decisions, and has also upheld one on appeal.¹⁵⁴ Therefore, it might be thought there would be no need for the addressees of restrictive measures to know if they can sue the Union for an action in damages on the basis of a breach occurring as a result of an CFSP Decision. Indeed, they can bring an action under Article 340 TFEU against a regulation adopted under Article 215 TFEU. However, as shown in section 5.3 above, in *Rosneft* the possibility to challenge the Regulation did not prevent the ECJ from asserting its competence to rule on the validity of the CFSP Decision. The same position could be taken with respect to an action in damages connected to a CFSP Decision. Moreover, once again, the adoption

150. Judgment, para 70.

151. Case 175/84, *Khron v. Commission*, EU:C:1986:85.

152. "It must therefore be held that a claim seeking compensation for the damage allegedly suffered as a result of the adoption of an act relating to the CFSP falls outside the jurisdiction of the Court." Case T-328/14, *Jannathian v. Council*, para 31. The General Court's position was more cautious in the order in Case T-602/15, *Liam Jenkinson v. Council*, EU:T:2016:660; in para 30, it stated: "It cannot be ruled out that the contractual and the non-contractual liability of an EU institution may coexist in respect of one of the parties with which it has concluded a contract."

153. There was no need to deal with this specific issue. See footnote 36 of the Opinion "Actions for failure to act and actions for damages which relate to a CFSP act are covered by the 'carve-out' . . . but not by the 'claw-back'".

154. Case C-45/15 P, *Safa Nicu v. Council*, EU:C:2017:402.

of regulations under Article 215 TFEU is not mandatory; there may also be cases in which sanctions set by a CFSP act are not given effect through a non-CFSP measure, as in the case of restrictions on the admission of persons, which are directly implemented by Member States. Leaving aside the added value of the availability of an action in damages, could the ECJ interpret “review of legality” to include non-contractual liability? The Commission supported a positive answer in the Opinion proceedings 2/13.¹⁵⁵ It could be argued that although the purpose of an action in damages is not to review the legality of a given EU act, such a remedy is complementary to the possibility of contesting the validity of a CFSP decision and therefore should be permitted in a system of remedies where the right to effective judicial protection is recognized by Article 47 of the EU Charter. However, on the whole, it is uncertain whether it would be possible to interpret the above-mentioned provision in such a way as to include the remedy provided for by Article 340 TFEU. On the hand, the coherence of EU system of remedies, which is at the heart of *Foto-Frost* ruling, would require the ECJ to extend the availability of the action in damages to CFSP Decisions. This would make the system of EU remedies for natural and legal persons affected by sanctions almost complete. On the other hand, there are limits to such an interpretation. Article 275(2) TFEU does not include the non-contractual liability of the EU amongst the exceptions to the limits on the ECJ’s jurisdiction. Moreover, *Segi* is an important precedent, where the Court considered this action inadmissible when interpreting Article 35 TEU.¹⁵⁶

5.9. *Interpretation of the compatibility of the contested CFSP Decision with the “non-affectation clause” (Art. 40 TEU) and a missed opportunity to shed light on what is a legislative act*

The Court’s examination of the compatibility of the impugned CFSP Decision with the non-affectation clause may be criticized. Rosneft contended that the contested CFSP act defines the EU position in excessive detail, thus encroaching on the powers of the High Representative of the Union and the Commission to propose measures necessitated by the adoption of a CFSP decision, as stipulated in Article 215(1) TFEU. The Court found that the

155. See Opinion 2/13, para 99.

156. This provision does not include the competence to examine an action in damages, and the ECJ rejected these actions in Cases C-355/04 P, *Segi and others*, paras. 46–47 and C-340/04 P, *Gestoras Pro Amnistia v. Council*, EU:C:2007:115, paras. 46–47. This issue was also raised by A.G. Kokott in her View in Opinion 2/13, para 94.

Council needed to decide on the technical details of the sanctions in the CFSP Decision, given the high degree of technicality of this field. This finding may be questioned. Restrictive measures are adopted on the basis of Article 29 TEU, enabling the Council to “define the approach of the Union to a particular matter of a geographical or thematic nature.” Should they set out the political choices – such as the subjects that targeted and the design of the main features of the sanctions – leaving all the technical details to the regulation necessary to implement them? The two acts have different functions. However, in the Council’s practice, everything is decided in the CFSP decision, and the regulation merely reproduces the content of the decision. It seems that the Council expressly wants to pre-determine the content of the regulation, with the net effect of affecting the extent of the powers of the High Representative and the Commission. By defining all the aspects of the sanction in CFSP decisions, does the Council not impinge upon the power of the Commission or the High Representative to propose and design a regulation? It is submitted that it does. The Court could have said something to condemn this practice.

Rosneft further argued that the contested CFSP Decision constitutes a legislative act by reason of its content, and was thus in breach of Article 24(1)(2) TEU, which excludes the adoption of legislative acts in the domain of foreign affairs. It is true that there are CFSP Decisions which may be described as legislative measures, given their content¹⁵⁷ and therefore they may be qualified *de facto* legislative acts, if not *de iure*. The Court does not look at the content of the mentioned act in its formalistic analysis. The Grand Chamber merely observes that the contested CSFP Decision cannot be a legislative act, since it has not been adopted by a legislative procedure.¹⁵⁸ Since the Treaty does not offer any guidelines on what is a legislative act, this was a missed opportunity for the Court to shed some light on this issue.

6. Conclusions

Rosneft strengthens the Court’s power to rule on the legality of restrictive measures. However, it does not lead to ending the special status of the CFSP compared with non-CFSP areas. The ECJ does not open up the possibility of challenging *all* aspects of CFSP decisions providing for restrictive

157. This was admitted by A.G. Wahl in his Opinion in Case C-455/14 P, *H.*, see his footnote 51.

158. Judgment, para 91. See, later, on this point, Joined Cases C-643 & 647/15, *Slovakia and Hungary v. Council*, EU:C:2017:631, where the ECJ confirmed that adoption through the legislative procedure is what determines that a measure is a legislative act.

measures.¹⁵⁹ In addition, there are certain types of CFSP acts which continue to be kept off-limits for the Court's jurisdiction. The carve-out provisions of the Treaties, limiting the ECJ's jurisdiction, continue to apply to CFSP decisions. This seems to be an acceptable limit from the perspective of the right to an effective remedy, as these measures do usually concern third countries rather than individuals. Nonetheless, there may be situations in which a national measure, having the effect of depriving a person of his/her liberty, is taken in the context of an EU military mission, authorized under a CFSP act, as happened in the context of the Atalanta mission. In March 2009 a group of suspected pirates was arrested by German military personnel who were operating under the command of the EUNAVFOR headquarters. They were transferred to Kenya after an agreement was concluded between the two countries. In May 2009, one of the arrested pirates brought an action before the German administrative court claiming that both the arrest and the transfer to Kenya were unlawful. The German court considered that the conduct was attributable to Germany rather than to the EU, and found in favour of the applicant on human rights grounds. A higher administrative court substantially confirmed the ruling of the lower court.¹⁶⁰ Does the exclusion of the ECJ's competence to deal with such situations lead to a legal lacuna in the individual protection?¹⁶¹ The answer seems to be negative. It is submitted that national courts are, in fact, best placed to provide access to justice for persons concerned in such a situation. This is justified by the fact that the contested conduct is attributable to the Member State rather than to the EU.¹⁶² Moreover, the task to verify whether violations of human rights were committed by the national authorities, albeit in the context of an EU operation, can be performed by the national courts.

The second paragraph of Article 19(1) TEU imposes on Member States the obligation to provide remedies sufficient to ensure effective legal protection in areas coming within the scope of EU law. Therefore, they can step in where the jurisdiction of the ECJ is limited. It is true that this state of affairs presents

159. Only those, admittedly numerous, which target specific individuals. See on this point section 5.6. *supra*.

160. See Sommaro, "Attribution of conduct in the framework of CSDP missions: Reflections on a recent judgment by the Higher Administrative Court of Nordrhein-Westfalen," in Poli (Ed.), *Protecting Human Rights in the European Union's External Relations* (CLEER Paper, 2016/5), p. 155.

161. Poli, "Human rights in EU external relations: Setting the scene," in Poli, *op. cit. supra* note 160, pp. 17–20.

162. Even if the conduct is attributable to the EU, Art. 274 TFEU makes it possible for domestic courts to have jurisdiction on the disputes to which the EU is a party. See on this issue Øby Johansen, *op. cit. supra* note 101, at 202.

inconveniences: it is possible that national courts provide a different answer to the question of whether or not international human rights standards are violated in the instance of an operation carried by the EU. However, this is a risk inherent to the EU system of decentralized control over CFSP acts.

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If and when age and sexual orientation discrimination intersect:

Parris

Case C-443/15, *Dr David L. Parris v. Trinity College Dublin and Others*, Judgment of the Court (First Chamber) of 24 November 2016, EU:C:2016:897

1. Introduction

On 24 November 2016, the ECJ rejected claims of age and sexual orientation discrimination raised by Mr Parris, a retired university lecturer, against his former employer, Trinity College Dublin, and various Irish education and welfare institutions. Mr Parris's same-sex partner had been declared ineligible for a survivor's pension because, under the applicable retirement scheme, the marriage/civil partnership needed to have taken place before the employee's sixtieth birthday. However, Ireland had only recognized same-sex marriage partnership after Mr Parris' sixtieth birthday, making it impossible to fulfil that condition. The plaintiff argued that this constituted either sexual orientation discrimination, or age discrimination, or both together. However, in its judgment the ECJ concluded that no discrimination had taken place.

This judgment is interesting for a number of reasons. First of all, it seems to run counter to a trend which has seen the institutions of the European Communities and later the EU as venues in which lesbians, gays, bisexuals and transgender (LGBT) fought rather successfully for their rights. Moreover, the ECJ, had already dealt with relatively similar situations concerning same-sex partners and survivor's pensions in previous judgments, in which it had found that they *did* constitute discrimination on the grounds of sexual orientation.¹

Further, this judgment is important because it is the first time that the ECJ was explicitly confronted with the issue of what has been named in anti-discrimination law as "intersectionality".² This refers to the fact that anti-discrimination law and politics are structured around single grounds of discrimination, such as sex, race, sexual orientation, disability and/or religion, but that when such grounds overlap (e.g. non-discrimination claims brought

1. Case C-267/06, *Maruko*, EU:C:2008:179; Case C-147/08, *Römer*; EU:C:2011:286.

2. Crenshaw, "Demarginalizing the intersection of race and sex", (1989) *University of Chicago Legal Forum*, 139–167; Crenshaw, "Mapping the margins: Intersectionality, identity politics, and violence against women of color", 43 *Stanford Law Review* (1991), 1241–1299.

by black women), courts and socio-political movements have difficulties grappling with them. In this case, the question was whether Mr Parris's claims constituted a specific form of discrimination of both age and sexual orientation. The diverging answers provided by Advocate General Kokott in her Opinion and by the ECJ in its judgment are further reasons why it is interesting and important to comment *Parris*.

2. Factual background

The plaintiff, Mr David L. Parris, was born in 1946 and started working for Trinity College Dublin (Ireland) in 1972 when he also joined the university's pension scheme. He had been in a stable relationship with his same sex partner for over 30 years. In 2009, at age 63, they registered a civil partnership in the United Kingdom and married there in 2015. Recognition of the civil partnership in Ireland occurred only in 2011.³ Mr Parris' request for a survivor's pension under the university's pension scheme for his civil partner was denied by Trinity because Rule 5 of that scheme provided that survivor's pensions are payable only if the member married or entered into a civil partnership before reaching the age of sixty. The problem with that rule was that Mr Parris could not marry or enter into a civil partnership before that age because in Ireland in 2006 when he turned sixty it was neither legally possible for same sex couples to enter into one of these unions, nor could a foreign same-sex marriage/partnership be recognized.

Mr Parris contested the university's decision and on appeal the Irish Labour Court which decided to stay the proceedings and to refer three questions to the ECJ on the interpretation of the Equal Employment Directive (EED). These can be summarized as follows: (a) whether the facts as described amount to sexual orientation discrimination; (b) whether they amount to age discrimination; or (c) whether they amount to a combined (intersectional) discrimination on the grounds of sexual orientation and age.

3. The Opinion of Advocate General Kokott

First, the Advocate General rejected the arguments that the facts of the case did not fall in the material and temporal scope of the EED. As to the former aspect, the Court had already previously held that occupational pension schemes and occupational survivor's pension schemes fall under the concept

3. For these details, see Opinion of A.G. Kokott in Case C-443/15, *Parris*, EU:C:2016:493, paras. 17–19.

of pay⁴ and thus within the material scope of the EED. The transfer of Trinity College's pension fund to a national authority could not change that answer.⁵ As to the latter aspect, Advocate General Kokott rejected the argument that the pension entitlements were predominantly based on periods of service prior to the entry into force of the EED and therefore should not be granted.⁶ In her view, the situation here described has not become definitive and refers to a future obligation thus entailing the application of the EED. All the more so as the EED contains no special limitations on its temporal application and the ECJ has not applied temporal restrictions, as it could have done,⁷ in previous case law.⁸ She extended this logic of future benefits vs. retroactive effect on the institution of civil partnership to the (non-) application of Recital 22 of the EED, which provides that "the Directive is without prejudice to national laws on marital status and the benefits dependent thereon".⁹

Having settled the "preliminary" issues, Advocate General Kokott went to the central point of the case, namely whether the age limit of sixty years before which an employee must have entered a marriage or civil partnership in order to obtain a survivor's pension benefit is compatible with the EED.¹⁰ On the question whether this limit constituted sexual orientation discrimination, she held that this was not direct discrimination as defined in Article 2(2)(a) of the EED mainly because this was a neutrally formulated rule and because, unlike with pregnancy and direct sex discrimination, there was not an inseparable link between the age limit and sexual orientation.¹¹ However, she did find that this was indirect discrimination under Article 2(2)(b) of the EED because the age limit "affects a large number of homosexual employees in Ireland more severely and more deleteriously than their heterosexual colleagues".¹² Indeed, that rule prevents homosexual employees born before 1951 "through no fault of their own"¹³ from being entitled to the survivor's pension.

Under Article 2(2)(b)(i) of the EED, indirect discrimination allows for certain objective justifications that need to pursue a legitimate aim and be appropriate and necessary for achieving that aim. In a classic example of proportionality analysis, Advocate General Kokott first accepted the

4. Case C-267/06, *Maruko*; Case C-147/08, *Römer*.

5. Opinion, paras. 32–35.

6. *Ibid.*, para 39.

7. Case C-262/88, *Barber*, EU:C:1990:209.

8. Opinion, paras. 37–44.

9. *Ibid.*, paras. 100–109.

10. *Ibid.*, para 28.

11. *Ibid.*, paras. 49–53.

12. *Ibid.*, para 57.

13. *Ibid.*, para 62.

legitimacy of the aim of preventing employees from abusively entering into partnerships or marriages on their deathbed to enable someone close to them to qualify for a survivor's pension scheme.¹⁴ Based on the broad discretion accorded to employers in the domain, she then found that the rule is not manifestly inappropriate to prevent such abuse.¹⁵ It is on the necessity and the proportionality *strictu sensu* that the measure fails. In fact, she recommended that instead of a strict age limit one could rather introduce a minimum waiting period between the marriage/civil partnership and the entitlement¹⁶ and that upon balancing the employer's legitimate but purely financial interest and the employee's legitimate interest to guarantee their partners a survivor's pension without being discriminated against, the latter prevails.

Concerning the issue of whether Trinity College's rules constituted age discrimination, she concluded that this is unjustified direct discrimination. In other words, there has been a distinction on the basis of age which is not justified directly or by analogy by any of the justifications/derogations established *inter alia* under Article 6 of the EED, namely that the differential treatment on the basis of age pursues legitimate employment policy, labour market and vocational training objectives (Art. 6(1) of the EED) and, for occupational social security schemes covering the risks of old age and invalidity, that (i) the age limits are set as a condition of membership of an occupational social security scheme, that (ii) they are set to determine the entitlement to retirement or invalidity benefits, and/or that (iii) they are used in actuarial calculations (Art. 6(2) of the EED).¹⁷ She easily dismissed justifications (i) and (iii) as inapplicable.¹⁸ As to justification (ii) whether the age limit of sixty is set to determine the entitlement to retirement or invalidity benefits, Advocate General Kokott also rejected the applicability of this derogation. In fact, she argued that it is not Mr Parris's partner's age as the person who will ultimately be entitled to the benefit but Mr Parris's age that is taken into consideration. Given that he will not benefit from the survivor's pension, she suggested that this justification does not apply here.

As to the third question whether the facts amount to a combined (intersectional) discrimination on the grounds of sexual orientation and age, Advocate General Kokott first mentioned the legal literature on the issue and noted the absence of any explicit analysis in EU legislature and ECJ case law.¹⁹ She then held that here the combined grounds of discrimination must be analysed from the point of view of indirect discrimination because the terms

14. *Ibid.*, paras. 72–73.

15. *Ibid.*, paras. 76–81.

16. *Ibid.*, paras. 86–88.

17. *Ibid.*, paras. 116–142.

18. *Ibid.*, paras. 125 and 127.

19. *Ibid.*, paras. 149–153.

of the pension scheme are *prima facie* neutral and have the effect of putting employees like Mr Parris and their partners at a particular disadvantage.²⁰ Moreover, this should also have an influence on the last step of the proportionality test, namely the proportionality *strictu sensu* by increasing the weight which the arguments of disadvantaged employees carry when compared to those raised by the employers.²¹

In conclusion, she recommended that the ECJ find indirect discrimination on the grounds of sexual orientation.²²

4. The judgment

The ECJ did not follow Advocate General Kokott's Opinion. On the material scope of the EED, namely whether the national rules fall under the concept of "pay"²³ and on the issue as to the characterization of the facts as indirect discrimination and not direct discrimination on the grounds of sexual orientation discrimination,²⁴ the Court (still) concluded along the same lines as the Opinion. However, when proceeding to analyse the facts under indirect sexual orientation discrimination, the Court never entered into the means-ends proportionality analysis, but directly referred to Recital 22 of the EED.²⁵ Essentially the way the Court interpreted the application of this provision is that only once Member States have decided to introduce some form of legal recognition to same-sex couples, then EU law and, as a consequence, also the EED's prohibition of non-discrimination on the grounds of sexual orientation can apply. But, according to the ECJ, EU law and the EED can not require Ireland to introduce some form of legal recognition of same sex partnerships, nor to give civic partnerships retroactive effects once they are introduced, nor to lay down transitional measures.²⁶

As far as the age discrimination point is concerned, the Court, like Advocate General Kokott, found that there is a direct differential treatment on the grounds of age²⁷ and also that the survivor's pension is a form of old age pension for which certain derogations have been established in Article 6(2) of the EED. But here, contrary to Kokott, the ECJ held that the 60-year age limit

20. Ibid., paras. 154–156.

21. Ibid., para 157.

22. Ibid., para 164.

23. Judgment, paras. 31–42.

24. Ibid., para 49.

25. Ibid., paras. 51–58.

26. Ibid., paras. 59–61.

27. Ibid., paras. 63–68.

constitutes an age limit for entitlement to retirement or invalidity benefits.²⁸ The circumstance that it is Mr Parris's age that is considered, and not the ultimate surviving partner beneficiary's age, as noted by Advocate General Kokott, was not mentioned by the Court. Thus, given that the facts were deemed to fall under one of the derogations allowed under Article 6(2) of the EED, the ECJ concluded that there was no age discrimination.

Last but not least, on the question of intersectional discrimination, the Court rejected the idea that in the absence of any discrimination on the grounds of sexual orientation or of age taken in isolation a separate ground of discrimination of the two together can exist independently.²⁹ Put differently, given that there was no finding of either sexual orientation discrimination or age discrimination, it is impossible to invent a "new category of discrimination resulting from the combination of more than one of those grounds".³⁰ The Court thus concluded that the Irish rules constitute no discrimination whatsoever under the EED.

5. Comments

For the reasons indicated in the introduction, *Parris* is an interesting decision. The focus of these comments is on two aspects which relate to (i) the Court's case law on sexual orientation in conjunction with marriage and/or civil partnership; and (ii) the concept of intersectionality.

5.1. *Discrimination on grounds of sexual orientation in conjunction with marriage and/or civil partnership*

As already noted above, it can safely be said that over the past twenty years the European institutions have become rather LGBT-friendly venues, where parties have successfully fought for their rights and against discrimination. The start of this trend can be identified as the 1997 Amsterdam Treaty which amended Article 13 EC (today Art. 19 TFEU) by enabling the European Communities to "take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or *sexual orientation*".³¹

Including sexual orientation in that provision was no foregone conclusion. In fact, at the time of Article 13's entry into force in 1999, the levels of

28. *Ibid.*, paras. 74–75.

29. *Ibid.*, paras. 79–83.

30. *Ibid.*, para 80.

31. Art. 19 TFEU (emphasis added).

protection against sexual orientation discrimination varied vastly between Member States,³² and only Denmark and France recognized same-sex unions in their legislation. Moreover, the ECJ had rejected arguments that the denial of an employment-related benefit to a lesbian railway employee constituted sex discrimination or that EC law protected against sexual orientation discrimination,³³ nor did it find that such a denial was a violation of the equal pay principle enshrined in Article 157 TFEU (ex 141 EC).³⁴ A few years later, it held that same-sex life partners of whom one was working in the European institutions could be excluded from marriage-related benefits.³⁵ Partly due to such case law, NGOs,³⁶ non-discrimination lawyers and academics³⁷ viewed the explicit inclusion of sexual orientation under Article 13 EC as a welcome and necessary accomplishment.

And indeed, the EC acted swiftly by adopting two non-discrimination directives. The first, Council Directive 2000/43/EC³⁸ (the Race Directive) prohibits discrimination on the grounds of race and ethnic origin in various areas of social life, including employment, provision of goods and services and education. The second, Council Directive 2000/78/EC³⁹ (the Employment Equality Directive, EED), prohibits discrimination on the grounds of age, religion, sexual orientation and disability in the employment context.

32. Waaldijk and Baraldi, *Sexual Orientation Discrimination in the European Union: National Laws and the Employment Equality Directive* (Asser Press, 2006).

33. The ECJ did reference the future Amsterdam Treaty and the inclusion of an authorizing provision for the EC to take action against sexual orientation discrimination, but that only seemed to serve as justification that the facts were not covered by the protection against sex discrimination. See Case C-249/96, *Grant v. South-West Trains*, EU:C:1998:63, para 48.

34. Ibid. It should be noted here that in another case the ECJ had instead extended the application of sex discrimination to a transsexual person who had been dismissed: Case C-13/94, *P. v. S. and Cornwall County Council*, EU:C:1996:170.

35. Joined Cases C-122 & 125/99 *P. D. and Kingdom of Sweden v. Council of Europe*, EU:C:2001:304.

36. See the role played by the International Lesbian and Gay Association (ILGA) both in lobbying for such an inclusion and in promoting its visibility: ILGA Europe, *After Amsterdam: Sexual Orientation and the European Union* (ILGA Europe, 1999).

37. See e.g. Bell, "The new Article 13 EC Treaty: A sound basis for European non-discrimination law?", 6 MJ (1999), 5; Flynn, "The implications of Article 13: After Amsterdam will some forms of discrimination be more equal than others?", 36 CML Rev. (1999), 1127.

38. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, O.J. 2000, L 180/22.

39. Council Directive 2000/78/EC of 27 Nov. 2000 establishing a general framework for equal treatment in employment and occupation, O.J. 2000, L 303/16.

From that moment on, with certain (mild) exceptions,⁴⁰ the ECJ has added to the sense that the EU is a good venue for pushing LGBT issues forward. Indeed, the Court held that the exclusion of same-sex registered partners from survivor's pensions⁴¹ from supplementary retirement pensions⁴² and from collective agreements⁴³ constitutes discrimination on the grounds of sexual orientation under the EED and that homophobic statements by the patron of a football club might be indication of a discriminatory recruitment policy.⁴⁴ In another judgment, the Court found a violation of the principle of equal pay because national legislation had deprived a couple of an entitlement to a survivor's pension after one of the partners had obtained a sex change which prevented them from getting married and thus being entitled to the benefit.⁴⁵

Finally, since the entry into force of the EU Charter of Fundamental Rights (the Charter), its Article 21 establishes an explicit primary law prohibition against sexual orientation discrimination. Given all these developments and the fact that in the interpretation of the Charter the Court, to some extent, should also be attentive to the increasingly favourable judgments to same-sex couples by the European Court of Human Rights,⁴⁶ *Parris* seemed destined for

40. See Joined Cases C-199-201/12, *X and Others*, EU:C:2013:720, and Case C-528/13, *Léger*, EU:C:2015:288. These are defined as “mild” exceptions, as both judgments also show some positive aspects from the perspective of protection against sexual orientation discrimination. *X and Others* dealt with cases brought by homosexual asylum applicants; despite holding that criminalization of homosexual acts does not *per se* constitute persecution, the ECJ found that homosexuals are a particular social group who cannot be asked to conceal their homosexuality. *Léger* held that the French ban for gay men to donate blood did not violate Art. 21 of the Charter and the enshrined prohibition of non-discrimination on the grounds of sexual orientation, but that a permanent deferral of blood donations for men who have same-sex relationships might be disproportionate under Art. 52 of the Charter. As a consequence, France revised its legislation and now homosexuals are allowed to donate blood under certain conditions. See Annex II of the Arrêté du 5 avril 2016, *JORF* No. 0085, 10 Apr. 2016, text no. 8. On *Léger*; see Dunne, “A right to donate blood? Permanent deferrals for ‘Men who have sex with Men’ (MSM)”, 52 *CML Rev.* (2016), 1661–1678.

41. Case C-267/06, *Maruko*.

42. Case C-147/08, *Römer*.

43. Case C-267/12, *Hay*, EU:C:2013:823.

44. Case C-81/12, *ACCEPT*, EU:C:2013:275. See Belavusau, “A penalty card for homophobia from EU non-discrimination law: Comment on *Asociația ACCEPT*, C-81/12”, 21 *CJEL* (2015), 351–381.

45. Case C-117/01, *K.B. v. National Health Service Pension Agency*, EU:C:2004:7.

46. E.g. compare and contrast with the following recent judgments of the ECtHR on sexual orientation discrimination in conjunction with various issues related to marriage and civil-partnership: *Pajić v. Croatia*, Appl. No. 68453/13, judgment of 23 Feb. 2016 (refusal to grant residence permit for family reunification purposes to same-sex partner deemed discriminatory on the grounds of sexual orientation); *Chapin and Charpentier v. France*, Appl. No. 40183/07, judgment of 9 June 2016 (reserving marriage to unions between men and women not deemed discriminatory on the grounds of sexual orientation); and *Taddeucci and McCall v. Italy*, Appl. No. 51362/09, judgment of 27 July 2016 (refusal to recognize residence rights to

a favourable answer to the plaintiff by the ECJ. Instead, that positive answer was not given. A look at the Court's most relevant precedents, namely *Maruko*, *Römer* and *Hay*, will demonstrate why this comes as a slight surprise.

First, in *Maruko* the Court had held that the denial of a survivor's pension constituted direct discrimination on the grounds of sexual orientation. Partly, this can be explained by the way the questions referred were formulated; they focused on how legislative regulation of marriage and life partnerships had progressively converged as far as survivor's benefits are concerned in Germany. The Court was thus drawn towards a direct comparison between life partnership (reserved to same-sex couples) and to marriage (reserved to opposite sex couples). Such a comparison, however, only occurs in direct discrimination evaluations whereas indirect discrimination cases rely more on a means-end balancing test. The Court therefore eventually recommended that if surviving spouses and surviving life partners are deemed to be in a comparable situation with regard to survivor's pensions, there is direct discrimination on the grounds of sexual orientation.⁴⁷ Moreover, in *Hay* the ECJ had also held that "[t]he difference in treatment based on the employees' marital status and not expressly on their sexual orientation is still direct discrimination because only persons of different sexes may marry and homosexual employees are therefore unable to meet the condition required for obtaining the benefit claimed".⁴⁸ Applying a similar approach here in *Parris*, the ECJ could or should have engaged with *Maruko* and *Hay* by focusing on the comparison between marriage and civil partnership, and the fact that heterosexual employees born before 1951 had access to marriage – and thereby to survivor's pensions – whereas homosexual employees born before 1951 did not. Thus there is direct discrimination on the grounds of sexual orientation for people above a certain age threshold.⁴⁹

Instead, Advocate General Colomer in his Opinion in *Maruko*,⁵⁰ and Advocate General Kokott and the Court here in *Parris*, focused on the neutral language of the national regulations; this then leads to characterizing the issue as indirect discrimination and a means-ends balancing test where the disparate

same-sex partner and not spouse deemed discriminatory on the grounds of sexual orientation). For more details on the ECtHR's case law on sexual orientation, see its fact sheet at <www.echr.coe.int/Documents/FS_Sexual_orientation_ENG.pdf>.

47. Case C-267/06, *Maruko*, para 72.

48. Case C-267/12, *Hay*.

49. See in this sense Wintemute, "Same sex survivor pensions in the CJEU (*Parris*) and the UKSC (*Walker*)", *UK Human Rights Blog*, 9 Jan. 2017, <www.ukhumanrightsblog.com/2017/01/09/professor-robert-wintemute-same-sex-survivor-pensions-in-the-cjeu-parris-and-the-uk-sc-walker/> (last visited 14 Apr. 2017).

50. Opinion of A.G. Colomer in Case C-267/06, *Maruko*, EU:C:2007:486, paras. 96 and 102.

impact resulting from the indirect discrimination can be upheld if the unequal treatment is justified on objective and proportionate grounds.

However, the ECJ never got to this balancing test, because – and this is the second point in which this judgment distinguishes itself from its predecessors – the European judges used Recital 22 to reject the case. In *Maruko*, the ECJ had admitted that marital status and the benefits relating to being married fall within the competence of the Member States but it then continued that in exercising such competences, Member States had to comply with Community law and specifically, with the principle of non-discrimination.⁵¹ Hence, the ECJ concluded, Recital 22 could not affect the application of the Directive and did not allow discrimination on grounds of sexual orientation. It confirmed this reasoning in *Römer*, where it summarily referred to *Maruko*.⁵² So, the Court could have done the same here and see whether a survivor’s pension falls under the concept of “pay” and thereby within the scope of the EED (which it had already found to be the case in *Maruko*) and then disregard Recital 22.

But the Court did not. One of the reasons for this departure from the earlier case law might be that the European Commission in *Parris* sided with the national pension scheme rules rather than with the plaintiff.⁵³ The argument sustained by the Commission, and with which the Court agreed,⁵⁴ is that if the Court found discrimination on the grounds of sexual orientation here, it would *de facto* mean that the EED would have required Ireland to recognize same-sex civil partnership retrospectively to 2006 instead of 2011, thus interfering with the Member States’ freedom under EU law – and guaranteed by Recital 22 – not to provide recognition to same-sex couples. One can find a similar position in the Commission’s Explanatory Memorandum to the stalled proposal for a new general anti-discrimination directive.⁵⁵ This directive’s future Article 3, concerning the scope of application, states *inter alia* that “[t]his directive is without prejudice to national laws on marital or family status and reproductive rights”; and the Commission clarifies that “Member States remain free to decide whether or not to institute and recognize legally registered partnerships. However, once national law recognizes such relationships as comparable to that of spouses then the principle of equal treatment applies.”⁵⁶ What we see here is that the content of

51. Case C-267/06, *Maruko*, para 59.

52. Case C-147/08, *Römer*, para 35, referring to para 60 of the *Maruko* judgment.

53. See Wintemute, *op. cit. supra* note 49.

54. Judgment, para 60.

55. Commission Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008)426 final.

56. *Ibid.*

Recital 22 is moved into the actual text of the future directive, thus eliminating the problematic issue of the use of a recital to effectively limit the scope of a legislative instrument.⁵⁷ Thus, the way the ECJ (and the European Commission) square this case with its (seemingly incompatible) earlier ones is that in *Maruko*, *Römer* and *Hay*, the Member States had already introduced some form of same-sex partnership recognition. As a consequence, it was the different treatment between the registered partnership and marriage regimes that was seen as discriminatory under EU law. In *Parris*, however, given that Ireland had not yet introduced any form of partnership for same-sex couples at the time, the Court saw it as requiring a Member State to retroactively introduce recognition of same-sex unions. Possibly the ECJ did not wish to be seen as forcing Member States here, and thus avoided rendering something that could be considered a controversial judgment.⁵⁸

This interpretation leaves outside the EU law's reach what is arguably the most open form of discrimination against same-sex couples, namely when a Member State does not provide any form of partnership recognition. At the same time, it would have been possible to give a different interpretation specifically to the facts in this case: Mr Parris was not asking Ireland to retroactively recognize or introduce same-sex unions prior to 2011. All he was asking for was that, in case of his future death, his partner would be entitled to the survivor's pension.⁵⁹ The Member State's decision not to legislate and not to introduce some form of recognition to same-sex couples in the past was unaffected.

5.2. Intersectionality

The second aspect to render this decision such an interesting one is that it is the first time that the Court deals explicitly with the issue of combined grounds of discrimination,⁶⁰ or "intersectionality".⁶¹ This term was coined by United

57. For a more detailed discussion on recitals and their relevance for the interpretation of EU law in conjunction with *Maruko*, see Möschel, "Germany's life partnerships: Separate and unequal?", 16 CJEL (2009), 41–42.

58. In theory this is relatively similar to the ECtHR's approach, which recently provided that States have no obligation to open marriage to same-sex couples if they had not done so yet (*Chapin and Charpentier v. France*, Appl. No. 40183/07). However, the ECtHR also determined that Member States need to provide some form of legal recognition to same-sex couples (*Oliari and Others v. Italy*, Appl. Nos. 18766/11 and 36030/11, judgment of 21 July 2015).

59. See Opinion, para 104.

60. *Ibid.*, para 149, note 75, where A.G. Kokott mentions other ECJ cases where several factors of discrimination have featured implicitly.

61. It should be noted here that the ECtHR has not dealt with the issue explicitly yet either, even though a number of its judgments, especially those concerning Islamic headscarves and/or

States' critical race feminist Kimberlé Crenshaw in two groundbreaking articles⁶² in which she highlights how the experience of women of colour has been marginalized in two ways: (a) *legally*, by highlighting how in a number of employment anti-discrimination claims brought under Title VII of the Civil Rights Act,⁶³ black women's claims were denied because judges either failed to see the specificity of the discrimination suffered or because their discrimination was seen as too specific to represent broader claims under class action law suits;⁶⁴ (b) *politically* because the voices and claims of black women are marginalized by conflicting political agendas of anti-racist and feminist movements.⁶⁵ To clarify the concept, Crenshaw uses the metaphor of a crossroads (intersection) where a car accident involving multiple cars coming from different directions has taken place. The ambulance arrives and for insurance reasons the doctors are instructed to only provide assistance to those injured where it is clear to identify by which car coming from which direction they had been hit. The cars are metaphorically speaking the different grounds of discrimination. While in certain cases the grounds of discrimination is clear, i.e. the doctor can provide assistance, black women are left behind because in their case it is unclear whether they were hit by sex or by race discrimination.⁶⁶ Thus, those that needed help the most, did not receive any.

Intersectionality has become quite a success story in Europe⁶⁷ discussed both in English language⁶⁸ and non-English language publications.⁶⁹ Its use

forced sterilizations on Romani women, are arguably classic examples of intersectional discrimination. See also the analysis of another judgment dealing with sexual and racial assault of a Nigerian woman in Spain: Yoshida, "Towards intersectionality in the European Court of Human Rights: The Case of *B.S. v. Spain*", 21 *Feminist Legal Studies* (2013), 195–204.

62. Crenshaw (1989), op. cit. *supra* note 2, and Crenshaw (1991), op. cit. *supra* note 2, 1241–1299.

63. *Civil Rights Act*, 78 Stat. 241 (1964).

64. Crenshaw (1989), op. cit. *supra* note 2, 141–150.

65. Indeed, she calls this "political intersectionality". Crenshaw (1991), op. cit. *supra* note 2, 1251–1282.

66. Crenshaw (1989), op. cit. *supra* note 2, 149.

67. Davis, "Intersectionality as buzzword: A sociology of science perspective on what makes a feminist theory successful", 9 *Feminist Theory* (2008), 70–77.

68. See e.g. the special volume dedicated to intersectionality 16 *Equal Rights Review* (2016), <www.equalrightstrust.org/ertdocumentbank/Equal%20Rights%20Review%20Volume%2016%20Intersectionality.pdf>; but also Solanke, "Putting race and gender together: A new approach to intersectionality", 72 *MLR* (2009), 723–749.

69. See e.g. Fassa, Lépinard and Roca i Escoda (Eds.), *L'Intersectionnalité: Enjeux Théoriques et Politiques* (La Dispute, 2016); Jaunait and Chauvin, "Les théories de l'intersectionnalité à l'épreuve des sciences sociales", 62 *Revue française des sciences politiques* (2012), 5–20; Smykalla and Vinz (Eds.), *Intersektionalität zwischen Gender und Diversity. Theorien, Methoden und Politiken der Chancengleichheit* (Dampfbrot Verlag, 2011); Markhard, "Die andere Frage stellen: Intersektionalität als Analysekategorie im Recht",

has also expanded to the EU law level for academic analyses of anti-discrimination law,⁷⁰ for institutionally driven and financed analyses of EU anti-discrimination law⁷¹ but also for the institutionalization of intersectionality.⁷² The ECJ had not previously been faced with the question of what intersectionality meant for EU anti-discrimination litigation.

Neither the Court nor Advocate General Kokott refer directly to the term itself. This might be because in EU law official literature,⁷³ “intersectionality” and “multiple discrimination” – or sometimes additive or cumulative discrimination – are sometimes used interchangeably. However, as this case shows, these terms are not completely synonymous. As to multiple discrimination or additive discrimination, a single person may experience discrimination on a number of different grounds of discrimination at different moments and for different reasons over a certain time lapse. For instance, a black woman in a wheelchair might be the victim of disability discrimination when she cannot access a building without any ramps. That same day, she might suffer race discrimination because someone insults her with a racial slur. And again that same day, she might find out that working as a part time worker she gets proportionately paid less than her full-time (predominantly) male colleagues, thus making her, at least under current ECJ case law, victim of the violation of the principle of equal pay and of indirect sex

42 *Kritische Justiz* (2009), 353–364; Bello, “Diritto e genere visti dal margine: Spunti per un dibattito sull’approccio intersezionale al diritto antidiscriminatorio in Italia”, 15 *Diritto & Questioni pubbliche* (2015), 141–171; Marchetti, “Intersezionalità. Pensare la differenza”, in Botti (Ed.), *Etiche della Diversità Culturale* (Le lettere, 2013), pp. 133–148.

70. See e.g. Schiek and Chege (Eds.), *European Union Non-Discrimination Law – Comparative Perspectives on Multidimensional Equality Law* (Routledge-Cavendish, 2009); Schiek and Lawson (Eds.) *European Non-Discrimination Law and Intersectionality: Investigating the Triangle of Racial, Gender and Disability Discrimination* (Routledge, 2011); Schiek, “Intersectionality and the notion of disability in EU discrimination law”, 53 *CML Rev.* (2016), 35–64.

71. See e.g. European Commission, *Intersectional Discrimination in EU Gender Equality and Non-Discrimination Law* (2016), <www.ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2016/07/Intersectional-discrimination-in-EU-gender-equality-and-non-discrimination-law.pdf>, and European Commission, *Tackling Multiple Discriminations – Practices, Policies and Law* (2007).

72. Kantola and Nousiainen (Eds.) “Institutionalizing intersectionality”, 11 *International Feminist Journal of Politics* (2009), Special issue No. 4; and Kriszan, Skjeie and Squires (Eds.) *Institutionalizing Intersectionality. The Changing Nature of European Equality Regimes* (Palgrave, 2012).

73. See e.g. Commission (2007), cited *supra* note 71, but also a report commissioned by the European Commission: Burri and Schiek (Eds.), *Multiple Discrimination in EU Law. Opportunities for Legal Responses to Intersectional Discrimination?* (2009), <www.ec.europa.eu/justice/gender-equality/files/multiplediscriminationfinal7september2009_en.pdf>.

discrimination.⁷⁴ Here, each of the grounds of discrimination can be more or less neatly distinguished and they add up or multiply.

With intersectionality instead it is not clear on which of the grounds the discrimination occurs. Let us assume that the same person does not get promoted at her job. It emerges that some at her workplace resented the accommodations made for her disability, that others did not like people of colour and that others again did not think that part-time workers should be promoted. What kind of discrimination claims can she bring? In this case a separation of the grounds is impossible because probably all occur at the same time and together, and they actually create a new and different form of discrimination altogether.

Parris is the first example at EU law level clearly demonstrating the difficulties intersectionality – and not multiple discrimination – poses to anti-discrimination law. In fact, the Court here understands the facts as multiple or additive discrimination. Age and sexual orientation discrimination are analysed separately; given that the Court found no discrimination on either ground separately, the sum of zero plus zero can only be zero. Intersectionality highlights precisely this shortcoming: we are not adding two separate things but we are establishing a different, compounded type of discrimination faced by Mr Parris, situated at the crossroads of age and sexual orientation discrimination. There is little difference with the example used by Crenshaw⁷⁵ in which black women's claims of race and sex discrimination failed because a federal district court held they needed to be brought separately.⁷⁶

Almost 40 years after the term was coined and the difficulty highlighted in literature and practice, the ECJ failed to see the issue. This is all the more surprising as in the past years, the ECJ has generally taken a relatively broad stance towards anti-discrimination law and effective protection against discrimination, by recognizing other forms of discrimination, such as discrimination by association⁷⁷ that are also not explicitly established in the text of anti-discrimination directives. Had the ECJ recognized intersectionality here in *Parris*, it would have meant that, in certain cases, intersectional discrimination is not a sum of single grounds of discrimination but can constitute its own form of discrimination. Simply because no discrimination on the grounds of age or sexual orientation could be found, should not have excluded the possibility that Mr Parris became victim of a different, combined form of discrimination where both grounds are

74. See e.g. Case C-170/84, *Bilka Kaufhaus*, EU:C:1986:204; Case C-33/89, *Kowalska*, EU:C:1990:265; Case C-285/02, *Elsner-Lakeberg*, EU:C:2004:320; Case C-300/06, *Vöb*, EU:C:2007:757.

75. Crenshaw (1989), op. cit. *supra* note 2, 141–143.

76. *De Graffenried v. General Motors*, 413 F. Supp. 142 (E.D. MO 1976).

77. Case C-303/06, *Coleman*, EU:C:2008:415; Case C-83/14, *CHEZ*, EU:C:2015:480.

inextricably linked. Moreover, as Advocate General Kokott's Opinion highlights, intersectionality might have some bearing on the way the Court conducts its proportionality analysis, in the sense that the defendant will have to bring more stringent justifications for the differential treatment.

Beyond the Court's failure to see intersectionality in *Parris*, a comparison between Advocate General Kokott's Opinion in *Parris* and her Opinion in *Achbita*⁷⁸ is revealing. The blind spot here is that one Opinion sees intersectionality so clearly in a case involving elderly gay men (*Parris*) but the other fails to see intersectionality in a case involving the dismissal of a Muslim woman wearing a headscarf at work in a private company (*Achbita*). In European academic literature, the headscarf – but also the full body veil – worn by some Muslim women has almost become the paradigmatic example of intersectionality analysis.⁷⁹ Arguably, these women face discrimination on grounds of sex, religion and race in intersectional ways. However, in *Achbita* Advocate General Kokott suggested to the ECJ that such a dismissal did not constitute indirect discrimination on the grounds of religion (under certain circumstances),⁸⁰ and the Court's Grand Chamber mainly followed her indications in its judgment⁸¹ – at the same time more or less implicitly rejecting Advocate General Sharpston's Opinion in a similar case,⁸² who had held, on the contrary, that such a dismissal would be directly discriminatory.⁸³

In Advocate General Kokott's defence, in *Achbita* the question of intersectional discrimination was not asked explicitly by the referring court. But her two Opinions lie only a month apart⁸⁴ and her Opinion in *Parris* demonstrates that she is familiar with the term and with the literature on intersectionality in Europe.⁸⁵ Moreover, the framing of the two Opinions is radically different. In *Parris*, Advocate General Kokott opts for an emotional opening by referring to words such as birthday, joy, celebration, pain and

78. Opinion of A.G. Kokott in Case C-157/15, *Achbita*, EU:C:2016:382.

79. See e.g. Vakulenko, "'Islamic headscarves' and the European Convention on Human Rights: An intersectional perspective", 16 *Social & Legal Studies* (2007), 183–199; Rottmann and Marx Ferree, "Citizenship and intersectionality: German feminist debates about headscarf and antidiscrimination laws", 15 *Social Politics* (2008), 481–513; Bilge, "Beyond subordination vs. resistance: An intersectional approach to the agency of veiled Muslim women", 31 *Journal of Intercultural Studies* (2010), 9–28; Baer, "Intersectional discrimination and fundamental rights in Germany", (2016) *Sociologia del diritto*, 65–86.

80. Opinion of A.G. Kokott in Case C-157/15, *Achbita*, para 141.

81. Case C-157/15, *Achbita*, EU:C:2017:203.

82. Opinion of A.G. Sharpston in Case C-188/15, *Bougnaoui*, EU:C:2016:553.

83. Nevertheless, in *Bougnaoui* the Court held that the customer's wishes could not serve as a justification for the company to dismiss the employee.

84. May and June 2016.

85. See Opinion, para 150, notes 76 and 77.

bitterness, thus inducing the reader to empathize with the plaintiff.⁸⁶ In *Achbita* instead, the words used are about unprecedented influx of migrants, toleration within borders and assimilation of minorities, which leaves much less space for empathy for the plaintiff and thereby also for intersectionality.⁸⁷

This selective reading of intersectionality exemplifies a trend that has been observed in the literature and that can now also be noted at the ECJ level, namely that of reading women of colour out of intersectionality, leading to what has been termed “white-washing of intersectionality”.⁸⁸ This happens firstly in terms of the literature that is referred to, where white feminists refer *en passant* to the founding work by women of colour but then mostly cite other white feminists.⁸⁹ Secondly, intersectionality as understood by “mainstream” feminist European literature has come to be interpreted as applying to an unlimited combination of grounds of discrimination. At this point everyone carries with her/him intersectional characteristics, even white, heterosexual men. So instead of revealing certain forms of discrimination that are rooted in historical and sociological power, privilege and representation differentials, the European form of intersectionality tends to hide them again. Put differently, intersectionality Europe-style forgets the synergy underlying intersectionality which is more than just adding different characteristics or grounds of discrimination.⁹⁰ As a result, those that were at heart of intersectionality, i.e. women of colour, are actually re-marginalized.⁹¹ Certainly, the ECJ and its advocates general have no control over the questions referred and cannot be held wholly responsible for having to answer the issue of intersectionality in *Parris* and for not raising the issue in its headscarf cases. But it is indicative of a trend observed in the literature and that now extends also to case law.

6. Conclusion

Ultimately, the ECJ’s judgment in *Parris* is disappointing both from a sexual orientation perspective and from an intersectionality perspective. For the former aspect, it runs counter to the trend of ECJ judgments that have been

86. Opinion, paras. 1–2.

87. Opinion in Case C-157/15, *Achbita*, paras. 2–3.

88. Bilge speaks about “*blanchiment de l’intersectionnalité*” in a recent piece: Bilge, “Plaidoyer pour une intersectionnalité non blanche” in Fassa, Lépinard and Roca i Escoda, op. cit. *supra* note 69, pp. 75–102.

89. *Ibid.*, pp. 91–94. This had already been noted in one of the founding pieces of critical race feminism: Harris, “Race and essentialism”, 42 *Stanford Law Review* (1990), 593.

90. See on this point Solanke, “Intersectionality in the UK: Between the american (*sic*) paradigm and the European paradox”, (2016) *Sociologia del diritto*, 112–113.

91. *Ibid.*, 113–115.

rather favourable to homosexual and/or same-sex partner plaintiffs from *Maruko* onwards. For the latter aspect, it is the failure to recognize intersectionality amongst the instruments of the EU anti-discrimination law toolkit which is problematic. The ECJ has come to be known for an expansive approach in this domain, e.g. by recognizing the concept of discrimination by association. Hence, this judgment represents something of a setback.

Parris is also rather “thin” as far as the distinction between direct and indirect discrimination is concerned. Indeed, in *Maruko* the ECJ had taken a more substantial approach by finding direct sexual orientation discrimination. In *Parris*, both Advocate General Kokott and the ECJ depart from this interpretation and provide a rather formalistic interpretation of discrimination, by “simply” looking at whether the statutory language is neutral with regard to a prohibited ground of discrimination and then characterizing it as indirect discrimination. Also, the *Parris* judgment adds little with regard to the applicability of Article 21 of the Charter which might become helpful in future cases dealing with sexual orientation discrimination and same-sex partnership.⁹² For such cases, Advocate General Kokott’s Opinion certainly provides the more interesting arguments and analyses, even though she also only mentions Article 21 of the Charter in passing.⁹³ Possibly this judgment is the proverbial exception that confirms the rule and in the future intersectionality will be recognized as part and parcel of the ECJ’s toolkit, as well as applied to those by and for whom the concept has been developed, namely those at the margins who are historically, sociologically and politically disadvantaged in terms of power, privilege and representation.

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92. See e.g. Case C-673/16, *Coman*, pending, request for a preliminary ruling lodged on 30 Dec. 2016.

93. Opinion, para 3.

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Directors' duties and liability in insolvency and the freedom of establishment of companies after *Kornhaas*

Case C-594/14, *Simona Kornhaas v. Thomas Dithmar*, Judgment of the Court of Justice (Sixth Chamber) of 10 December 2015, EU:C:2015:806

1. Introduction

The ruling in *Kornhaas* is significant for two reasons. First, and most obviously, it clarifies the application and interplay of EU and national laws concerning cross-border insolvencies. This is important, given the EU's persisting economic issues.¹ But its second significance is still more salient. *Kornhaas* authoritatively clarifies the degree to which freedom of establishment (under Arts. 49 and 54 TFEU) permits a host Member State to apply its own law to a pseudo-foreign company. By “pseudo-foreign company”, we refer to a company which primarily operates in that host Member State – that is, has its head office, principal place of business, or the centre of its main interests (“COMI”) there – but is established (incorporated) under the law of another Member State.

From the earlier judgments of the ECJ in *Centros*,² *Überseering*³ and *Inspire Art*,⁴ commentators and practitioners often inferred that pseudo-foreign companies' internal affairs must be governed exclusively by the law of the Member State of their incorporation. It followed that any

1. Whilst the EU's economic recovery is gaining momentum, the number of corporate insolvencies remains large (around 266 000 in 2016 and 2015). Further, it is as yet unclear how Brexit and the political course of the new US administration will affect the EU's economy, including insolvency: see Verband der Vereine Creditreform e.V., “Corporate insolvencies in Europe, 2016/17”, at 1, 2 and 19, available at <www.creditreform-bad-homburg.de/fileadmin/user_upload/crefo/download_de/news_termine/wirtschaftsforschung/insolvenzen-europa/analyse_EU-2016-17_englisch_international.pdf> (all websites last visited 18 Sept. 2017). 25% of EU insolvencies have a cross-border character, Commission Staff Working Document: Impact Assessment Accompanying the document Commission Recommendation on a New Approach to Business Failure and Insolvency, SWD(2014)61 final, point 3.1.

2. Case C-212/97, *Centros Ltd v. Erhvervs- og Selskabsstyrelsen*, EU:C:1999:126.

3. Case C-208/00, *Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC)*, EU:C:2002:632.

4. Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd*, EU:C:2003:512.

application of the host Member State's domestic company law, and even some rules of domestic insolvency law, to those companies constituted a restriction of their freedom of establishment under Articles 49 and 54 TFEU, and needed to be justified by overriding reasons in the public interest.⁵ *Kornhaas* shows that this inference was a mistaken and overly-broad interpretation of the ECJ's earlier rulings. There are certain circumstances in which the application of the host Member State's rules to a pseudo-foreign company's internal affairs does not constitute such a restriction. Whilst this clarification is welcome and highly significant, the way in which the ECJ defines these circumstances is, as will be shown, not wholly consistent with its broader case law on restrictions of the freedom of establishment.

2. Factual and legal background

Kornhaas concerned a pseudo-foreign company (hereafter "the company"). It was a private company limited by shares which, although incorporated and registered in the United Kingdom, had its COMI in Germany via a branch established in Jena. In 2006, the company became insolvent. Insolvency proceedings were launched in Germany, with Mr Dithmar appointed as the company's liquidator.

Mr Dithmar contended that the company had been insolvent since 1 November 2006 at the latest. Despite this, Ms Kornhaas, its managing director, had subsequently made payments borne by the company totalling € 110,151.66, between 11 December 2006 and 26 February 2007. Mr Dithmar sought reimbursement of that sum from Ms Kornhaas, relying on Paragraph 64(2) of the German Law on limited liability companies ("the GmbHG").⁶ The first sentence of this provision stipulates that "[t]he managing directors must reimburse the company with any payments which they made after the company became insolvent or after it was established that the company was over-indebted".

5. See e.g. Johnston and Syrpis, "Regulatory competition in European company law after *Cartesio*", 34 *EL Rev.* (2009), 378–404, at 385–386; Zimmer, annotation of Case C-167/01, *Inspire Art*, 41 *CML Rev.* (2004), 1127–1140, at 1134–1139; Pannen and Riedemann, "Article 4. Law applicable" in Pannen (Ed.), *European Insolvency Regulation: De Gruyter Commentaries on European Law* (De Gruyter Recht, 2007), pp. 211–212; Borg-Barthet, *The Governing Law of Companies in EU Law* (Hart Publishing, 2012), Ch. 5; Druta, *The Company Law in the European Dimension: Freedom of Establishment, Competition Between Jurisdiction, Protection of Creditors* (Diana Druta, 2014), p. 81; Jestädt, *Niederlassungsfreiheit und Gesellschaftskollisionsrecht* (Nomos, 2005), pp. 196 et seq. See also Judgment, para 12.

6. Gesetz betreffend die Gesellschaften mit beschränkter Haftung, RGBL. 1898, at 846.

In the decision on appeal to the Federal Court of Justice (“the FCJ”), that court found Mr Dithmar’s action well founded under German law. However, it was uncertain as to the relationship between Paragraph 64(2) GmbHG and EU law and its compatibility therewith. First, whilst Article 4(1) of Regulation 1346/2000⁷ provided that insolvency proceedings and their effects were governed by the law of the Member State in which such proceedings are opened, German commentaries and court rulings disagreed on whether the first sentence of Paragraph 64(2) GmbHG formed part of insolvency law within the meaning of that article. Only if it did would that German provision be enforceable against managing directors of pseudo-foreign companies, via Article 4(1) of the Regulation.

Second, although the FCJ considered that the first sentence of Paragraph 64(2) GmbHG did not interfere with freedom of establishment (and that any interference would be justified), it noted that the ECJ’s judgments in *Überseering* and *Inspire Art* might lead to the contrary view. In particular, those judgments could be interpreted as meaning that the internal affairs of pseudo-foreign companies should be governed by the law of the Member State of formation, so that the application of that provision to pseudo-companies’ managing directors may infringe freedom of establishment within the meaning of Articles 49 and 54 TFEU. Again, German commentaries and court rulings disagreed on this point.⁸

Consequently, the FCJ referred both doubts to the ECJ.

3. Judgment of the Court of Justice⁹

The ECJ began by confirming that the first sentence of Paragraph 64(2) GmbHG falls within the scope of Article 4(1) of Regulation 1346/2000 (now Art. 7(1) of Regulation 2015/848), thereby answering the first referred question.¹⁰

7. Council Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings, O.J. 2000, L 160/1. As of 26 June 2017, Regulation 1346/2000 was repealed and replaced by Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, O.J. 2015, L 14/19. Art. 4 of Regulation 1346/2000 is reproduced (without changes) in Art. 7 of Regulation 2015/848.

8. An extensive overview of the German literature and jurisprudence in this regard can be found in paras. 15–16 of the Resolution of the FCJ delivered on 2 Dec. 2014 (II ZR 119/14), which concerned the present case, see <juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?gericht=bgh&Art=en&nr=69832&pos=0&anz=1>.

9. The Judgment was issued without an Opinion from the A.G..

10. Judgment, paras. 14–21. The Court explained its stance by saying that the action provided for in the first sentence of para 64(2) GmbHG is “an action deriving directly from insolvency proceedings and closely connected with them” – see Judgment, para 16.

As to the second referred question, the ECJ began by recalling its earlier rulings on when the application of national law to pseudo-foreign companies amounted to restrictions on their freedom of establishment. *Überseering* established that the host Member State's refusal to recognize the legal capacity of a pseudo-foreign company amounted to such a restriction.¹¹ *Inspire Art* further established that national provisions concerning minimum capital requirements, as well as the penalties attached to non-compliance with those requirements (such as directors' personal joint and several liability where those minimum capital requirements were not met, whether upon establishment or during the company's subsequent existence), did too.¹²

The ECJ observed that the first sentence of Paragraph 64(2) of the GmbHG included neither of those restrictions.¹³ First, the legal capacity of the company in Germany was not called into question.¹⁴ Nor did the managing directors' personal liability under that provision relate to a failure to reach minimum capital amounts under German law or under the law of the Member State of establishment; instead, it arose from the managing directors' decision to make payments at a stage when, under Paragraph 64(1) GmbHG, they were obliged to apply for the opening of insolvency proceedings.¹⁵ To quote the Court's conclusion in full:

“In light of the above, the application of a provision of national law such as the first sentence of Paragraph 64(2) of the GmbHG in no way concerns the formation of a company in a given Member State or its subsequent establishment in another Member State, to the extent that that provision of national law is applicable only after that company has been formed, in connection with its business, and more specifically, either from the time when it must be considered, pursuant to the national law applicable under Article 4 of Regulation No 1346/2000, to be insolvent, or from the time when its over-debtedness is recognized in accordance with that national law. A provision of national law such as the first sentence of Paragraph 64(2) of the GmbHG does not, therefore, affect freedom of establishment.”¹⁶

11. Judgment, para 23, referring to Case C-208/00, *Überseering*, para 82.

12. Judgment, para 24, referring to Case C-167/01, *Inspire Art*, para 141.

13. Judgment, para 25.

14. Judgment, para 26.

15. Judgment, para 27.

16. Judgment, para 28.

4. Comment and analysis

As noted in the introduction above, this judgment is important for two reasons: for its consequences for cross-border insolvency proceedings, and for its wider implications for the freedom of establishment of companies. This case comment focuses on the second of these points.¹⁷ Below, the wider context of directors' duties and liability in and around insolvency under national laws is set out (section 4.1); thereafter an analysis is given of how such laws interact with freedom of establishment post-*Kornhaas*, showing that whilst *Kornhaas* is consistent with (and develops) the existing case law on freedom of establishment of companies, it is in tension with the broader case law on freedom of establishment (section 4.2); finally the wider consequences of *Kornhaas* for the law of freedom of establishment of companies are outlined (section 4.3).

4.1. Context: duties and liability of directors in and around insolvency under national laws

Paragraph 64 GmbHG is not unique. On the contrary, all Member States have laws governing the duties and liability of companies' directors in and around insolvency, and these laws are neither harmonized nor uniform. The compatibility of such laws with Articles 49 and 54 TFEU is thus important to all Member States.

In most Member States, managing directors of companies are legally obliged to file for insolvency proceedings within a specified time period following certain events concerning the company (such as illiquidity or over-indebtedness; cessation or suspension of payment of debts; inability to pay its debts when they fall due; or where the directors knew or should have known about an inability to regularly fulfil obligations). In those Member States, failure to comply with these obligations gives rise to liability in private law. This usually involves the directors' personal liability to creditors for such loss of company assets or funds as resulted from the failure to file for

17. With respect to the first point, the judgment provides guidance on how to establish whether a given issue is covered by the term "insolvency proceedings and their effects" under Art. 4 of Regulation 1346/2000 (now Art. 7 of Regulation 2015/848), thereby falling within the national *lex fori concursus*. To do so, one should apply the systematic (contextual), literal, and teleological interpretations of the relevant EU and national rules: see paras. 14–21 of the judgment. Detailed consideration of this point is, however, beyond the scope of the present case comment.

insolvency within the required time.¹⁸ In other Member States (namely the UK, Ireland, Malta, Hungary and Netherlands), there is no duty on directors to file for the opening of insolvency proceedings; instead, when a company is insolvent or close to insolvency, directors must modify their actions so as to protect the interests of creditors and minimize the latter's potential losses.¹⁹ If the directors fail to comply with this duty, then they can be held personally liable under the doctrines of "wrongful trading" or "reckless trading".²⁰

Under the law of most Member States, once a company enters liquidation or bankruptcy proceedings, the directors either lose office, or their powers largely cease. The directors' duties also cease, because their functions are passed to the insolvency practitioner (liquidator). On the other hand, where a company enters restructuring or reorganization proceedings, the directors will often keep their offices and will remain subject to certain duties. However, the directors' duties are usually confined to not acting in such a way as to prejudice the creditors' interests or inhibit the work of the insolvency practitioner during the restructuring process.²¹

Almost all Member States have procedures for the disqualification of any former directors of insolvent companies who breached their insolvency-related duties. However, there are significant differences between Member States as to both the procedures and their legal effect.²²

In sum, it is clear that the duties and liability of managing directors of companies in and around insolvency under Member States' laws are diverse. Nor are they harmonized at the EU level.²³ Unsurprisingly, therefore, the

18. McCormack, Keay and Brown, *European Insolvency Law: Reform and Harmonization* (Edward Elgar, 2017), pp. 27 et seq., which provides an overview of the relevant national provisions in individual Member States.

19. Gerner-Beuerle and Schuster, "The evolving structure of directors' duties in Europe", 15 *EBOR* (2014), 191-233, at 224 et seq.; Keay, "The shifting of directors' duties in the vicinity of insolvency" 24 *International Insolvency Review* (2015), 140-164.

20. See e.g. Tolmie, *Corporate and Personal Insolvency Law* (Cavendish, 2003), pp. 365 et seq.; Keay, *Company Directors' Responsibilities to Creditors* (Routledge-Cavendish, 2007), pp. 73 et seq.; McCormack, Keay and Brown, op. cit. *supra* note 18, pp. 37-39.

21. McCormack, Keay, Brown and Dahlgreen, "Study on a new approach to business failure and insolvency: Comparative legal analysis of the Member States' relevant provisions and practices", commissioned by the European Commission, 2016, at 57, available at: <ec.europa.eu/justice/civil/files/insolvency/insolvency_study_2016_final_en.pdf>.

22. McCormack, Keay and Brown, op. cit. *supra* note 18, pp. 51-61.

23. In March 2016, the Commission published its Inception Impact Assessment – Initiative on insolvency (DG JUST (A1), 2016/JUST/025 – Insolvency II), which considers the adoption of a minimum harmonization directive focusing on specific aspects of insolvency. The document suggests that this directive could include, *inter alia*, common minimum rules for directors' duties and liabilities in anticipation of insolvency, as well as their disqualification due to breach of those duties. Such harmonization is, however, a remote possibility at present – as the Commission itself admits.

compatibility of such laws with companies' freedom of establishment may – in certain situations – give rise to issues.

4.2. *National rules on duties and liability of directors in and around insolvency are, in certain circumstances, outside the concept of restrictions under Articles 49 and 54 TFEU*

Following *Centros*, *Überseering* and *Inspire Art*, it was widely thought that a pseudo-foreign company had a right, as part of its freedom of establishment, for *all* of its internal affairs to be governed by the law of the Member State of its incorporation. This included the actions and liability of its directors in and around insolvency. Consequently, the application of the host Member State's company law (and also some parts of insolvency law, especially those closely linked with company law) to such a pseudo-foreign company would constitute a restriction on its freedom of establishment that would need to be justified by overriding reasons in the public interest.²⁴ The fact that since *Inspire Art* no further case has been brought to the ECJ to test the legitimacy of host Member State company law applying to pseudo-foreign companies even leads some authors to conclude that Member States do not try, or do not manage, to impose and/or enforce meaningful domestic corporate law rules on such companies.²⁵ In other words, the very absence of further ECJ case law could be interpreted as meaning that Member States felt obliged by the *Centros* line of cases to respect the law of the Member State in which a pseudo-foreign company was incorporated.

However, that widely-held view was simplistic. One could easily imagine an interpretation that would be less favourable for companies. *Kornhaas* gave the Court an opportunity to revisit the aforementioned widely-held view.

Before setting out how *Kornhaas* revisited this, it is important to make one preliminary point. *Kornhaas* clarifies that although provisions of national insolvency law fall to be applied, as part of the *lex fori concursus*, under Article 4(1) of Regulation 1346/2000 (now Art. 7(1) of Regulation 2015/848), they can nevertheless – at least potentially – constitute restrictions on the freedom of establishment.

Although the ECJ did not state this explicitly, it is implicit in the Court's approach. Having confirmed that the first sentence of Paragraph 64(2) GmbHG fell within Article 4(1) of Regulation 1346/2000 and could therefore be applied to a pseudo-foreign company as the *lex fori concursus* (the first referred question), the ECJ went on to verify whether the application of that

24. See *supra* note 5.

25. Enriques, "A harmonized European company law: Are we there already?", 66 ICLQ (2017), at 775; an earlier draft is also available at <ssrn.com/abstract=2913723>.

national provision constituted a restriction on the freedom of establishment (the second referred question). Tellingly, then, the ECJ did not conclude that the second referred question required no answer given the answer to the first question. This implies that national provisions of insolvency law applied via Regulation 1346/2000 (now Regulation 2015/848) can, in some circumstances, constitute a restriction on freedom of establishment of companies.

This is important. Before *Kornhaas*, some commentators claimed that provisions of national insolvency law applied on the basis of Article 4(1) of Regulation 1346/2000 were, *by definition*, compatible with Articles 49 and 54 TFEU.²⁶ This view was wrong, as *Kornhaas* has confirmed. It is true that the ECJ has previously found that national law which imposes obligations on companies and properly implements EU secondary law,²⁷ or promotes the aims mandated by EU secondary law,²⁸ does not constitute a restriction on the freedom of establishment or freedom to provide services. Critically, however, that case law concerned *substantive* EU secondary law, not – as in Article 4(1) of Regulation 1346/2000’s case – conflict of laws rules. The distinction is crucial. Whilst it is reasonable to argue that national provisions properly implementing substantive EU secondary legislation are by definition compatible with freedom of establishment,²⁹ the same is not true of national rules that are merely *referred to* by conflict of law rules provided for in EU secondary law, but which do not themselves *implement* that EU law. If there were an irrebuttable presumption that all provisions of a national law falling within Article 4(1) of Regulation 1346/2000 or Article 7(1) of Regulation 2015/848 (or any other conflict of law rule under EU secondary law) are compatible with EU primary law, this would leave Member States free to shape their national insolvency law in a manner contrary to that primary law.

Having made this preliminary point, we can turn to how *Kornhaas* overturns the widely-held view noted above (that a pseudo-foreign company’s internal affairs cannot be governed by the host Member State’s law, since this would restrict freedom of establishment). Contrary to what that view would predict, the Court held that the first sentence of Paragraph 64(2) GmbHG does

26. Pannen and Riedemann, *op. cit. supra* note 5, 229–230; Ringe and Willemer, “Zur Anwendung von § 64 GmbHG auf eine englische Limited”, 13 *Neue Zeitschrift für Gesellschaftsrecht* (2010), 56, at 57.

27. Case C-167/01, *Inspire Art*, paras. 56–58; Case C-475/12, *UPC DTH Sàrl v. Nemzeti Média- és Hírközlési Hatóság Elnöksége*, EU:C:2014:285, paras. 96–100.

28. Case C-148/10, *DHL International NV, formerly Express Line NV v. Belgisch Instituut voor Postdiensten en Telecommunicatie*, EU:C:2011:654, paras. 38–52 and 60–64.

29. Because it is the EU legislature which must ensure the compatibility of its secondary law with EU primary law: see e.g. Mortelmans, “The relationship between the Treaty rules and Community measures for the establishment and functioning of the Internal Market: Towards a concordance rule”, 39 *CML Rev.* (2002), 1303–1346.

not constitute a restriction on the freedom of establishment under Articles 49 and 54 TFEU.³⁰

The basis of this conclusion was *not* its earlier finding that this German provision was part of insolvency law rather than company law: the formal classification of national law (as insolvency law, company law or any other substantive or procedural law) is immaterial to the question of whether that law restricts freedom of establishment. Rather, the basis was that this (non-discriminatory) provision applied to the company only after it had been formed, in connection with its ongoing business. In other words, the provision was not applied at the stage of, or in connection with, the company's incorporation in England and Wales (or in any other Member State), or its subsequent establishment in Germany.³¹

In this way, the Court's reasoning relies on a clear – but, as we shall see, problematic – distinction. One can infer from *Kornhaas* that where a host Member State's national law imposes obligations *concerning the formation or the establishment of pseudo-foreign companies* (as regards their organization, capital, and so on) or provides for directors' liability for violation of such obligations, this should be treated as a restriction on freedom of establishment. This is because such rules force pseudo-foreign companies, which are otherwise willing to enter the host Member State's market, to adapt to those national requirements, something that undoubtedly restricts their freedom of establishment. The two specific examples of restrictions already recognized in *Überseering* and *Inspire Art* both fall into this category.³² To understand the distinction between such rules and the rules at issue in *Kornhaas*, we need to look more closely at *Inspire Art* and *Kornhaas*.

In this regard, there are crucial differences between the laws at issue in *Inspire Art* (which constituted restrictions on freedom of establishment) and those in *Kornhaas* (which did not), even though both cases concerned the national rules on personal liability of pseudo-foreign companies' directors. In *Inspire Art*, that personal liability arose from the pseudo-foreign company's failure to comply with obligations necessary to establish itself in the host Member State (and which had to be continuously satisfied during the company's lifetime) – not with obligations that were imposed on a company

30. Judgment, paras. 22–29.

31. Judgment, para 28, quoted *supra* in section 3.

32. That is, rules concerning recognition of pseudo-foreign companies' legal capacity and directors' liability for a pseudo-foreign company's failure to reach national minimum capital requirements. Whilst paras. 23–27 of the Judgment could be read as suggesting that these examples are *exhaustive*, i.e. are the only circumstances in which such rules can restrict companies' freedom of establishment, para 28 makes clear that they are not – instead, they reflect this underlying distinction.

only when it conducted its activity in the host Member State.³³ By contrast, in *Kornhaas* the personal liability arose from irregularities occurring during the company's ongoing business activities, not from failures to comply with obligations on a pseudo-foreign company establishing itself or setting up its activities in the host State. Notably, this distinction between national rules regulating the conduct of company's activities in the host State (which do not constitute restrictions under Arts. 49 and 54 TFEU) and national rules concerned with establishing or setting up a company's activities in the host State (which do) had already been introduced by the ECJ in *Inspire Art*,³⁴ a point which most commentators failed to notice. In *Kornhaas*' explanation of why the first sentence of Paragraph 64(2) GmbHG does not restrict freedom of establishment, the ECJ brings out this distinction yet more clearly.³⁵

However, this distinction between rules regulating initial establishment and rules regulating ongoing conduct after initial establishment, introduced in *Inspire Art* and underlined in *Kornhaas*, amounts, for all its clarity, to a highly formalistic and rigid criterion for defining restrictions within the meaning of Articles 49 and 54 TFEU.³⁶ This rigid distinction differs markedly from the more market and economy-oriented criteria developed by the ECJ in its broader case law on restrictions on the freedom of establishment, especially in recent years. This broader case law holds that national rules affecting access to the market for other Member States' undertakings *can* restrict freedom of establishment, in particular where such rules: increase the economic risks for such undertakings, and force them to re-think their business policy and

33. "So far as *Inspire Art* is concerned, the issue is *not regulation of the conduct of its activities* in the Netherlands but whether or not the rules of Netherlands company law, such as those on minimum capital, must be observed *on setting up a secondary establishment* in the Netherlands." (Case 167/01, *Inspire Art*, para 121, emphasis added). "To the extent that the provisions concerning minimum capital are incompatible with freedom of establishment, as guaranteed by the Treaty, the same must necessarily be true of the penalties attached to non-compliance with those obligations, that is to say, the personal joint and several liability of directors where the amount of capital does not reach the minimum provided for by the national legislation or where during the company's activities it falls below that amount." (Case 167/01, *Inspire Art*, para 141).

34. See Case 167/01, *Inspire Art*, paras. 121 and 141.

35. Judgment, para 28.

36. Such a formal distinction between the rules regulating the *taking up* of the economic activity in the host Member State (which should be treated as restrictions on freedom of establishment) and the rules on the *exercising* of economic activity (which should not) had previously been proposed by more than one A.G.. See the Opinion of A.G. Lenz in Case C-415/93, *Bosman*, EU:C:1995:293, paras. 205, 206 and 210 and the Opinion of A.G. Fennelly in Case C-190/98, *Völker Graf v. Filzmoser Maschinenbau GmbH*, EU:C:1999:423, paras. 24–33. Some authors claim that the distinction adopted by the ECJ in *Kornhaas* closely resembles the application of the *Keck* formula, which was developed in the context of free movement of goods: Ringe, "*Kornhaas* and the challenge of applying *Keck* in establishment", 42 EL Rev. (2017), 270 et seq.

strategy;³⁷ require such undertakings to obtain prior authorization or subject them to other formal restrictions or limits;³⁸ subject such undertakings to obligations that are in fact more advantageous to operators who are already present on the host Member State's market;³⁹ entail significant additional costs for such undertakings, especially necessitating changes in their organizational arrangements or investments, thereby reducing their ability to compete effectively in the host Member State;⁴⁰ deprive such undertakings of certain means of effective competition in the host State;⁴¹ or make it impossible for such undertakings to participate in the host Member State's market under conditions of normal and effective competition.⁴² In the case of all of those restricting national rules, it is immaterial whether they are applied at the stage of taking up or exercising of an economic activity.⁴³

Interestingly, if the ECJ had applied the economy and market-oriented criteria from its broader case law to *Kornhaas*, it would have reached the same result. The first sentence of Article 64(2) GmbHG is entirely non-discriminatory; it does not force pseudo-foreign companies or their managing directors to make any additional organizational arrangements or investments; it does not deter them from entering the German market; and it does not deprive them of any means of effective competition in the host Member State. Further, it will never be applied to the great majority of pseudo-foreign companies, insofar as those companies are not subject to insolvency proceedings opened in Germany. Still further, the managing directors' personal liability under this German provision depends upon those directors' own behaviour (i.e. on whether or not they act honestly and providently). This normative model of liability is incomparably less restrictive than national rules making directors or shareholders liable for states of affairs that they cannot influence or prevent.⁴⁴ It is argued that the Court should not

37. Case C-577/11, *DKV Belgium SA v. Association belge des consommateurs Test-Achats ASBL*, EU:C:2013:146, paras. 33–37.

38. Case C-400/08, *Commission v. Spain*, EU:C:2011:172, paras. 64–70.

39. Case C-384/08, *Attanasio Group Srl v. Comune di Carbognano*, EU:C:2010:133, paras. 44–45.

40. Case C-518/06, *Commission v. Italy*, EU:C:2009:270, paras. 64–71.

41. Case C-442/02, *Caixa-Bank France v. Ministère de l'Économie, des Finances et de l'Industrie*, EU:C:2004:586, paras. 12–14.

42. Case C-565/08, *Commission v. Italy*, EU:C:2011:188, paras. 50–51.

43. On the ECJ's concept of market access see e.g. Snell, "The notion of market access: A concept or a slogan?", 47 *CML Rev.* (2010), 437–472; de Boer, "Fundamental rights and the EU Internal Market: Just how fundamental are the EU Treaty freedoms? A normative enquiry based on John Rawls' political philosophy", 9 *Utrecht Law Review* (2013), 148–168, at 164–166; Spaventa, "From *Gebhard* to *Carpenter*: Towards a (non-)economic European Constitution", 41 *CML Rev.* (2004), 743–773, at 757 et seq.

44. One example of the latter form of rules can be found in Case C-81/09, *Idrima Tipou v. Iporgos Tipou kai Meson Mazikis Enimerosis*, EU:C:2010:622, paras. 54–60. There, Greek

have hesitated in *Kornhaas*, and should not hesitate in future cases concerning the freedom of establishment of companies, to apply the standards of its ordinary case law on restrictions of the freedom of establishment.

4.3. *Further implications of Kornhaas for the freedom of establishment of companies*

After *Kornhaas*, it is clear that – in the Court’s eyes – freedom of establishment of companies is not restricted by national laws which make pseudo-foreign companies’ directors personally liable for the company’s actions in the course of economic activity, provided that the company in question has already been established in the host Member State. This is so in two cases.

First, laws concerning directors’ liability for actions in or around a company’s insolvency. Such laws do not restrict freedom of establishment, irrespective of whether or not formal insolvency proceedings have been opened in the host State (thereby activating Regulation 2015/848 which, as noted, replaced Regulation 1346/2000 as of 26 June 2017). This includes, for instance, directors’ liability for failing to apply for the opening of insolvency proceedings within the prescribed time limits and their liability for making prohibited payments on behalf of an insolvent company.

Second, and more broadly, laws concerning directors’ liability for other actions, as long as these are not linked to the initial establishment in the host Member State. This includes the directors’ liability for violations of company law (e.g. a director’s unlawful acts, without apparent authority, in excess of his or her actual authority; directors’ actions causing damage to the company, its shareholders or creditors), contract law (e.g. liability for breaching contractual obligations), tort law, consumer law, competition law, and so on. None of these examples constitutes a restriction on freedom of establishment, despite being incurred on the basis of the host Member State’s national law.

Freedom of establishment is only restricted when national law holds pseudo-companies’ directors personally liable for their company’s failure to comply with the host State’s rules concerning the setting up of the company’s establishment (including COMI) and requiring it to adapt to particular rules of the host State’s company law (as regards its internal organization, capital, etc.).

law allowed the shareholders of a public limited company in the television sector to be held personally liable for certain fines (namely fines the company incurred for infringing rules on private television stations and private television’s operation). The ECJ held that this law restricted freedom of establishment, because the Greek legislation governing public limited companies’ operation gave shareholders no power to supervise whether or not the company was complying with the relevant Greek rules.

How far can we apply the clear distinction in *Kornhaas* beyond the narrow issue of managing directors' liability? It is argued that the question of whether the application of a host State's national law to a pseudo-foreign company restricts freedom of establishment must be answered on a case-by-case basis. In each case, we must ask what that host State's law specifically requires from the company itself, its shareholders or directors, and what the practical consequences of this are. If the host State's law makes it necessary to reorganize the pseudo-foreign company and adapt it to the host State's rules (as regards its internal organization, capital, etc.), failing which it will be denied access to the host State's market, then this law restricts freedom of establishment and must be justified. If, conversely, the relevant host State law is non-discriminatory and simply requires the pseudo-foreign company to adapt to rules that only concern the conduct of company's activities in the host State (including the regulation of the company's directors' conduct), and is applied only after the pseudo-foreign company has been successfully established in the host Member State, then it does not restrict freedom of establishment under Articles 49 and 54 TFEU.

Immediately after *Kornhaas*, some commentators claimed that it signalled a departure from the *Centros*, *Überseering* and *Inspire Art* line of case law.⁴⁵ These views were incorrect. In *Kornhaas*, the ECJ in fact confirmed that case law, simply making it clear that pseudo-foreign companies' rights in their host Member State are narrower than some had previously thought. Nevertheless, there remains a clear tension between the concept of restrictions on the freedom of establishment as elaborated with regard to pseudo-foreign companies (*Inspire Art*, *Kornhaas*), and the concept of restrictions on the freedom of establishment as elaborated in the Court's broader case law. *Kornhaas* has not resolved that tension.

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45. See Enriques, op. cit. *supra* note 25, at 775, footnote 50.

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**Rights, remedies and effective enforcement in air transportation:
*Ruijsenaars***

Joined Cases C-145/15 and C-146/15, *K. Ruijsenaars and Others v. Staatssecretaris van Infrastructuur en Milieu*, Judgment of the Court (Eighth Chamber) of 17 March 2016, EU:C:2016:187

1. Introduction

Passengers have a right to compensation if their flights are cancelled at short notice or significantly delayed. If an airline refuses to pay the compensation, passengers may bring an action before a civil court. In *Ruijsenaars* the Court had to address whether Regulation 261/2004¹ provides for an additional remedy, that is, whether administrative enforcement actions are required in each individual case in which an airline company infringes a passenger's right to compensation. The Court denied that the Regulation contained any such obligation on Member States or any corresponding remedy for the benefit of passengers.

The judgment has not caught the headlines and appears to be largely uncontroversial. It merits closer attention, however, as it touches upon concepts that are crucial to EU law: on the one hand, for example, the procedural autonomy of Member States and the conditions of an effective protection of rights conferred by EU law, and, on the other hand, the requirement of “effective, proportionate and dissuasive” sanctioning of EU law infringements. In particular, the Advocate General's plea for a restriction of the intensity of administrative enforcement in order to avoid parallel proceedings gives cause to dwell on the interrelation between private and public enforcement. Remarkably, none of these issues are explicitly discussed in the *Ruijsenaars* judgment by the ECJ, whose reasoning is rather sparse, even when measured against its usual practices.

1. Regulation (EC) 261/2004 of the European Parliament and of the Council of 11 Feb. 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) 295/91, O.J. 2004, L 46/1.

2. Factual and legal background

Following Royal Air Maroc's cancellation of a flight from Amsterdam to Casablanca, and a 26-hour delay of a KLM flight from Curaçao to Amsterdam, the Air Maroc passengers Ruijssenaars and Jansen and the KLM passenger Dees-Erf claimed compensation as provided for in Article 5(1)(c) and Article 7 of Regulation 261/2004. As both airline companies refused to pay, the passengers complained to the Dutch Secretary of State for Infrastructure and the Environment and requested enforcement actions. The Secretary of State rejected the requests. Consequently, the passengers brought actions against this decision. After district courts in Oost-Brabant and The Hague dismissed their respective actions, the passengers appealed to the Raad van State (Council of State).

The Raad van State assumed that the Secretary of State had authority to take action against an airline company only in cases of systematic infringements of the airline's obligations laid down in Regulation 261/2004. The Dutch court maintained that under the Dutch Law of Aviation, coercive measures by the Secretary of State are not foreseen in the event that an airline merely refuses to pay compensation to individual passengers. In the court's view, passengers' rights to compensation are sufficiently protected through the civil law system. The court stressed that passengers can invoke those rights directly before the national courts. Furthermore, the Raad van State argued that the possibility of parallel proceedings before administrative courts to review decisions by the Secretary of State and before the civil courts could undermine the division of judicial functions in the Netherlands. For these reasons, the Raad van State doubted whether the Secretary of State was permitted to take enforcement actions based on individual complaints by passengers. However, as the court considered it possible that EU law might in fact require public enforcement actions even in the event of individual infringements of passengers' rights to compensation, it stayed the proceedings in both cases and referred the following (identical) question to the ECJ: "Given that Netherlands law provides access to the civil courts to protect the rights which passengers may derive under EU law from Article 5(1)(c) and Article 7 of Regulation 261/2004, does Article 16 of the Regulation oblige the national authorities to take implementing measures which form the basis for administrative enforcement action through the bodies designated under Article 16 separately in each individual case in which Article 5(1)(c) and Article 7 of the Regulation are infringed, in order to be able to guarantee a passenger's right to compensation separately in each individual case?"

3. Opinion of Advocate General Yves Bot

In his Opinion, delivered on 14 January 2016, Advocate General Bot answered the referred question in the negative. He explained this essentially in three steps.

First, considering the wording of Article 16 and Recital 22 of Regulation 261/2004, the Advocate General argued that the enforcement body in the meaning of Article 16(1) of Regulation 261/2004 only needs to ensure general compliance with the Regulation by air carriers. Therefore, the enforcement body's competence is restricted to an enforcement of the Regulation in the collective interest of passengers. It has not been assigned the protection of passengers' rights in every single case.²

Second, the Advocate General maintained that this view is supported by the correct interpretation of Article 16(2) of Regulation 261/2004. He argued that Member States have "some latitude" regarding the competences they confer upon the national body which is responsible for handling complaints by passengers (which sometimes acts simultaneously as an enforcement body). This body might act either as a mediator, seeking to foster out-of-court settlements between airline companies and passengers, or as an information intermediary, working to ensure that passengers are aware of their rights and know how to exercise them.³ In any case, no duty to enforce passengers' rights in each individual case could be deduced from this provision.

Third, since passengers may bring private actions, such a restrictive interpretation of Article 16(1) and (2) of Regulation 261/2004 did not, in the Advocate General's view, jeopardize the Regulation's aim to ensure a high level of protection of passengers. The Advocate General stressed that simplified procedures for small claims as foreseen by national law and as provided for by Regulation (EC) 861/2007 with regard to cross-border disputes ensure a sufficiently low threshold for access to the civil justice system.⁴

These arguments comprehensibly substantiated the Advocate General's introductory statement, whereby Article 16 of Regulation 261/2004 did not "require" the authorities responsible for enforcing the air carrier's obligations, and/or to which individual complaints by passengers, are to be referred, to take enforcement actions against airline companies that contravene Article 5(1)(c) and Article 7 of the Regulation by refusing to pay compensation.⁵ Remarkably, in his final conclusion the Advocate General did not confine

2. Opinion, paras. 24–29.

3. *Ibid.*, paras. 31 et seq.

4. *Ibid.*, paras. 34–37.

5. *Ibid.*, para 17.

himself to repeating this statement (which fully answered the referred question) but stipulated furthermore that national bodies “cannot”⁶ or “may not”⁷ take such enforcement actions. Was the Advocate General here really trying to say that Article 16 of the Regulation prohibits Member States from allowing their respective enforcement bodies to treat individual infringements of passenger rights to compensation as a cause for sanctions? The considerations submitted prior to that statement certainly support such a reading. The Advocate General argued that where a public enforcement of individual rights of passengers might occur in parallel with proceedings before civil courts, this “would inevitably lead to differences of interpretation of EU law, which would give rise to legal uncertainty for passengers”.⁸

4. Judgment of the Court

The ECJ held that a body pursuant to Article 16(1) of Regulation 261/2004, to which an individual complaint has been made by a passenger, is not required to take enforcement action against an airline company to compel it to pay compensation as provided for in Articles 5(1)(c) and 7(1) of the Regulation. Viewed against the background of the Opinion delivered by the Advocate General, this answer to the Raad van State conveys one explicit and one implicit message: while Article 16 of the Regulation does not demand Member States to provide a mechanism of administrative enforcement that will respond to each individual request by a passenger, the Regulation does not bar such an enforcement mechanism either.

In order to substantiate the first part of this ruling, the Court joined the arguments put forward by the Advocate General and referred to the wording of Article 16(1) of Regulation 261/2004 and its Recital 22.⁹ Furthermore, the Court maintained that the second and third paragraphs of Article 16 of the Regulation must be read as specifying the obligations that accompany the enforcement task entrusted to the body referred to in Article 16(1). Starting from this, the Court argued that the national enforcement body must only hear complaints, and consider these as “alert signals” regarding general compliance with the Regulation; it is not required to enforce each individual passenger’s right to obtain compensation. Thus, in the Court’s view, the term “sanction” as employed in Article 16(3) of the Regulation must be understood as referring to enforcement measures “in the course of general monitoring

6. *Ibid.*, para 41.

7. *Ibid.*, para 42.

8. *Ibid.*, para 39.

9. Judgment, para 29.

activities”, not to administrative enforcement action in the interest of each individual passenger.¹⁰ Last, the ECJ emphasized that passengers may directly rely on the provisions of the Regulation before national courts, and thus enjoy effective judicial protection.¹¹

In addition, the ECJ considered the possibility of an inconsistent application of the Regulation due to parallel proceedings being pursued before civil courts on the one hand and by public enforcement authorities on the other. The Court took it as a confirmation of its view that such inconsistency can be avoided through a restrictive interpretation of Article 16 of the Regulation, and that Article 16(1) and Recital 22 of the Regulation support differentiated roles of the civil courts and the authorities responsible for enforcement.¹² However, the ECJ went on to stress that Member States enjoy discretion when it comes to the question of the competences they may invest in the bodies responsible for enforcement, as mentioned in Article 16(1) of the Regulation. In contrast to the conclusion drawn by the Advocate General, the ECJ held that Member States may indeed empower these national bodies “to adopt measures in response to individual complaints” if they consider this appropriate to “remedy inadequate protection” for airline passengers.

5. Comment

5.1. *Putting the preliminary reference in perspective*

Ruijsenaars is of course not the first case where the ECJ has been asked to address whether a national enforcement authority has an obligation to act on the request and on behalf of individuals affected by an infringement. In *Peter Paul*,¹³ the Court denied that a depositor may claim a right to appropriate supervisory measures in his interest under the First¹⁴ and Second¹⁵ Banking Directives and the Own Funds Directive.¹⁶ What distinguishes the case at

10. Ibid., paras. 30–32.

11. Ibid., para 37.

12. Ibid., paras. 34 et seq.

13. Case C-222/02, *Peter Paul and others v. Bundesrepublik Deutschland*, EU:C:2004:606, paras. 40–47.

14. First Council Directive 77/780/EEC of 12 Dec. 1977 on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions, O.J. 1977, L 322/30.

15. Second Council Directive 89/646/EEC of 15 Dec. 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC, O.J. 1989, L 386/1.

16. Council Directive 89/299/EEC of 17 Apr. 1989 on the own funds of credit institutions, O.J. 1989, L 124/16.

hand, however, is that Article 5(1)(c) and Article 7 of Regulation 261/2004 confer upon passengers a right to claim compensation from an airline company which can be enforced through an action brought before the civil courts. Thus, as rightly observed both by the Advocate General and the Court, the crucial question in *Ruijsenaars* was whether an effective protection of passengers' rights requires an *additional* remedy, according to which the competent national authorities must take enforcement action in response to an individual request by a passenger to whom an airline company has denied the payment of compensation.

Regarding the issue of the required intensity of administrative enforcement, *Ruijsenaars* bears a close resemblance, for instance, to the ECJ's judgment in the *Parmesan Cheese* case.¹⁷ Here, infringement proceedings were brought by the Commission on the ground that, *inter alia*, Germany did not meet the required level of administrative enforcement with regard to the rules on designations of origin. While it was not disputed that economic operators could bring legal proceedings if their exclusive right to use a protected designation of origin had been infringed, the Commission argued that the objectives of Regulation 2081/92¹⁸ – in particular the protection of consumers – could only be achieved if the national authorities were under an obligation to take administrative action on their own initiative against infringements of rules protecting designations of origin.¹⁹ The Court disagreed. It held that by granting civil law remedies not only to the holders and legitimate users of a protected designation of origin but also to competitors (of infringers), business associations and consumer organizations, Germany had taken the necessary measures to guarantee an adequate level of enforcement.²⁰ *Ruijsenaars* is in line with this judgment as the Court accepted in both cases that an effective enforcement may be ensured by private rights of action, and thus does not necessarily require an obligation imposed on public authorities to take up any infringement they become aware of.

5.2. Wording and context of Article 16 of Regulation 261/2004

Article 16(1) of Regulation 261/2004 does not contain any detailed requirement with regard to administrative enforcement but leaves

17. Case C-132/05, *Commission v. Germany (Parmesan Cheese)*, EU:C:2008:117. Note, however, that this case did not involve the issue of a subjective right *vis-à-vis* public authorities.

18. Council Regulation (EEC) 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, O.J. 1992, L 208/1.

19. Case C-132/05, *Commission v. Germany (Parmesan Cheese)*, EU:C:2008:117, paras. 58–61.

20. *Ibid.*, paras. 69–81.

considerable discretion to the competent enforcement authorities: “Where appropriate, this body shall take the measure necessary to ensure that the rights of passengers are respected.” It is precisely with a view to Regulation 261/2004 that the ECJ had already emphasized the important role that recitals should play in interpreting the operative part of an EU act of legislation.²¹ Therefore, both the Advocate General and the Court rightly relied on Recital 22, according to which it is the enforcement bodies’ task to “ensure and supervise general compliance by . . . air carriers with this Regulation”. This statement certainly indicates that the EU legislature did not envisage the national enforcement body pursuant to Article 16(1) of the Regulation as an authority under an obligation to take enforcement measures in respect of each individual infringement that comes to its notice.

While the Advocate General and the Court agreed that this interpretation is reinforced by Article 16(2) and Article 16(3) of Regulation 261/2004, they seem to have somewhat differed on the proper understanding of Article 16(2) of the Regulation. The Advocate General assumed that Member States could alternatively entrust *either* the enforcement authority pursuant to Article 16(1) of the Regulation *or* any other body (typically a consumer protection authority) with the task of dealing with individual complaints.²² Consequently, the Advocate General discusses the significance of Article 16(2) of the Regulation with regard to the interpretation of Article 16(1) only in respect of those Member States where these roles are combined in one body.²³ In contrast, the ECJ seems to have read the “or” in Article 16(2) of Regulation 261/2004 as an “and/or”, that is, as meaning that passengers may always complain to the enforcement body referred to in Article 16(1) of the Regulation.²⁴ In terms of practical consequences however, this appears not to make much difference (at least from the Court’s point of view), as the Court treats such passengers’ complaints only as a source of information for the respective enforcement body.²⁵ Unlike the Advocate General,²⁶ the Court does not remark on the kinds of activities that could be expected from a body responsible for handling complaints pursuant to Article 16(2) of the Regulation.

21. See e.g. Joined Cases C-402 & 432/07, *Sturgeon and others*, EU:C:2009:10923, paras. 41–44.

22. Opinion, paras. 23 and 31.

23. This is indeed the case in the majority of the Member States, see <www.ec.europa.eu/transport/sites/transport/files/themes/passengers/air/doc/2004_261_national_enforcement_bodies.pdf>, (last accessed 6 July 2017).

24. Judgment, paras. 30 et seq. This is open to debate, however, as one may read the passage as being written under the implicit assumption that the national legislature has entrusted the enforcement body with the task of hearing passengers’ complaints.

25. Judgment, para 31.

26. Opinion para 32.

5.3. *Effective enforcement and judicial protection of an individual passenger's right to compensation*

The ECJ stated, rather succinctly, that, notwithstanding the ascertained restrictive understanding of Article 16 of Regulation 261/2004, effective enforcement of a passenger's right to compensation is guaranteed because the provisions of the Regulation are directly applicable; thus, passengers may rely on these provisions before national courts.²⁷

Certainly, it comes as no surprise that the ECJ infers from the "direct applicability" of the provisions of the Regulation that passengers may enforce their rights to compensation against airline companies through an action before the national civil courts. Indeed, the Court has repeatedly referred to the "direct applicability" and the "nature and the function" of regulations to substantiate that in a case brought before a national court against another individual, an individual can rely on a (subjective) right contained in a regulation.²⁸ Nevertheless, this reasoning may still be criticized for reasons of terminological clarity. The fact that Article 288(2) TFEU states that "[a] regulation . . . shall . . . be . . . directly applicable in all Member States" means, first of all, only that regulations have legal effect and are immediately part of the national legal systems without implementing measures of Member States. By contrast, the deduction of the existence of rights and remedies from a provision is usually associated with the concept of "direct effect." It seems important to maintain this terminological distinction; it is equally true with regard to regulations as it is for directives (if invoked against a Member State) that only those provisions which are couched in clear, precise and unconditional terms, are capable of being directly relied upon and enforced by individuals before national courts.²⁹ At any rate, the Court implicitly and rightly assumed that these requirements are met in the case of Regulation 261/2004. Therefore, the Court's reference to the "direct applicability" of the Regulation should be read as a succinct way of expressing that Article 5(1)(c) and Article 7 of Regulation 261/2004 contain a right to compensation which is sufficiently clear, precise, and unconditional, and which thus may be relied upon before national courts.

The possibility of suing an airline company as such, however, does not suffice to guarantee an effective enforcement of this right. In its earlier case

27. Judgment para 37.

28. See e.g. Case 43/71, *Politi v. Italy*, EU:C:1971:122, para 9; Case C-253/00, *Muñoz and Superior Fruiticola*, EU:C:2002:497, para 27; Case C-379/04, *Dahms v. Fränkischer Weinbauverband*, EU:C:2005:609, para 13.

29. See Case C-403/98, *Azienda Agricola Monte Arcosu v. Regione Autonoma della Sardegna*, EU:C:2001:6, paras. 26–29; Case C-278/02, *Herbert Handlbauer*, EU:C:2004:388, paras. 26–35.

law, the Court already established that in the absence of Community legislation, the procedural and substantive details of the protection of rights conferred by European law will remain a matter of the Member States.³⁰ This has been widely recognized as a normative principle and given the label “procedural autonomy”, a term which the Court has also adopted.³¹ This label is somewhat misleading as the concept not only concerns procedural law but also substantive rules – such as substantive conditions of damages claims – that are part of a remedy provided under national law and applicable in the case of a violation of a right conferred by EU law.³² It is for this reason that, for example, Advocate General Trstenjak has referred to the concept more precisely as “remedial autonomy”.³³

Another reason the label “procedural autonomy” seems misleading is that the discretion of the Member States in shaping the remedies for the violation of rights that stem from EU law is subject to substantial limitations, so that their “autonomy” effectively comes down to a “national procedural responsibility”.³⁴ In particular, based on the duty of loyal cooperation between the Union and the Member States as enshrined in Article 4(3) TEU, it is the latter’s obligation to ensure that national rules are not “less favourable than those governing similar domestic actions (principle of equivalence)” and that they are not “framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by European Union law (principle of effectiveness)”.³⁵

30. See e.g. Case 13/68, *Salgoil v. Italy*, EU:C:1968:54, 463 (“Thus the answer to be given to the present question is that, in so far as the provisions in question confer on persons subject to the jurisdiction rights which national courts must protect, those courts must ensure that the said rights are indeed protected, but that it is for the legal system of each Member State to decide which court has jurisdiction and, for this purpose to classify those rights with reference to the criteria of national law.”). See also Art. 291 TFEU.

31. See e.g. Case C-472/11, *Banif Plus Bank*, EU:C:2013:88, para 26.

32. See e.g. Case C-557/12, *Kone AG and Others v. ÖBB-Infrastructure AG*, EU:C:2014:1317, para 24 (“in the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed rules governing the exercise of the right to claim compensation for the harm resulting from an agreement or practice prohibited under Art. 101 TFEU, including those on the application of the concept of ‘causal relationship’, provided that the principles of equivalence and effectiveness are observed.” (references omitted)).

33. See Case C-591/10, *Littlewoods Retail Ltd and Others v. Her Majesty’s Commissioners of Revenue and Customs*, EU:C:2012:9, para 24, with reference to Trstenjak and Beysen, “European Consumer Protection Law: Curia semper dabit remedium?”, 48 CML Rev. (2011), 95–124, 104 et seq.

34. Craig and de Búrca, *EU Law*, 6th ed. (OUP, 2015), p. 227.

35. See e.g. Case C-453/99, *Courage v. Crehan*, EU:C:2001:465, para 29. This case law was first laid down in Case 33/76, *Rewe v. Landwirtschaftskammer für das Saarland*, EU:C:1976:188, para 5 (“In the absence of such measures of harmonization the right conferred by Community law must be exercised before the national courts in accordance with the

The Court has adhered to this standard, though it was advised in at least two cases by its Advocates General to adapt it in consideration of the principle of effective judicial protection, as developed in the case law starting from *Johnston*³⁶ and enshrined in Article 47 of the Charter and Article 19(1) TEU. In *Alassini*, Advocate General Kokott submitted that “[i]n respect of the judicial enforcement of Community law, the principle of effectiveness [à la *Rewe* and *San Giorgio*] is an expression of the general principle of effective judicial protection”.³⁷ The Court (implicitly) rejected this perception and assessed the compliance with both principles separately.³⁸ In *Donau Chemie*, the ECJ ignored³⁹ Advocate General Jääskinen’s proposition to waive in light of Article 19(1) TEU the “classical formula referring to practical impossibility or excessive difficulty” and to adopt instead a “more demanding” standard of effective judicial protection according to which “national remedies must be accessible, prompt, and reasonably cost effective.”⁴⁰

While there is, on the one hand, a significant overlap between the standard of effectiveness à la *Rewe* and *San Giorgio* and the principle of effective judicial protection, there are, on the other hand, significant differences which make it quite comprehensible that the Court did not follow suggestions that would have amounted to a merger of both concepts in the context of “procedural autonomy” cases.⁴¹ First, the scope of application of the principle of effective judicial protection is narrower. In contrast to *Rewe* and *San Giorgio* effectiveness,⁴² it concerns only procedural rules in a narrow sense, such as the right to receive legal aid.⁴³ More specifically, while the right to effective judicial protection may typically only benefit the individual (and thus may at most indirectly work to the detriment of an opposing party), *Rewe*

conditions laid down by national rules. The position would be different only if the conditions and time-limits made it impossible in practice to exercise the rights which the national courts are obliged to protect.”). In its subsequent case law, the Court amended the wording and introduced the phrase “virtually impossible or excessively difficult”, see Case 199/82, *San Giorgio*, EU:C:1983:318, para 14.

36. Case 222/84, *Johnston*, EU:C:1986:206, paras. 18 et seq.

37. A.G. Kokott, Opinion in Case C-317/08, *Alassini and Others*, EU:C:2009:720, para 42.

38. See Case C-317/08, *Alassini and Others*, EU:C:2010:146, paras. 47–60 (principle of effectiveness à la “*Rewe*” and “*San Giorgio*”) and paras. 61–66 (principle of effective judicial protection).

39. Case C-536/11, *Bundeswettbewerbshörde v. Donau Chemie and others*, EU:C:2013:366, para 27.

40. A.G. Jääskinen, Opinion in Case C-536/11, *Donau Chemie*, EU:C:2013:67, para 47.

41. See Prechal and Widdershoven, “Redefining the relationship between ‘*Rewe*-effectiveness’ and effective judicial protection”, 4 *Review of European Administrative Law* (2011), 31–50, at 38–49.

42. See Case C-557/12, *Kone AG*, and accompanying text to note 32 *supra*.

43. See Art. 47 of the Charter and Case C-279/09, *DEB*, EU:C:2010:811.

and *San Giorgio* effectiveness may directly result in stricter duties or sanctions imposed on individuals.⁴⁴ Second, separate yardsticks permit the Court to differentiate with regard to the intensity of judicial review. The way the Court phrased the test of *Rewe* and *San Giorgio* effectiveness indicates its willingness to grant Member States considerable leeway to find solutions that do justice to the respective institutional framework. Admittedly, this is not always reflected in the case law.⁴⁵ However, as the principle of effective judicial protection is not only reinforced in Article 19(1) TEU⁴⁶ but enshrined in fundamental rights, namely Article 47 of the Charter and Articles 6 and 13 of the ECHR,⁴⁷ a higher intensity of judicial review is justified to verify Member States' compliance. Third, while the Court usually infers *positive* obligations from the principle of effective judicial protection, the application of the effectiveness requirement à la *Rewe* and *San Giorgio* typically results in *negative* standards. The latter corresponds to the way the yardstick is phrased, namely to filter out those national rules that do *not* comply with the principle of effectiveness. At first glance, this difference seems merely rhetorical. Just as the Court's yardstick can be positively rephrased as a test of "practical possibility",⁴⁸ the standards the Court derived from its application contain – at least implicitly – positive standards as well. For example, the Court held in *Kone* that domestic legislation must not exclude cartelists' liability for losses resulting from umbrella effects "categorically and regardless of the particular circumstances of the case";⁴⁹ this effectively means that, at least as a matter of principle, such losses have to be compensated. However, this example demonstrates that those implicit positive standards inevitably remain relatively vague. Thus, the application of *Rewe* and *San Giorgio* effectiveness appears to be less suited than the principle of effective judicial protection to establish comprehensive and refined standards for an effective enforcement and protection of rights. Certainly, this is only true as a general statement and

44. See e.g. Case 68/88, *Commission v. Greece (Greek Maize)*, EU:C:1989:339.

45. See for a critique in this vein Franck, "Umbrella pricing and cartel damages under EU competition law", 11 ECJ (2015), 135–167, p. 159.

46. Art. 19(1) TEU prescribes that "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law". This provision, introduced by the Treaty of Lisbon, affirms the role of national courts as an essential part of the EU judicial order and, more in particular, reinforces the duty to provide effective judicial protection if individuals invoke EU law before national courts. Thus, this maxim emerges as an obligation for Member States which is necessary for the rule of law.

47. Note that it is the Court's view that Art. 47 of the Charter "implements the protection afforded by Art. 6(1) of the ECHR" so that "[i]t is necessary . . . to refer only to Art. 47 [of the Charter]", see Case C-386/10 P, *Chalkor v. Commission*, EU:C:2011:815, para 51, and Case C-199/11, *Otis and Others*, EU:C:2012:684, para 47.

48. See Craig and de Búrca, *EU LAW*, 6th ed. (OUP, 2015), p. 228.

49. Case C-557/12, *Kone AG*, para 33.

of course there are instances where the Court has seized the opportunity to deduce refined standards from the effectiveness principle *à la Rewe* and *San Giorgio*.⁵⁰

Hence, the domestic rules that complement the conditions under which passengers may receive compensation as laid down in Regulation 261/2004 must meet the criteria of effectiveness *à la Rewe* and *San Giorgio* and guarantee effective judicial protection pursuant to the standard envisaged in Article 19(1) TEU and Article 47 of the Charter. This may include, for example, provisions that define rights to interest or time limits for bringing action for compensation,⁵¹ but also rules that determine barriers to access to the civil justice system, such as the amount of court fees to be paid, the necessity of representation by a lawyer, the availability of contingency or conditional fees, the distribution of court and lawyers' fees between the parties (e.g. the loser-pays rule, one-way fee shifting, or each party bears his or her own costs), the requirements of proof and the rules on access to evidence and on disclosure *inter partes*. Access to justice is a concern, because Article 7 of the Regulation provides for lump sums of (only) EUR 250, EUR 400, or EUR 600, respectively. For this reason, as the Advocate General emphasized, most Member States provide for a simplified procedure with regard to claims that do not exceed a certain threshold – in the case of the Netherlands, EUR 25,000 – and make representation by a lawyer non-obligatory.⁵² In the case of cross-border disputes, Regulation 861/2007 is intended to ensure effective enforcement of claims that do not exceed EUR 2,000.⁵³

It has been remarked that the prevalence of diverse business models offering professional collection for fees of up to one-third of the compensation (in the event of successful enforcement) indicates the inadequacy of the civil justice system.⁵⁴ But this appears to be debatable. Whether the cost risks involved with the enforcement of an (alleged) right to compensation of EUR 250, EUR 400, or EUR 600 justify such a price depends on the specific circumstances of each case and the opportunity costs of the individuals involved.

50. See e.g. Case C-557/12, *Kone AG*, para 34 (establishing the condition that “the cartel at issue was, in the circumstances of the case and, in particular, the specific aspects of the relevant market, liable to have the effect of umbrella pricing being applied by third parties acting independently, and that those circumstances and specific aspects could not be ignored by the members of that cartel.”).

51. With regard to the latter aspect see Case C-83/10, *Moré v. Koninklijke Luchtvaart Maatschappij*, EU:C:2012:741, paras. 25 et seq.

52. Opinion, para 35.

53. *Ibid.*, para 36.

54. Fühlich, “Anmerkung”, (2016) EuZW, 384–385, 385.

Thus, the Court's statement that a passenger's right to compensation is sufficiently protected as he or she can invoke that right before a national court, only holds true if the complementing national rules do not in practice make it "impossible or excessively difficult" to exercise this right, and if the requirements of effective judicial protection pursuant to Article 19(1) TEU and Article 47 of the Charter are met. On the one hand, one might be inclined to think that this caveat is so obvious that there was no need for the Court to make it explicit. On the other hand, the silence of the ECJ on this point conceals a potential exception regarding its answer to the referring court. Under circumstances where access to the civil justice system is effectively hindered with regard to the right to compensation as provided for under Regulation 261/2004, a national court in the position of the Raad van State would have to consider exceptionally granting passengers a right to claim enforcement measures through the competent authorities in order to provisionally close the enforcement gap left by the rules of national private law.

5.4. *General compliance with the obligation to pay compensation*

In a Communication from April 2011, the Commission conceded – based on a commissioned Report⁵⁵ – that “in many Member States, enforcement is not effective, proportionate and dissuasive enough to provide carriers with an economic incentive to comply with the Regulation.”⁵⁶ More specifically, the Commission identified shortcomings on the part of the national enforcement authorities.⁵⁷ This corresponds with statements of knowledgeable observers who have remarked that airlines seem to systematically negate passengers' rights to compensation,⁵⁸ and that the general level of compliance with passengers' rights appears to be so low that one should expect those airlines which satisfy every legitimate claim to suffer from a competitive disadvantage.⁵⁹ If we assume that these findings hold true, shouldn't the Court have considered such a lack of effective overall enforcement in answering the referred question?

55. Gleave, “Evaluation of Regulation 261/2004”, available at <ec.europa.eu/transport/themes/passengers/studies/passengers_en>, (last visited 24 Jan. 2017).

56. COM(2011)174, Communication from the Commission to the European Parliament and the Council on the application of Regulation 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, p. 8.

57. *Ibid.*, pp. 11 et seq.

58. Führich, *op. cit. supra* note 54.

59. Schuster-Wolf, “Aktuelle Probleme bei der Anwendung der Fluggastrechte-VO 261/2004/EG und Perspektiven bei der geplanten Reform aus der Sicht der Passagiere” (2012) *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht*, 149–164, 162.

Member States must guarantee an effective administrative enforcement of the rights and duties laid down in Regulation 261/2004. National enforcement authorities “shall take the measures necessary to ensure that the rights of passengers are respected”⁶⁰ and Member States must provide a system of sanctions that allows for “effective, proportionate and dissuasive”⁶¹ sanctioning of infringements. This latter stipulation, and in particular the quoted triad of attributes, stems from the ECJ’s adjudication.⁶² In the light of the assessment above, it appears rather doubtful whether all Member States ensure general compliance as specified under Article 16(1) and (3) of the Regulation.

However, first of all it should be noted that the question referred by the Raad van State concerned only the conditions national law has to meet in order to safeguard *individual* passengers’ rights to compensation. It follows that, on that ground alone, the Court of Justice was correct in not addressing in the present case the requirements for effective *overall* enforcement in order to guarantee general compliance with the Regulation.

Besides, a remedy such as that suggested by the plaintiffs in *Ruijsenaars* would only open up an alternative route to individual enforcement to the benefit of those passengers who are in any event willing to bring a case – be it as a civil or an administrative matter. Certainly, depending on the institutional framework, which may vary between Member States, there can be good reasons for a passenger to find it more convenient to bring an action to compel authorities to take enforcement measures than to file suit against an airline company. However, where a case may be brought before the civil courts, the possible benefit of an additional remedy against the enforcement authorities appears to be rather limited. In particular, it seems far from clear, that the availability of such a remedy could indeed raise the overall level of administrative enforcement. Where an authority’s resources are too scarce to cope with an (allegedly) almost ubiquitous negation of passengers’ claims for compensation, remedies brought by some passengers will in all likelihood simply trigger a shift of enforcement activities to those cases. In addition, the effectiveness of such remedies would ultimately depend on the national legal framework for enforcement measures and in particular on the availability of sufficiently large administrative fines. Thus, even if a remedy against national enforcement authorities was available to passengers, the most crucial role in

60. Art. 16(1) of Regulation 261/2004.

61. Art. 16(3) of Regulation 261/2004.

62. See e.g. Case 68/88, *Greek Maize*, para 24, “[W]hilst the choice of penalties remains within [the Member States’] discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.”

safeguarding sufficient administrative enforcement would remain in any case with the European Commission, which should guarantee that the Member States fulfil their obligations pursuant to Article 16(1) and (3) of Regulation 261/2004.⁶³

5.5. *Evaluating the interrelation between private and public enforcement: Article 16 of Regulation 261/2004 does not require a restriction of administrative enforcement*

Member States may consider it appropriate to introduce sanctions in their national legislation that go beyond the sanctions that are provided for in a regulation.⁶⁴ Their leeway ends, however, where their measures effectively obstruct the *effet utile* of the rights and remedies laid down in the Regulation or where cumulative enforcement measures entail the risk of disproportionate sanctioning. It is apparently on this basis that Advocate General Bot suggested that Article 16 of the Regulation should be read as *prohibiting* Member States from entrusting their authorities with a mandate to take enforcement measures in every single case of an infringement they become aware of, including non-legitimate refusals to pay compensation. The ECJ did well, however, to oppose the Advocate General's view on this point.

First of all, it should be noted that even by adopting the Advocate General's position, the possibility of parallel proceedings cannot be ruled out completely. Ultimately, any enforcement measure by an authority must be based on the demonstration of certain individual infringements. Hence, where an airline company challenges a sanction by an authority before a court, there is always the possibility that this court will assess an infringement put forward by an authority differently to a civil court from which – based on the same facts – a decision has been requested by a passenger.

On a more general level, the Advocate General's proposition raises the question of whether it is necessary or even desirable to exclude from the outset parallel proceedings before different branches of national court systems. In several areas of EU law, it is by no means unusual that public and private enforcement run in parallel, including the possibility of cases pending at the same time before different courts. A clear case in point is EU competition law.

63. It is only in the period immediately after the Regulation entered into force that the Commission initiated a couple of infringement proceedings against Member States that failed to comply with Art. 16(1) and (3) of Regulation 261/2004, see e.g. Case C-264/06, *Commission v. Luxembourg*, EU:C:2007:240; Case C-333/06, *Commission v. Sweden*, EU:C:2007:351.

64. See Case 50/76, *Amsterdam Bulb BV v. Produktschap voor Siergewassen*, EU:C:1977:13, paras. 31–33.

The EU Commission or a national competition authority⁶⁵ may fine a firm,⁶⁶ which in turn may challenge that decision before the EU courts or the competent national court, respectively. At the same time, and based on the same facts, a customer or any other market player affected by the infringement can bring an action for injunctive relief (including interim relief) or damages⁶⁷ before a national court,⁶⁸ or may rely on the nullity of a contract based on the infringement of competition law.⁶⁹ Such parallel proceedings do entail certain challenges. Two courts addressing the same legal question may end up with divergent interpretations of the law – an outcome which obviously runs contrary to fundamental expectations of justice. Moreover, parallel enforcement proceedings may lead to double sanctions, which are potentially legally intolerable, if the overall sanctioning effect is disproportionate or violates the fundamental principle of *ne bis in idem*. These challenges appear, however, to be manageable by the competent institutions. Again, the enforcement of EU competition law provides a vivid example.

First, national courts can avoid inconsistencies in the interpretation of EU law by way of preliminary reference pursuant to Article 267 TFEU. More specifically, in *Masterfoods* with regard to EU competition law, the ECJ held that a national court must refrain from rendering a judgment that conflicts either with a prior decision or with a decision contemplated by the Commission.⁷⁰ This rule has been codified in Article 16(1) of Regulation 1/2003. Moreover, as Article 9 of the Cartel Damages Directive 2014/104⁷¹ prescribes a binding effect of decisions by national competition authorities on

65. See Art. 4 and Art. 5 of Council Regulation (EC) 1/2003 of 16 Dec. 2002 on the implementation of the rules on competition laid down in Arts. 81 and 82 of the Treaty, O.J. 2002, L 1/1.

66. Alternatively, in some Member States the national competition authority may not directly fine a firm but has to file a suit against the company that has (allegedly) infringed competition law. This is, for instance, the case in Sweden where the Stockholm City Court may, at the request of the Swedish Competition Authority, order an undertaking to pay an administrative fine, see Ch. 3, Art. 5 of the Swedish Competition Act.

67. See Art. 6 of Regulation 1/2003.

68. See Case C-453/99, *Courage v. Crehan*, para 26: “The full effectiveness of Art. [101] of the Treaty and, in particular, the practical effect of the prohibition laid down in Art. [101](1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.”

69. See Art. 101(2) TFEU.

70. Case C-344/98, *Masterfoods and HB*, EU:C:2000:689, paras. 51 et seq.

71. Directive 2014/104/EU of the European Parliament and of the Council of 26 Nov. 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, O.J. 2014, L 349/1.

follow-on damages actions, a priority of these decisions over subsequent court proceedings has been established.⁷²

Second, while the Commission's right to impose fines on firms that infringe Article 101 or Article 102 TFEU⁷³ constitutes the principal deterrent mechanism, in *Courage* the ECJ postulated the right to claim damages because it "discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition."⁷⁴ The cumulative effect of fines imposed by the Commission or national competition authorities and successful damages actions might result in over-deterrence,⁷⁵ i.e. in an inefficiently high level of enforcement that could particularly deter even perfectly legal behaviour; such enforcement would have to be considered "disproportionate" under the ECJ's *Greek Maize* criteria.⁷⁶ So far, however, there is no comprehensive mechanism in place to forestall such an effect. Certainly, the competition authorities are in a position to prevent systematic over-deterrence: in calibrating the competition law infringer's fines they may take into consideration the amount of compensation the firm actually pays⁷⁷ or (conceivably) even the compensation the firm may be expected to pay. A reduction in recognition of paid compensation has been granted by the Commission in at least two instances.⁷⁸ While the General Court has approved the Commission's discretionary power to take into account such payments as an attenuating circumstance,⁷⁹ it has also said that the Commission is under no

72. Both rules are without prejudice to the rights and obligations of national courts under Art. 267 TFEU, see Art. 16(1), 4th sentence of Regulation 1/2003 and Art. 9(3) of the Cartel Damages Directive 2014/104/EU, respectively.

73. See Art. 23(2)(a) of Regulation 1/2003.

74. See Case C-453/99, *Courage v. Crehan*, para 27, and Case C-536/11, *Donau Chemie*, para 23.

75. See on the concept of "optimal deterrence" and in particular on the possibility of over-deterrence in the context of competition law Lianos, Davis and Nebbia, *Damages Claims for the Infringement of EU Competition Law* (OUP, 2015), pp. 219–235.

76. See Case 68/88, *Greek Maize*, and accompanying text *supra* note 62. Note that the General Court specified that "the principle of proportionality requires that the burdens imposed on undertakings in order to bring an infringement to an end do not exceed what is appropriate and necessary to attain the objective sought, namely re-establishment of compliance with the rules infringed", see Case T-201/04, *Microsoft v. Commission*, EU:T:2007:289, para 1276.

77. See Case 14/68, *Walt Wilhelm and others v. Bundeskartellamt*, EU:C:1969:4, para 11: "If, however, the possibility of two procedures being conducted separately [by the European Commission and by a national competition authority] were to lead to the imposition of consecutive sanctions, a general requirement of natural justice . . . demands that any previous punitive decision must be taken into account in determining any sanction which is to be imposed."

78. COMP IV/35.691/E.4, *Pre-Insulated Pipes Cartel*, O.J. 1999, L 24/1, recital 172, and COMP/35.587, *PO Video Games*, COMP/35.706, *PO Nintendo Distribution*, and COMP/36.321, *Omega — Nintendo*, O.J. 2003, L 255/33, recitals 440 et seq.

79. Case T-13/03, *Nintendo v. Commission*, EU:T:2009:131, para 74.

obligation to do so.⁸⁰ In the same spirit, Article 18(3) of the Cartel Damages Directive 2014/104 provides discretionary power for competition authorities to address risks of over-deterrence as they “may consider compensation paid as a result of a consensual settlement and prior to its decision imposing a fine to be a mitigating factor”.

Third, where cartel infringers can be sued for exemplary or punitive damages after they have been fined,⁸¹ this may also raise issues concerning the principle of *ne bis in idem*. This maxim prohibits the same person from being sanctioned more than once for the same unlawful conduct and has been considered a fundamental principle of EU law.⁸² In *Devenish Nutrition* the High Court of England and Wales held in that respect that the principle of *ne bis in idem* precludes the award of exemplary or punitive damages in an action for damages following a decision to fine of the Commission.⁸³

This brief excursus illustrates that a framework of dual public and private enforcement brings certain perils which can, however, be negotiated by the competent enforcement institutions. This is not to say that the rules which have been established for that purpose in competition law are perfect. Indeed they are not, but they provide material for illustration and reflection and, what is more, demonstrate that coping with the challenges brought by an accumulation of enforcement mechanisms does not inevitably mean foregoing potential benefits in terms of an effective protection of individual rights and dissuasive sanctioning.

Certainly, this does not exclude the possibility that – from a policy point of view – in a particular field of law a monopolization of enforcement, in the hands either of private actors or public authorities, may appear to be the preferable solution. Yet as the EU legislature has opted for a dual enforcement mechanism in Regulation 261/2004, the remaining legal issue is whether Member States need to install specific mechanisms to avoid distorting interferences. The facts and arguments advanced by the parties in *Ruijsenaars* do not provide sufficient evidence to support such a requirement. At any rate, we can safely conclude that neither the risk of an incoherent application of Regulation 261/2004 nor the risk of a

80. See Case T-59/02, *Archer Daniels Midland v. Commission*, EU:T:2006:272, para 352.

81. While, as a matter of principle, over-compensatory damages for breach of competition law were available in England and Wales, Ireland and Cyprus, see Ashton and Henry, *Competition Damages Actions in the EU* (Edward Elgar, 2013), para 5.24, it has been noted that “they were only effectively enforced in Ireland and to a limited extent in the UK”, see Lianos, Davis and Nebbia, op. cit. *supra* note 75, p. 288. Meanwhile, Art. 3(3) of the Cartel Damages Directive prohibits any kind of over-compensatory damages.

82. See e.g. Joined Cases C-204/00 P etc., *Aalborg Portland and Others v. Commission*, EU:C:2004:6, para 338, and Case T-59/02, *Archer Daniels*, para 61.

83. *Devenish Nutrition Ltd v. Sanofi-Aventis SA* [2007] EWHC 2394 (Ch.), para 52.

disproportionate level of sanctioning legitimizes an adoption of the Advocate General's proposition to bar Member States' authorities from prosecuting any single case of an infringement of passengers' rights they become aware of.

6. Final remarks

Where a party may initiate civil proceedings, the effective protection of a right conferred by a regulation does not require a right to administrative enforcement as an additional remedy. The gist of the judgment in *Ruijsenaars* reaffirms the crucial importance of private rights of action against an alleged infringer. The judgment is consistent with the Court's decision in *Muñoz*, where it held that the "full effectiveness" and "in particular, the practical effect" of certain obligations laid down in a regulation "imply that it must be possible to enforce that obligation by means of civil proceedings."⁸⁴ Most tellingly, in *Muñoz* the Court ascertained this private right of action without clarifying whether actions by the competent authorities, including possible remedies directed against such authorities, might already guarantee a sufficient level of overall enforcement.

Through its proposal of March 2013 for an amendment of Regulation 261/2004, the Commission sought to introduce *inter alia* detailed rules on the designation of a national body responsible for the out-of-court resolution of disputes between air carriers and passengers with regard to the rights covered by the regulation.⁸⁵ While this attempt had some potential to effectively facilitate the enforcement of passengers' rights to compensation, and the European Parliament approved the concept,⁸⁶ the Council could not agree upon the reform⁸⁷; thus, the proposal appears, at least for the time being, to

84. Case C-253/00, *Muñoz*, para 30.

85. See Art. 16a of the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Regulation (EC) 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air, COM(2013)130, 2013/0072 (COD).

86. Indeed, the European Parliament suggested a whole string of amendments to the proposal that could have significantly improved the passengers' position; see European Parliament, legislative resolution of 5 Feb. 2014 on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and Regulation (EC) 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air (COM(2013)0130 – C7-0066/2013 – 2013/0072(COD)), Am. 126–134.

87. In the Progress report of 19 May 2015 (2013/0072 (COD)) in preparation of the Council meeting on 11 June 2015 the thresholds for compensation in cases of delayed or terminated flights and the compensation for connecting flights are considered major outstanding issues.

have failed. Regulation of the procedural and substantive details concerning the enforcement of a passenger's right to compensation therefore remains within the realm of the "procedural autonomy" of Member States, subject to the principles of "equivalence" and "effectiveness".

In *Ruijsenaars* the Court was not called upon to address the requirements Member States have to meet in order to ensure effective overall enforcement ("general compliance") through the competent national authorities. However, since severe shortcomings are apparent in this regard, the Commission must not let matters rest. Interestingly, in its position on the Commission's proposal for an amendment of Regulation 261/2004, the European Parliament suggested amending Article 16(3) of the Regulation, specifying that "[t]he sanctions laid down by Member States for infringements of this Regulation shall be effective, proportionate, dissuasive and sufficient to provide carriers with a financial incentive to comply consistently with this Regulation."⁸⁸ The Commission accepted this amendment⁸⁹ before the entire project reached an impasse.

Thus, the ball is once again in the Commission's court. It will have to ensure that Member States fulfil their duty of loyal cooperation and guarantee that civil actions for compensation brought by passengers against airline companies are not rendered "impossible or excessively difficult" and that they provide for an institutional framework that allows the competent authorities to sanction infringements by airline companies in an "effective, proportionate and dissuasive" manner.

Jens-Uwe Franck *

88. European Parliament, resolution cited *supra* note 86, Am. 121 (emphasis in the original). Note that in subsequent documents of the Council this amendment to Art. 16(3) of the Regulation has been slightly rephrased: "The sanctions laid down by Member States for infringements of this Regulation shall be effective, proportionate and dissuasive. In particular, such sanctions shall be sufficient to provide air carriers with a financial incentive to comply with the Regulation." The Finnish, Irish and UK governments proposed to delete the second sentence whereas the Dutch and Polish governments proposed a harmonization of sanctions and enforcement measures by the national enforcement bodies. See Council of the EU, 24 Feb. 2015, document No. 6169/15, p. 38.

89. Commission response to text adopted in plenary, 20 May 2014, SP (2014) 446, p. 1.

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BOOK REVIEWS

Anna Kocharov, *Republican Europe*. Oxford: Hart Publishing, 2017. 232 pages. ISBN: 9781509910748. GBP 60.

Recent events in the development of the EU polity have shown how new interpretations, or re-considerations, of the constitutional nature and purpose of transnational integration are required. Many popular approaches and well-established theories are either incomplete and need refining, unsatisfactory or simply wrong. In *Republican Europe*, Kocharov, who completed her PhD dissertation at the EUI, offers precisely what was missing: a fresh perspective on EU constitutionalism – which, as Kocharov implies, should not be dismissed too easily (as some scholars eagerly do). Instead, if we go to the very origin of the European project of integration, we realize that what lies at its core is a shared idea of “positive liberty”, conceived as the individual capacity for self-fulfillment. This remark may appear at first sight self-evident or trite. Yet it speaks to the reflexivity of our staying together. For, as Kocharov explains, promoting European integration “as a virtue” does not equal promoting it “as a value”. In the first scenario, integration is furthered for its own sake – a mere commitment to a common project of individual freedom, regardless of the persons who are entitled to such freedom. This is the case of the ECHR, a “union of shared virtue”. In the second scenario (European integration as a value), integration requires a more intense form of commitment, a sort of intimacy based on the sense of a “We”. For this to happen, we are told, Loyalty must develop. Hence, it will not be enough to merely ensure the proper functioning of the internal market, but it will also be necessary to re-negotiate a shared European idea of positive liberty, in such a way that each national polity can accept it.

This is the challenge facing the EU: since its role is to ensure peace, the ideal of a polity can only be advanced if two types of conflict are addressed successfully. On the one hand, “static conflicts”, which take place between the national polities, can be avoided through reciprocal non-interference by way of deregulation: this is the essence of the liberal model. Each national polity is left free to pursue its own idea of positive liberty. Co-existence can thus be accomplished through legal constitutionalism, which ensures the judicial enforcement of individual rights. On the other hand, “dynamic conflicts”, which concern diverging ideas of positive liberty, can only be managed by constructing a proper European political space: this is the essence of the republican model. Here political constitutionalism is required, built as it is on counter-minoritarian guarantees and the political process as a source of legitimacy. Kocharov suggests that both models are present in the process of European integration. In particular, whereas prior to Lisbon the European project was predominantly liberal, as it emphasized protection of individual rights, after Lisbon the weight of republican features – which are centred upon the common good of the polity and the collective self-determination of its citizens – has increased. How and why has this occurred?

One of the book’s merits is that, of all forms of legitimacy which may be analysed, it emphasizes *social* legitimacy, corresponding to the support that a polity *as such* enjoys. If this is true, then the added value of republican legitimation is precisely its reliance upon Loyalty. Legitimation, in other words, functions in such a way that a loss of elements of positive liberty may be compensated for by acquiring other elements, expressed by the value placed by individuals on the continued relationship with each other. Of course, that this should ensue from the development of a polity is by no means self-evident. In order to illustrate this reality, Kocharov combines originally Albert Hirschman’s “Voice-Exit-Loyalty” model with Quentin Skinner’s work on liberty. Her starting point is simple. The members of a polity are prepared to accept living within it only as long as the polity is able to satisfy their interests. However, being part of a polity also means accepting majority rule, with inevitable (at least partial) loss of Voice. Since not all citizens’ interests may be satisfied, ultimately continued membership is

ensured only if its benefits somehow outweigh the costs associated with it. This generates the so-called “paradox of Loyalty”, which may not be explained merely by way of a trade-off between Voice and Exit. In other words, there must be some special reason for the outvoted minority to keep supporting the legal and social framework which underpins the EU polity. Normally, low levels of output legitimacy may be tolerated, as long as input, formal and adjudicative forms of legitimacy are provided, i.e. whenever (respectively): (a) interest representation is high, (b) procedural and constitutional guarantees are sufficiently complied with, and (c) the rule of law and protection of individual rights are ensured. However, EU law has been considerably amended since the early stages. It is not merely a matter of EU enlargement and related cultural and political issues. In fact, a number of factors, e.g. the passage from unanimity to qualified majority voting in the Council, the politicization of the European Commission, and further transfer of national competences to the EU level, have contributed to reducing Voice in the EU. However, by emerging as mere “interest in being members of the group, in relationship with others”, Loyalty represents an alternative to the loss of interest deriving from reduced Voice, i.e. it emerges as the added value, which introduces an additional cost to Exit. Thus, only a thicker understanding of Loyalty, one that is closely connected with liberty, sheds some light on how the legitimacy of the European liberal project may be preserved. This is why the Hirschman model needs to be integrated with Skinner’s distinction between positive liberty, negative liberty and liberty from domination or dependence. Whereas positive liberty essentially corresponds to Loyalty, negative liberty amounts to freedom from interference by others (Exit) and liberty from dependence corresponds to Voice. The legitimacy of the majoritarian rule may thus only be ensured if benefits associated with positive liberty are higher than the costs associated with reduced Voice and Exit.

The book’s focus on the idea of conflict management is certainly a valuable contribution to the debate on European integration, and immigration and asylum policies are a good example. One cannot help but notice Hegelian ideas scattered across the book. The author does not engage with them explicitly, and it would have been interesting to know more about her view – in particular on the relevance of participatory freedom for the development of the EU polity. In addition, the normative claims of the book, for instance on the extent to which a commitment to the duties and virtues of *Sittlichkeit* is acceptable, or effective, are not always necessarily clear. Kocharov rightly points out that the area of freedom, security and justice (AFSJ) has achieved some degree of independence from the internal market – although one may doubt that it has achieved full independence. This requires a holistic approach on the expansion of EU competences, for example as regards the link between citizenship and the AFSJ. As noted in the book, as opposed to the internal market (which pursued specific policy choices by way of directly effective rights and establishing functional objectives), the AFSJ, operating under co-decision and majority rule, opens up a space for political contestation and negotiation of diverging visions of ideal life. However, while identifying the predominantly republican features of the AFSJ, the book does not perhaps dwell enough upon the paradoxes of the AFSJ, i.e. the fact that, while expressing a political space, it still seeks to portray itself as a neutral space, thus concealing its internal tensions and contradictions and the epistemic incommensurability of some of its claims. Ultimately, placing value on the continuity of the EU for its own sake may be self-defeating. Yet the book, by making clear that “primacy of EU law cannot be unconditional”, exhibits a strong commitment to strengthening national democracy. Political liberty and social justice must go hand in hand. By providing a thorough and sharp analysis of the roots of the EU constitutional design, this book elucidates Europe’s crises of governance as very few have done in the past. It is a major contribution to our understanding of the increasingly complex EU machinery.

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Anna Jonsson Cornell and Marco Goldoni (Eds.), *National and Regional Parliaments in the EU-Legislative Procedure Post-Lisbon*. Oxford: Hart Publishing, 2017. 384 pages. ISBN: 9781782259176. GBP 70.

The introduction of a direct role for national parliaments in the Union's legislative process has spawned a great deal of literature since the proposal was first concretized in the Convention on the Future of Europe. Despite this, the edited collection reviewed here is able to add significant value to the existing field through its unified approach and its in-depth analysis. The book's clear focus is on the "Early Warning Mechanism" (EWM) and its operation. Other issues, such as the "political dialogue" with the Commission and national parliamentary influence of their Council representatives, are present in the background. The book is structured in three parts. Part I (Cooper, Hettne, Wetter, Dias Pinheiro) takes a holistic view of the EWM, considering some overarching theoretical questions. Part 2 (Fromage, Boronska-Hryniewiecka, Fasone, Vandenbruwaene and Popelier) looks in detail at how regional parliaments interact with the mechanism. The final section, Part 3 (Jonsson Cornell, Lupo, Tacea, Cygan, Granat, Goldoni), looks at specific countries, and specific groups of countries, to see how they engage with the EWM.

Part 1 opens with Cooper's chapter, which sets out a useful typology of the EWM. This was probably chosen as the first substantive chapter of the book because of its overarching theoretical nature. This acts as a frame through which the more specific instances featured throughout the book can fit. While many such attempts have been made to categorize the different ways in which national parliaments interact with EU law, Cooper's may well be the best attempt in the literature so far. His inter-disciplinary consideration, taking insights from both political science and legal scholarship, leads him to a compelling conclusion of the three main ways that national parliaments interact with the EWM: legal rule-following, political bargaining and policy arguing. This account is crystallized in a later chapter, when Jonsson Cornell is informed by the typology in her discussion of the Scandinavian parliaments. Part 1 as a whole offers more interesting overarching discussions, of judicial enforcement of the procedural requirements of subsidiarity (Wetter) and the growth of inter-parliamentary cooperation (Dias Pinheiro). Also present is an interesting chapter by Hettne, which proposes that a certain number of parliamentary votes should trigger a review of subsidiarity by the Court of Justice at the pre-legislative phase. This proposal may well be viewed with scepticism in some quarters, but it is one that is likely to return as the conversation about subsidiarity enforcement continues.

Part 2 focuses on the role of regional parliaments. One difficulty often present in the empowerment of national parliaments is their varying nature, and this is an even greater challenge in relation to regional parliaments. With such variance in existence, part of Boronska-Hryniewiecka's chapter offers a useful overview of the different position of regions in a number of Member States, a useful primer for the topic. Despite the difficulties they face, Fromage suggests regional parliaments can play a role if rather than adopting a systematic approach to EU issues, they focus on those that are of political importance to their region (Fromage). Belgium's position is discussed expertly by Vandenbruwaene and Popelier, especially important given the significance of regions in the country. Interestingly, Fasone's contribution on the position of Italian regional councils may offer the most hopeful outcome for regional parliaments, noting the potential for the EWM to bring "positive externalities" such as helping to establish the position of regional parliaments within the national constitutional system.

One of the great successes of the book, found in Part 3, is the insights gained through a close comparison of the position of different national parliaments. This is achieved in two key ways. The first is the presence of chapters which directly compare the position of different, but similar national parliaments. For example, Jonsson Cornell's excellent chapter considering the position of the Scandinavian parliaments, closely compares Sweden, Finland and Denmark's interaction with EWM, with rich findings as a result. We also see comparison of the Czech Republic and Poland's parliaments (Granat), as well as an assessment of the German *Bundestag* and the

Austrian *Nationalrat* (Auel). These chapters are successful in their rigorous comparison, clearly highlighting how different parliaments have had different responses to the EWM and the reasons underlying these differences.

The second way that the book achieves a close comparison of different national parliaments is through a unity of approach in the way that the authors conduct their analysis. This applies in the collective chapters as well as those specifically on the UK (Cygan), France (Tacea) and Italy (Lupo). As a result, some key themes emerge that can be compared across chapters. One example of this is the legislative-executive relationship and how it is affected. How do different parliamentary chambers use EWM and how does it affect their relationship with the government? Because of the unified analysis of the book, we learn that France's *Assemblée nationale* and Finland's *Eduskunta* tend to use EWM simply to reinforce the position of their governments. However, other chambers do not follow the government majority so closely, for example the Polish *Sejm* or the French *Senat*. Such close analysis is beneficial, as the representativeness of the institution and its relationship to the government's majority may affect our analysis of the "added value" that the EWM brings to the democratic legitimacy of the Union.

Another theme which emerges from this unified analysis is a consideration of the key players *within* the parliament in the use of EWM. After all, parliaments are large and complex bodies; with plenaries, specific European committees, sectoral committees and administrations. The question emerges: who is actually in control of submitting votes for reasoned opinions? From the close and unified analysis of the book, we learn parliaments can have a more or less centralized approach, with some allowing sectoral committees to drive the scrutiny of subsidiarity (e.g. Sweden's *Riksdag*) and others favouring a centralized committee on European affairs (e.g. Czech Republic's *Poslanecká sněmovna*). This is one of those questions that is essential if we are to truly assess the legitimacy of the contribution that national parliaments make. We may like the idea of national parliaments, but if in reality this is left to a small body of people and mainly conducted through administrative tasks, to what extent can we speak of this as improving democratic legitimacy? This book contributes to our understanding of these important questions through its rigorous analysis of the mechanism's use in practice.

The book closes by looking to the future position of national parliaments in the EU, in particular in the area of Economic and Monetary Union. It is clear that EWM will continue to be an important issue, but it has arguably already achieved one of its most important goals: bringing about more national parliamentary engagement with Union issues. The book is correct to point out that future research will need to consider each individual national parliament's interaction with EMU, given the relevance of the socio-economic position of each and their relative positions of power within the EU's economy. As such, each parliament will have to be considered in a rigorous manner, alongside more theoretical reflections on the topic. In that sense, this book can be seen as a guide on how to construct such necessary in-depth scholarship.

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Moritz Jesse, *The Civic Citizens of Europe: The Legal Potential for Immigrant Integration in the EU, Belgium, Germany and the United Kingdom*. Leiden: Brill Academic Publishers, 2017. 408 pages. ISBN: 9789004252264. EUR 153.

What does it mean for a non-EU citizen to be integrated in a European society, and what is the role of law in this process? Is the primary function of the law facilitative in nature, whereby the legal framework promotes equal access to societal institutions and membership? Alternatively, should the law intervene to promote "civic integration" by creating mandatory integration trajectories and conditions for migrants? These questions have recently been hotly debated in political, judicial and academic circles. Carens famously espouses an equality-based model of migrant incorporation, for example, whereas Miller has argued that the "right" of States to deal

with immigrants according to community goals and preferences (including the desire to preserve the national culture) can justify the imposition of civic integration tests. Jesse's welcome contribution to the growing body of literature on the subject of the integration of third-country nationals in the EU comes down firmly in favour of an equality-based, rather than a social affiliation, approach.

The book is refreshingly up-front about its scope, methodology and hypotheses. It sets out to map the legal rules which provide, create, or delimit the room within which integration takes place. It is based on the premise that legislation cannot enforce integration. Rather, legislation "has to create the room necessary for all individuals and institutions involved for integration to occur" (p. 5). The book employs a predominantly legal methodology and does not claim to contribute to measuring social integration. In this respect, the book may be under-selling itself a little: it goes far beyond a simple black-letter analysis of the law and is a must-read for those interested in the concept of integration in its political, social, and ethical dimensions.

Chapter 2 provides the theoretical foundation for the rest of the book, with "immigration integration" and "civic citizenship" as the two central concepts. Jesse begins by developing a working definition of immigrant integration. This is essential to the success of the book because one of the key difficulties with the term "integration" is its shifting and context-dependent meaning. After extensive discussion, the author finds that integration "refers to ideas and visions on how the receiving society and the newcomer will interact and how the get-together will be organized to enable a peaceful, fruitful and mutually beneficial coexistence" (p. 27). In constructing this definition, Jesse devotes considerable space to debunking the paradigm of "civic integration", according to which rights are rewards for fulfilling integration conditions rather than tools to foster social, political and economic inclusion. Among Jesse's simplest and potentially most convincing arguments in this section is that "civic integration policies are symbolic politics, which will not achieve their objective" (p. 16). However, this also indirectly hits on one of the thorniest issues in this sphere: how can integration be measured, and how can it be proved that integration policies actually achieve their objectives? Jesse refers to the work of Kymlicka and Ignatieff on the impact of "multiculturalism", but what evidence do we have of the effect of present-day integration policies? Jesse correctly notes that there is no empirical evidence that multicultural policies of recognition erode and undermine support for the welfare State (p. 22). But equally, it must be acknowledged that there is no real evidence that they do *not* have these negative effects. This highlights the data gap at the heart of many theoretical discussions of integration.

Another key insight comes when Jesse reminds us that civic integration is not new: it is based on the same intolerant narrative of national cultural homogeneity upon which policies of racial exclusion have always been based, from the treatment of African Americans in the USA to the "Whites only" immigration policies in Australia. On this reading, civic integration is a thinly disguised illiberal immigration control measure which echoes other racialized means of oppression. This historical perspective is often missing from accounts of modern integration policies, and overlooked in the political debate. Overall, Jesse cogently makes the case for an inclusive paradigm of integration. In this regard, one useful addition to his arsenal of arguments could be a rights-based critique. International human rights law is a useful starting point for an equality-based approach to immigrant inclusion, and provides a platform to explore the structural racial discrimination underlying the aims and scope of integration policies.

One of the conceptual innovations of this book is the development of the concept of "civic citizenship" in tandem with that of immigrant integration. Jesse draws on concepts of citizenship and denizenship proposed by Marshall, Walker, Benhabib and others in teasing out a concept of "civic citizenship". Civic citizenship unbundles citizenship rights from formal citizenship and makes secure residence, political, economic, and social rights available to non-nationals legally residing in a national society. Legally speaking, it comes in the form of a residence permit available under EU or national immigration legislation (p. 41). This frame of analysis is particularly appropriate to use when examining the interaction of EU law and integration, as EU law has basically employed a civic citizenship model in its design of EU citizenship (although this is now contested in light of recent case law such as *Dano* and

Alimanovic). Jesse convincingly describes and justifies civic citizenship as a legal construct dependent on equal rights, but he also ably deals with the limitations of this concept. It doesn't supplement citizenship, it cannot directly ensure social integration, and so on. This nuanced analysis strengthens the overall impact of this section of the book.

Having laid these solid foundations, the substantive chapters go through the details of rules on entry and residence; employment and occupation; education; family life; permanent residence permits; and legal integration measures. The chapters explore the treatment of regular migrants within EU legislation and national legislation, but with a focus on analysis at the EU level. One of the most interesting aspects of the three national case studies (the UK, Germany and Belgium) is the diversity of the migration experiences of EU countries which is revealed. In the UK, most migration is for the purposes of work and study. Germany follows similar tendencies, but with a higher proportion seeking asylum. In contrast, Belgium has a very large proportion of family migration. Despite these differences, immigration and integration law and policy in the three countries have many common features. Each have introduced forms of mandatory integration conditions as part of the requirements of immigration law; and each have followed the EU-wide trend of attempting to limit family reunification. On the bright side, he finds that all three countries have a relatively sophisticated framework for protection against discrimination (on the basis of race, ethnic origin, religion) in daily life.

Some, but not all, of the commonalities among the case study countries are due to their EU Member State status. The focus on EU law in the book is invaluable, especially given important recent developments at EU level on the topic of integration. Jesse carefully dissects the key EU legislative measures and related case law of the ECJ in trying to determine the role of EU law in this strangely nationalistic domain. The implications of the Family Reunification Directive and the Long-Term Residents Directive, in particular, are explored in depth, as are recent judgments – including Case C-153/14 *K&A* and Case C-579/13 *P&S*.

Some commentators (including this author) have argued that EU law has legitimized and facilitated the spread of restrictive integration criteria as part of national immigration law, by importing the idea of national integration conditions into EU legislation. However, the analysis running through the chapters of this book presents a complex picture. In a nutshell, Jesse finds that the relevant directives “do not harmonize national integration measures, but significantly limit the discretion of Member States to install too restrictive integration conditions as tools of migration control” (p. 318). The ECJ has required that integration conditions which may be imposed in national law under the various directives must be proportionate to the aim of integration – as opposed to being a blunt instrument of immigration control. It has also generally identified the purpose of the EU measures as being to acquire a certain residence status. This broadly fits with Jesse's idea of civic citizenship, and indeed Jesse affirms that “the conclusions of this book in the year 2016 are relatively positive” (p. 360). He finds that the case law of the ECJ in recent years has improved the standing of regular immigrants from third countries, and optimistically suggests that we may see further approximation of rights between EU citizens and TCNs (while acknowledging that there are serious doubts about this projection).

However, while these practical and pragmatic conclusions respond accurately to the fascinating complexities revealed in this book, it must be said that EU law hardly measures up to the idealized vision of immigrant integration set out in the early chapters. Ultimately, Member States remain free under EU law to impose civic integration conditions, so long as they are proportionate and do not undermine the *effet utile* of the directive in question. EU law does not therefore seriously tackle the “nationalist narrative of unique nations” (p. 22, quoting Kostakopoulou) which is so corrosive to tolerance and inclusion within the local societies and communities where integration really takes place.

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Julian Nida-Rümelin, *Über Grenzen denken. Eine Ethik der Migration*. Hamburg: Edition Körber-Stiftung, 2017. 241 pages. ISBN: 9783896841957. EUR 20.

Between September 2015 and March 2016, Europe saw a massive influx of refugees and migrants, which has been described as the greatest mass movement of persons across Europe since World War II. Although numbers have decreased since then, the challenge is not yet over, and given the future development on the African continent and the Middle East, this situation could easily recur. Therefore, migration will remain a high priority for the EU and its Member States. In 2015, McDonnell presented a review of the book *The Ethics of Immigration* (CMLRev (2015), pp. 1417 et seq.) by Canadian political science professor Carens, one of the top scholars on immigration. It is worth mentioning that Carens' book dates from May 2015, therefore before this mentioned period.

Now that (for the moment) the peak of this massive influx is over, what we can observe are ex post analyses of this exceptional situation at different levels. At a legal level, the ECJ has to classify and judge the phenomenon of "waving through" in the light of the non-observed rules of Schengen and Dublin (Case C-490/16, *A.S.* and Case C-646/16, *Jafari*), or has to deal with the legal disputes initiated by the Slovak Republic (Case C-643/15) and Hungary (Case C-647/15) against the Council's relocation decision (2015/1601/EU), to name but a few. At a philosophical level, one can clearly see that the book of German philosopher Nida-Rümelin (published March 2017) has been written against the background of this exceptional period and the changed public opinion after the initial "welcoming culture", for example in Germany. While Carens' book was more about social membership (which can be opposed to the concept of EU citizenship) and pleading for "open borders", already the title of Nida-Rümelin's book ("reflecting about borders") suggests a different approach. He does not advocate for "open borders", as, according to him, this would not substantially ease poverty and would weaken the regions of origin even further and worsen social conflicts.

Apart from having been written before (Carens) or after (Nida-Rümelin) the mentioned peak, Carens stated that "we cannot leap directly from analysis of principles to prescriptions for policy" (p. 61), while Nida-Rümelin explicitly aims to bridge ethics and politics (p. 8) and sees ethics as an integral part of politics etc. (p. 16). With regard to methodology, Nida-Rümelin as a self-described "ethical realist" (p. 18), does not apply a utilitarian, a social contract or a libertarian theory, but a "coherent-istic" ("*kohärentistisch*") one. Thus, his starting point is a list of seven normative grounds (p. 44), which aim at making our ethical evaluation more coherent. These grounds include an obligation to act when promoting our own interests, when having committed oneself, or when being connected to one's role; the same is true in case of cooperative or altruistic reasons for action. Furthermore, there is an obligation to abstain from acting when infringing moral rights of another person, or when discriminating against this person. Therefore, Nida-Rümelin does not base his essay on a postulated principle, but rather on an ethical evaluation, advocating for openness, differentiation and complexity (p. 42). His approach to bridge ethics and politics and accepting empirical and normative facts (p. 9) is also coherent in the sense that he offers a lot of empirical data in the endnotes to his book.

After a rather long introduction (covering basically Chs. I to IV), Nida-Rümelin distinguishes three types of migration, one caused by poverty (Ch. V), one due to war and civil-war (Ch. VI), and finally economic migration (Ch. VII). Based on these analyses, subsequently he formulates seven ethical postulates for a migration policy (Ch. VIII), before he argues against open borders (Ch. IX).

Migration can be seen from the perspective of the countries of origin or the countries of destination, obviously resulting in different outcomes. Nida-Rümelin opts for a cosmopolitan one in the sense of including a prohibition of impairment in relation to those remaining in the countries of origin, as well as a social impact assessment of immigration in the countries of destination.

According to Nida-Rümelin, migration caused by poverty (Ch. V) is mainly a regional phenomenon. As the costs for trans-continental migration are very high, he argues that trans-continental migration is not an adequate way of tackling poverty and misery in the world.

Nida-Rümelin argues both with regard to the migrants' individual situation (enormous psychic, cultural and social pressure), as well as with effectiveness. The leverage effect of the money, for example spent by Italy, for receiving people from the African continent would be multiple times higher, if spent on the African continent itself (p. 100). Moreover, he observes a gender-bias, as the majority of migrants are male (and aged between 14 and 34). Nida-Rümelin is not in favour of poverty-based migration, as it would create problems, both in the countries of origin (lack of the fittest), and in the countries of destination (rise of right-winged and populist parties). It should be briefly noted that also the ECJ in cases of "benefit-tourism" (no knowledge of local language and no willingness to work) has taken a restrictive approach (Case C-333/13, *Dano*).

The second form of migration, i.e. caused by (civil-) war (Ch. VI), starts with a description of the responsibility of western politicians for the situation in the current countries of origin. Nida-Rümelin argues that the decision of German chancellor Merkel to welcome refugees stranded in Hungary should be welcomed from a humanitarian perspective, but was too spontaneous and not well reflected (p. 116). Capacities would soon have been reached and Nida-Rümelin points out to the strong pull-effect, in which such a statement can result. Demanding support as close to home as possible together with a sharing of costs by the international community, Nida-Rümelin refers to the criteria of absorptive capacity, size and economic strength of EU countries (p. 225). Those criteria have already been addressed by Carens in the context of resettlement (pp. 214–215), and are overlapping with the ones used (COM(2015)240, "A European agenda on migration", at 19) for the above-mentioned Council decision on relocation of people from Italy and Greece to some (in total 23) of the other EU Member States. Furthermore, Nida-Rümelin requires the European countries to practise an international refugee policy, which has to be based on solidarity and should not only cover those who made it to the EU's external borders. Although, knowing how difficult it is already to fill this EU value (Art. 2 TEU) with life for those on EU soil, finding solidarity-based solutions for people in need of support and located elsewhere, remains a very high challenge.

The last form of migration is economic migration (Ch. VII), where Nida-Rümelin starts from an economic perspective and argues that economic markets have to be ethically and culturally embedded (p. 130). An unleashed global employment market would destroy local solidarity-based structures and would create resistance, especially in the lower-income classes. Moreover, there is often high unemployment among migrants in countries of destination due to a lack of steering effects of immigration laws. From the perspective of countries of origin, Nida-Rümelin addresses the ethical challenge of brain drain, which is also explicitly addressed as an ethical issue by the EU's blue card Directive (2009/50/EC); similarly also the recent third-country nationals' studies Directive (2016/801/EU). While countries of origin should be compensated for brain drain, Nida-Rümelin also states a right of countries of destination to protect their social structures against unregulated economic migration (pp. 140–141).

All these findings culminate in seven ethical postulates for migration policy (pp. 144–156). While one is rather general (No. 1: more human and just world), only two of them relate to the countries of origin (No. 5: compensation for countries of origin in case of economic migration; No. 6: transfer payments instead of transcontinental migration). The others focus on the countries of destination, such as proposing to see immigration as enrichment and not as a threat (No. 2). With regard to the right of collective self-determination, Nida-Rümelin criticizes Merkel's statement, as having received consent neither from citizens, nor other EU Member States (No. 3). In order to avoid a rise of right-wing and populist parties, he urges respect of social structures (No. 4), and finally, to act towards migrants as one would also act in their social neighbourhood (No. 7).

Therefore, how is one to reach a more just world (Ch. X)? Nida-Rümelin observes a failure of intergovernmental structures (p. 178), demands more multilateralism (p. 180) and acknowledges that an institutional framework for cooperation, such as in the EU, can be helpful (p. 181). Again based on a reference to the EU, he calls for a worldwide social jurisdiction ("*Weltsozialgerichtsbarkeit*"), which would enforce dignified working conditions (p. 184).

At some stages it might have been helpful to use a language which addresses a broader scope of readers, for instance by outsourcing more "technical" details to an appendix, as Carens did it

(“presuppositions and political theory”). From a historical perspective it is important to emphasize that the 1951 Geneva Refugee Convention was drafted at a moment, when World War II was already over. Therefore, the reasons of this Convention (well-founded fear of being persecuted because of race, religion, nationality, membership of a particular social group or political opinion) don’t cover war. Consequently, they are not necessarily linked to migration caused not only by war, but also caused by poverty or economic migration (Chs. IV-VI). Thus, a separate chapter on refugees would have been of interest (also Carens distinguished between “ordinary admissions” and “refugees”). While Carens’ book might be enriching for the issue of inclusion of migrants and refugees (his concept of “social membership”), Nida-Rümelin’s essay, based on this “peak-experience”, is clearly able to enrich the current discussion and the setting of policies for future developments, both for the EU, as well as for its Member States.

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Roberta Mungianu, *Frontex and Non-Refoulement: The International Responsibility of the EU*. Cambridge: Cambridge University Press, 2016. 274 pages. ISBN: 9781107133570. GBP 69.99.

In the first legal monograph written on the EU border management agency, Frontex, for an international audience, Mungianu discusses the core of the matter, namely the issue of international responsibility for human rights violations. In particular, she examines the possibility of joint operations resulting in push-backs and violations of the principle of non-refoulement. She seeks to establish the legal circumstances, which may expose the EU and its Member States to incurring responsibility for breaches of the aforementioned principle. For this purpose, she looks into the establishment of Frontex and the structure of its joint operations in order to determine the division of responsibility among the EU and its Member States, and she outlines the legal framework covering international responsibility and the principle of non-refoulement. She answers her research question using traditional desk research methods, and complements those with interviews with Frontex officials, which enrich the analysis both in information and in perspective, but are not substantial enough to build an empirical research path. She conducts an in-depth legal analysis of general public international law, human rights law, and the law of the sea, as well as the relevant primary and secondary sources of EU law, combining the two regimes successfully and convincingly. The book offers entry-level accessibility to EU lawyers into international law, while still being a useful resource for international lawyers.

The book does not take into account the most recent development in September 2016 of the evolution of Frontex into the European Border and Coast Guard (EBCG) (as it is the adaptation of Mungianu’s doctoral thesis, defended in 2014). This does not, however, make it out-dated, since the basic structure of joint operations and the conduct and powers of the agency remain unchanged. Nevertheless, details have to be adapted to the changes brought by the EBCG Regulation. This study also misses out on some important literature published on Frontex accountability in the last three years, which limits its novelty value. Although this would count as a weakness, it is justified by the rapid developments in the field. Furthermore, in terms of theory, post-Lisbon assessments of non-refoulement, as it is enshrined in the various legal sources, have already been published, especially in ECHR and EU law handbooks. Perhaps the most important strength of the book and its main contribution to the field is in terms of systematization of this legal framework. The book provides a useful literature review, a detailed examination and a very good logical analytical structure of the state of the law, which is to be applied in Frontex joint operations. It skilfully systematizes the existing knowledge and brings an analysis of primary together with secondary sources.

Mungianu first approaches the topic from a governance and administrative EU law angle (Ch. 2). She looks into the underlying foundations of the establishment of Frontex and sees the agency as the amalgamation of supranationalism and intergovernmentalism. In a background of

shared competence, she analyses the division of competences between the agency and the Member States in the context of Frontex coordinated operations and she highlights the dependence of the agency upon Member State contributions. In Chapter 3, Mungianu elaborates further on such contradictions, which place the agency in between supranationalism and intergovernmentalism, and highlight the complexity of its legal standing, in between autonomy and interdependence. Her aim is to draw attention to how these complexities may result in violations if they are not sufficiently taken into account. She takes a step-by-step approach to explain the balancing exercise that is the division of competences between Frontex and Member States. With respect to joint operations and pilot projects, she concludes that the role of Frontex extends further than mere coordination, towards adopting a leading role in “directing operations”. This role however does not go as far as the execution of the operational plan, which still remains with the Member State. As far as the European Border Guard Teams (EBGTs) are concerned, the scale of competence leans more towards the Member State rather than towards the agency.

In Chapter 4, she goes on to look into the issue of the responsibility of the EU and its Member States, asking basic international law questions as to what constitutes an internationally wrongful act and what are the elements of attribution of responsibility. She examines the attribution of responsibility under two different analytical models found in literature, the “competence” and the “organic model”. Under the “competence model”, characterized by formal division of competences within the EU legal framework, the responsibility of the EU can almost never occur, as law-enforcement power lies by definition with the Member States.

By contrast, the “organic model”, which as she convincingly argues, fits more comfortably in the situation of Frontex joint operations, establishes responsibility on the basis of decisions taken at the operational level rather than on the ground. In this model, she concludes that there is no EU responsibility, as Frontex has no effective control (operational command and control) over the EBGTs, whose conduct is exclusively attributable to the Member State hosting the operation. The EU however may incur derivative responsibility by aiding or assisting, directing and controlling, or coercing a Member State to commit an international wrongful act.

Chapters 5 and 6 are the most well-researched and source-rich parts of the book. Chapter 5 provides a detailed account of the relevant EU and international legal framework, and combines the two, in order to establish the precise scope of the obligation of the EU and its Member States. In doing so, Mungianu builds on existing literature and takes the investigation one step further, asking whether the EU obligation of *non-refoulement* falls under customary international law. Although interesting, the reason for this particular approach is not clear, and perhaps a more pure EU law analysis (EU Charter, general principles of EU law) should have had a more central role in the analysis. In Chapter 6, Mungianu engages in a discussion of the *ratione loci* application of the principle of *non-refoulement*, covering issues of extraterritorial jurisdiction, where responsibility can arise outside the territory of the host Member State or even the EU. She argues in favour of a broad interpretation, where the role the exercise of actual control by a State over territory, persons, or, in the case of Frontex, vessels is central, and she concludes that the principle of *non-refoulement* must be respected also when Frontex operations take place in the high seas or even in the territory of a third country as long as the State/EU exercise *de jure* or *de facto* control over places or people.

Chapter 7, which seems to be parenthetical in nature, since it is not relevant *per se* for answering the research question, discusses the role of Frontex in search and rescue (SAR). There, the author argues that the EU is not directly bound by SAR obligations, but has a limited obligation under customary international. Furthermore, she argues that SAR is only incidental to Frontex surveillance operations, and that the Agency is not under the obligation to launch an exclusive search-and-rescue operation.

Mungianu brings the argument home by applying the conclusions of the theoretical chapters to potential examples of incidents during joint operations on sea and on land (Ch. 8). She finds the basic link to EU responsibility in the operational plan, which Frontex co-drafts together with the host Member State. This responsibility can also occur outside the EU territory. The author skilfully manages to ground these ethereal topics of extraterritorial jurisdiction and

international responsibility by providing examples of Frontex operations, where the theoretical conclusions on the territorial applicability can be tested in practice.

Altogether this book touches upon the question that is on everyone's mind when discussing Frontex operations – namely is Frontex merely the coordinator, or is the Agency responsible for possible violations under international law? – the analysis does not move far beyond the limited scope of division of competence within the EU framework and a first “who does what” examination, which does not necessarily correspond to an in-depth look at the full spectrum of allocation of responsibility. It makes a well-argued case, but a limited one, as it leaves a wider range of grounds for responsibility, and issues regarding judicial accountability for further in-depth research. Furthermore, several issues discussed in the book, such as the possibility of shared responsibility between the EU and the Member States, remain controversial. In particular, Mungianu rejects the possibility of multiple attribution, which could lead to the joint responsibility of the EU and the host Member State, although she acknowledges that this possibility is not excluded under international law. Another such example is her conclusion that the EU does not have a direct legal obligation for SAR. It would be interesting to follow the continuation of this discussion with the results of the project “Human Cost of Border Controls”, researching border deaths and their relation to EU policies.

At any rate, this book, being one of the first on the topic does not aspire to provide a definite answer to these complex questions, but a sound entry point into the discussion. In this respect, *Frontex and Non-Refoulement* is a welcome introduction to the subject, opening the way for future in depth studies into Frontex responsibility.

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Werner Schroeder (Ed.), *Strengthening the Rule of Law in Europe. From a Common Concept to Mechanisms of Implementation*. Oxford: Hart Publishing, 2016. 320 pages. ISBN: 9781849467087. GBP 70.

It is a truism that the rule of law is a slippery notion, impossible to pin down in a precise and clear-cut definition. The rule of law can be treated as both a culturally-bound and a meta- or transcultural principle. The former approach locates it in the context of Anglo-Saxon and, even more specifically, English legal culture and, when proceeding to a comparative or theoretical analysis, discusses its differences from and similarities to concepts and principles of continental legal culture, such as the *Rechtsstaat*. As a metacultural principle, the rule of law gathers together elements common to the Anglo-Saxon or English notion and its kin notions in other legal cultures, most importantly the *Rechtsstaat*. Evidently, when the rule of law is invoked in the context of the Council of Europe or the EU, the notion is used in a metacultural sense.

Surprisingly little comparative research exists on the English notion of the rule of law and its kin concepts in Continental legal culture. Schroeder's book does not remedy the situation: Part II of the book engages in an examination of the “core elements” of the rule of law without any preceding comparative analysis. The chapter titles imply that the core elements consist of the principle of legality and hierarchy of norms; access to justice and judicial independence; transparency; legal certainty; and the principle of proportionality. However, no justification is provided for the selection of exactly these elements. One of the recent developments in the field of the rule of law, which most of the articles collected in the book have not had time to register, is the adoption by the Venice Commission in 2016 of a comprehensive rule of law checklist. In this checklist, the rule of law is divided into the principles of legality; legal certainty; prevention of abuse (misuse) of power; equality before the law and non-discrimination; and access to justice. Moreover, each of these principles is further specified through sub-principles. It may be considered a benefit of the rule of law that it is a living notion, calling for continuous transnational discussion and specification of its contents. Still, one would expect in a book with

academic pretensions, too, a more thorough comparatively and theoretically based analysis of and justification for the chosen “core elements” of the European principle of the rule of law.

Not only are the contents of the rule of law hard to specify. What also complicates the discussion of the “strengthening of the rule of law in Europe” is the multi-level nature of the European polity and law. In the EU, most conspicuously in the case law of the ECJ, the emphasis of the rule of law principle has lain on the legal position of private subjects in the application of EU law. The state of the rule of law in Member States has come to the focus of EU law only in the application by Member State authorities of EU law. In turn, in more theoretically oriented analyses, the standard starting points, also shared by articles in Schroeder’s book, have consisted in Hallstein’s characterization of the EU as a *Rechtsgemeinschaft* and the ECJ’s introduction in *Les Verts* of the notion of “a Community based on the rule of law”. Often enough both *Rechtsgemeinschaft* and *Rechtsstaat* are translated into “the rule of law”, thus obliterating their conceptual difference. “A Community based on the rule of law” is a veritable terminological mishmash, obviously trying to capture something of the conceptual contents of both *Rechtsgemeinschaft* and *Rechtsstaat*.

For Hallstein, the Community was a *Rechtsgemeinschaft* in three senses. It was a creation of law (*Rechtsschöpfung*), it was a source of law and it was a legal order. The foremost of these connotations was the first one: the Community as a creation of law. Here Hallstein evoked the central role of law as the means and object of integration; the reason why European integration has so often been characterized as a legal project, in spite of its basic economic orientation. *Rechtsgemeinschaft* refers, first, to the Community of States: instead of being simple relations of power, the mutual relations of the Member States and their relations to the Community are governed by law. But, secondly, the connotation of *Rechtsgemeinschaft* possesses a societal aspect, too, and bears an echo of the ordoliberal conception of the marriage of economy and law. In this wider, societal connotation, Hallstein’s *Rechtsgemeinschaft* comes close to Böhm’s *Privatrechtsgesellschaft*.

With EMU and the emergence of the macroeconomic constitution, the EU has lost much of its character of a *Rechtsgemeinschaft*. By the same token, new rule of law problems have emerged; problems which turn on the relations between the EU and its Member States. These are developments which Schroeder’s book ignores. In contrast to free movement and competition law, the macroeconomic constitution is not about the activities of individual economic subjects but about macroeconomic objectives and aggregate values, as well as actions of Member States and EU institutions. What is missing in the context of the macroeconomic constitution is the societal or private aspect of the *Rechtsgemeinschaft*. Furthermore, even in public relations, the Maastricht macroeconomic constitution granted the law but a minor role. Non-monetary economic policy at the European level was supposed to be about coordination, and the instruments the Treaties indicated for this purpose were mainly of the character of peer review and soft law. Accordingly, it is hard to label the economic community of Member States which the Treaty provisions on EMU envision as a *Rechtsgemeinschaft*. The Eurozone crisis produced a massive rule-work, but this can hardly be deemed conducive to strengthening the EU as a *Rechtsgemeinschaft* or reinforcing the rule of law sub-principle of legality. On the contrary, this rule-work has created new rule of law problems in the relations between the EU and its Member States.

Schroeder’s book focuses on the available European mechanisms of reacting to the erosion of the rule of law in Member States, as highlighted by recent events in Hungary and Poland. Thus, the rule of law framework, introduced by the European Commission in 2014 as a reaction to developments in Hungary, occupies a prominent place in several contributions. However, the authors have not yet had the possibility to examine the first application of this framework to the situation in Poland. Neither do the contributions add much to the discussion in, for example, the volume on *Reinforcing Rule of Law Oversight in the European Union* edited by Closa and Kochenov.

The contributors to the volume under review include both academics and representatives of European institutions. This might be said to guarantee diverse perspectives to rule of law issues. Yet, it may also tell of a hesitation as to the character of the book: are we dealing predominantly

with academic research, a report on certain aspects of European rule of law issues or a contribution to ongoing public debate?

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Mark Dawson, *The Governance of EU Fundamental Rights*. Cambridge: Cambridge University Press, 2017. 250 pages. ISBN: 9781107070493. GBP 85.

Whilst the issue of fundamental rights protection is at the core of the EU regulatory agenda, its development has been gradual. *Ab initio*, the European Community did not have a clear policy of human rights. Then, fundamental rights legislations and policies were gradually introduced within the EU legal system, first via the general principles of EU law and then, through the EU Charter of Fundamental Rights. Consequently, research in this area has expanded.

The scholarship of EU governance has also seen a huge development. According to a 2006 survey undertaken as part of the “Network of Excellence” on “Efficient and Democratic Governance in a Multi-Level Europe” (CONNEX), an “explosion of EU governance research” has manifested in the recent decade (Kohler-Koch and Rittberger, 2006). Indeed, scholars have associated the concept of governance with theory of European integration and examined governance in relation to “intergovernmental” or “supranational” modes of decision-making in the wider discourse on EU politics (Weiler; Moravcsik; Stone Sweet and Sandholtz). In addition, research has explored different modes of governance (Sabel and Zeitlin) and studied this concept in relation to the internal market, employment policies and the European research area, just to name some fields (Bulmer; Mosher and Trubek; Morano-Foadi).

More recently, academics have reflected on how the EU is managing its current crises, i.e. the Eurozone and the refugee resettlements in the light of fundamental rights protection. Within this context, Dawson’s book offers a unique critical overview of the governance of EU fundamental rights in a dynamic and original vein. Its aim is to shed light on the mechanisms through which fundamental rights are protected and enforced. Accordingly, this volume accounts for the evolution of fundamental rights within the EU over the last decade.

Dawson has focused on the concept of “governance of fundamental rights”, also known as the “architecture of EU fundamental rights”. He has defined this thorny concept in negative terms and gone on to examine the constraints on to the enforcement of fundamental rights’ legislation. He defines governance as the exercise of public power in conditions under which normative authority and steering capacity are dispersed. Dispersal, however, is not a homogeneous concept; it is expressed in two different varieties. The first form is defined as “normative dispersal” and relates to the EU legitimate authority to govern. The authority of the EU is contested and arranged through a series of overlapping constitutional orders. Conflicts between different national constitutional courts and the ECJ in general, and in particular between the German Constitutional Court and the ECJ, are examples of its contested authority. The second form of dispersal is described as the “EU capacity to govern”. Although the EU has a significant steering power, it has to rely on domestic courts and administrative bodies to implement EU policies. In other words its capacity to enforce its policy hierarchically is limited.

The above-mentioned forms of dispersal characterize the EU governance and specifically its relationship with fundamental rights. The concepts of governance and fundamental rights do not appear *prima facie* compatible or associable. Governance is a political concept, which refers to the exercise of political powers, whilst fundamental rights are understood as an instrument of legal constraint of limiting power (pp. 4–5). The former term relates to the allocation of rules amongst different institutions at several levels and the latter carries a universal element, a common and mutually accessible core of protection to be enforced by authoritative central institutions. Moreover, governance is a fluid and changing concept which sits in tension with the hierarchical and static rule implied by the “rule of law”, whilst fundamental rights exist in a state of relative stability to be meaningful.

Dawson adopts a variety of methods to examine the interrelation between these two concepts. A critical approach to the theory of governance of EU fundamental rights is contextualized in the first chapter. A dichotomy between *EU Human Rights Scepticism strand* and a *procedural approach to transnational human rights protection* is proposed.

The *first strand*, the Human Rights Scepticism doctrine, is elaborated through three different theories and criticisms. The *first* is counter-majoritarian theory, which considers the challenges posed by divergences over the scope of human rights across EU Member States and the difficulties in reconciling the political will with the judicial enforcement of those rights. The *second* theory is the communitarian critique, which relates to the individualist approach of the EU citizenship in protecting individuals by undermining the bonds of collective solidarity. The *third* is an empirical critique that questions the added value of EU human rights protection for minorities and individuals. This is based on the assumption that often the national judiciary have a more effective role in protecting individual and minority rights than legislatures, as they do not have to respond to the electorate. At EU level, the absence of an explicit “margin of appreciation” mechanism, characteristic of the ECtHR approach, limits the ECJ’s capacity to determine sensitive issues such as cultural or religious questions.

The *second strand*, which concerns the procedural understanding of transnational rights, substantially explores the features of judicial review if an individual’s fundamental rights have been infringed. The theoretical underpinnings of this approach are expressed through an analysis of Hart Ely and Habermas’ theories. Based on the main American school of constitutional interpretation, Ely’s account adopts a process-oriented judicial review, arguing that in interpreting human rights rather than limiting political choices judges open up channels of political communications. Thus, intervention to protect human rights is conducted via different human rights charters and broader principles of constitutionalism. Although based on a different disciplinary and political tradition, Habermas’ theory is consistent with Ely’s account, in that he considers human rights are not grounded in external morality alone but also in democratic authorship, i.e. political process and not in pre-political values (pp. 28–30)

Dawson has also developed a further account of human rights scepticism, which is empirical in nature and questions the effectiveness of the governance of fundamental rights. This approach requires more than judicial supervision; it suggests that proactive institutions are able to promote and fulfil human rights guarantees across the EU (Williams, 2015). Such an argument is brilliantly reviewed in Chapter 2. Dawson provides a doctrinal analysis of relevant ECJ case law to assess whether the EU courts engage in a form of “margin of appreciation” which is designed to respect the “legitimate diversity” between Member States in two ways. The *first* standpoint, which is defined as the vertical deference, examines the extent to which EU courts have developed the margin of appreciation in their interaction with national courts. The *second* perspective, which is defined as the horizontal deference, involves a direct dialogue between the EU courts and the EU legislature; the latter is a set of different EU institutions that issue legislative acts. The concluding reflection provided in this chapter is strictly related to the following chapter and focuses on the EU’s political institutions.

The main line of reasoning reflects on the difficulty of the EU courts to protect fundamental rights adequately. The solution can be found in asserting that EU fundamental rights protection is a shared responsibility between the EU judiciary, the EU legislature and national courts. The question is: how much responsibility should be expected of each of the above bodies, bearing in mind that the legal basis for this policy is fragmented between different areas. To answer this question effectively, the author believes a mapping exercise should be conducted at two levels. The *first level* considers the formal division of competences between the EU institutions which carry and share their mandate. The three main political institutions are the Commission, the Council and the Parliament and the watchdog institutions, i.e. those which monitor the work of the EU institutions themselves: the ECJ and the Ombudsman. The *second* level analyses the implementing bodies which are subordinated to assist other institutions to fulfil their duties. An external evaluation of the EU FRA and Frontex was provided to unpack the principal procedures used by the EU to monitor fundamental rights and assess their effectiveness. The analysis is based on two arguments. The *first* argues that the EU institutions cannot be

understood independently from their strategic objectives and their role in the EU's larger institutional framework. The *second* suggests that despite some failures in the system, the EU governance of fundamental rights has demonstrated an ability to correct itself, as omissions committed by an institution are then rectified by others. Thus, the cumulative effect is an "institutional architecture of greater sophistication and with a higher capacity to rectify fundamental rights violations, than at any point in the EU's past history". (p. 142).

The subsequent analysis proceeds with an evaluation of the work of the EU institutions in relation to a set of concrete rights. Two case studies containing doctrinal and empirical findings are developed. The *first* one focuses on justice and the rule of law within the context of the recent crises in Poland and Romania (Ch. 4). The *second* case study explored the issue of social rights protection under the EU Charter during the economic crisis focusing on Greece, Portugal and Ireland (Ch. 5). These two case studies have shown that the challenge is not whether the EU institutional framework for the governance of fundamental rights is adequate. Instead, the real issue is that fundamental rights are bypassed either by programmes which threaten substantive rights *per se* or by measures that remove the possibility of their legal or political contestation. For example, in the case of social rights, intergovernmental actions have rendered the legal and political accountability developed under the Treaties inapplicable, and in relation to the rule of law, Member States have threatened their national courts making national judicial review and/or reference to transnational courts impossible.

Thus, Dawson acknowledges the benefits of the EU governance of fundamental rights. However, he is concerned that its effectiveness might be limited by distort mechanisms adopted by the EU and its Member States.

In short, this book has explored this complex topic through an elaborate theoretical and empirical discussion at different levels using impressive methodological tools. Although highly recommended as essential reading in this field of research, this monograph struggles to offer a practical and feasible proposal to overcome the distortions between the theory and practice of the EU governance of fundamental rights.

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Oxford

Sybe de Vries, Ulf Bernitz and Stephen Weatherill (Eds.), *The EU Charter of Fundamental Rights as a Binding Instrument. Five Years Old and Growing*. Oxford: Hart Publishers, 2015. 416 pages. ISBN: 9781782258254. GBP 70.

The difficulty in assessing the impact of the Charter of Fundamental Rights on the EU legal order stems from the topic's breadth and dynamic nature. The Charter is applicable within all the diverse branches of EU law. Its elevation to a binding source of primary law has increased the visibility of EU fundamental rights. Litigants before the EU courts and referring courts have been basing their claims on the Charter increasingly often. This results in a continuous expansion of the Charter's actual applicability and generates new legal questions, many still unresolved. Despite these intrinsic difficulties of the topic, the editors of the book have provided a broad, in-depth and succinct assessment of the post-Lisbon case law involving the Charter. The book results from a conference held in Oxford in 2014, a follow up to a book published in 2013. Important developments have arisen in the case law since then, with cases such as *Fransson*, *Melloni*, Opinion 2/13 on accession to the ECHR or those relating to privacy and data protection. This has prompted the editors to update their research.

Part I concerns the interactions between different layers of the European system of fundamental rights and is composed of five chapters. Chapter 1, by Rosas (judge at the ECJ), provides an overview of the Charter's impact. To Rosas, the ECJ has taken the Charter "quite seriously" as it has even served as the basis for the annulment of legislative provisions; and references to the ECHR and national constitutional traditions have become less frequent. Rosas highlights that despite *Fransson* and its follow-ups, there remains a "grey area" between the Charter's applicability and non-applicability to national measures, causing practical problems.

Finally, Rosas posits that although under EU provisions the ECJ must respect national constitutional identities and traditions, national constitutional norms cannot trump the application of conflicting EU provisions. In Chapter 2, Douglas-Scott discusses the relationship between the EU and ECHR systems. To her, Opinion 2/13, filled with statements on the autonomy and specificity of EU law, expresses in reality the ECJ's concern for its own prerogatives. She claims that acceding to the ECHR under the Court's terms would not serve its actual purpose of strengthening fundamental rights protection in the EU. Regrettably, this important but not self-evident argument is not discussed further. Douglas-Scott later predicts that the ECtHR will exceptionally assess EU measures (in particular AFSJ measures), resigning from applying the *Bosphorus* presumption.

The value of the autonomy between the EU, ECHR and national fundamental rights is the leitmotif of the next three chapters. In Chapter 3, Gerards proposes that fundamental rights courts coordinate their tasks, by selecting cases or moderating the intensity of review, with due regard to their *raison d'être*: the primacy, unity and effectiveness of EU law as concerns the ECJ and the effective protection of rights as concerns the ECtHR. In case of the diverging meaning of rights at issue or relevance of local circumstances, the case should be deferred to national courts. These propositions resonate well with those made by Komárek in his thought-provoking Chapter 4. He argues that, faced with the parallel mechanism for the judicial review of national laws by ordinary courts relying on EU law, national constitutional courts should stick to their national constitutions instead of embracing EU fundamental rights. The national and EU systems of fundamental rights are embedded in different rationalities: constitutional democracy and market integration respectively. Komárek urges ordinary courts to choose carefully between EU or national rights in concrete cases considering these differences. Chapter 5 by Rauchegeger is a transition between Part I and II, the latter discussing the rules of the Charter's application. She identifies two main challenges for the EU system of fundamental rights: completeness and non-marginalization of national constitutional systems. As concerns the first challenge, the test for the Charter's applicability seems coherent only on the conceptual level, leaving many details open when applied in concrete cases. The author does not however present suggestions on how to amend the test in practice. The rationale of the second challenge is that constitutional courts safeguard against a "race to the bottom" of fundamental rights standards and provide a balance on the ECJ's powers. Therefore, Rauchegeger favours the exception to the *Melloni* formula on the basis of the constitutional identity clause (Art. 4(1) TEU) and urges the ECJ to refer explicitly to national constitutional traditions to support further convergence between EU and national standards.

Part II opens with Chapter 6 by Groussot and Petursson. They ask whether the Charter – in particular its limitation clause (Art. 52(1)) – brought about a coherent constitutional framework for the uniform assessment of both EU and national measures. They point out inconsistencies in how the ECJ applies the Charter to EU and national measures. What should be particularly appreciated about this piece is that the authors make the effort to present their own practical suggestions of how to remedy the problems identified. The next chapter contains an in-depth case study of the aftermath of *Fransson*. Bernitz shows that the Charter can reinforce the effect of the ECHR insofar as the rights guaranteed by the two of them overlap. This is because the Charter, unlike the ECHR, must be directly applicable in all Member States. The case study also illustrates a spill-over effect: for pragmatic reasons, the national law-maker may extend the applicability of norms modified by the Charter beyond the reach of EU law.

In an engaging Chapter 8, Barnard asks who should decide on social rights in Europe. She claims that whether the EU's social rights can bring added value depends on the case. To her, the Charter could play a positive role in assessing national labour laws resulting from bailout conditions imposed by European institutions. Barnard proposes to the ECJ concrete solutions: imposing on the basis of the Charter's social provisions certain procedural safeguards on national legislatures. In contrast, she does not see any room for the Charter's offering of social rights in cases relating to the Posted Workers Directive, retirement and age discrimination. In these cases, in her view, the ECJ should not upset the delicate balance between social and economic rights reached by the EU political institutions. Although Barnard's arguments are

very pragmatic, the reader is left unsure of the legal bases of her proposals. Should the Court simply reject certain preliminary references? Or should it rather, depending on the case's context, adopt a deferential standard of review?

Part II is completed with Chapter 9 by Paju, which concerns a significant component of EU social policy: the social security coordination system. Undertaking a careful and detailed analysis of the case law, Paju considers whether the Court's current approach indicates that it may derive independent EU social standards from the Charter and impose them through the system for social security coordination. He believes that this is not a likely scenario in the near future.

Part III deals with selected issues concerning the Charter's impact on the internal market. In Chapter 10, Weatherill claims that contrary to mainstream narratives, the ECJ has always been friendly to non-economic considerations as justifications to trade-restrictive national practices. The Charter should not change the pre-existing balance between the economic and social rights. Weatherill criticizes *Viking Line*, *Laval* and *Alemo-Herron* as "aberrations" from the traditional ECJ approach towards non-economic values. Thus, he subscribes to a traditional dichotomy between internal market (economic) freedoms and social rights (which has recently been contested by Kukovec).

Chapter 11 by de Vries is the first one of three dealing with data protection and privacy. It presents complex and multidirectional interrelationships between internal market freedoms and fundamental rights. The conclusion is that EU fundamental rights are subordinate to the internal market freedoms: the former are applicable along with the latter or as grounds for exceptions to them. And yet, the ECJ has coupled the market freedoms and fundamental rights to develop efficient guarantees of privacy and data protection. Fabbrini continues this topic arguing that the ECJ has jumped on the opportunity delivered by the Charter to play the role of a fully-fledged human rights court, giving data privacy precedence over other rights and public interest objectives (Ch. 12). He underlies further challenges stemming from the ensuing potential clashes of data privacy with conflicting interests and rights. Concluding the topic, Oliver analyses whether economic actors, both natural and legal persons, enjoy the rights to privacy and data protection under the EU law as it stands (Ch. 13).

The last two chapters provide specific examples of how EU fundamental rights influence its regulations and institutional practices. Andersson asks in Chapter 14 whether procedural safeguards surrounding dawn raids by the Commission are sufficient in light of the rights to good administration and judicial protection. A reader will appreciate not only a detailed analysis of ECJ and ECtHR case law but also insights from the practice of competition law enforcement. In Chapter 15, Lang presents a comprehensive and compelling critique of the previous EU State aid procedure as being non-transparent, not constraining the Commission's discretionary powers and disregarding individual rights of defence and to be heard.

The book's main advantage is the variety of issues it tackles, guaranteeing a holistic analysis. It is an example of thorough doctrinal scholarship at its best. Not only do the authors explore and critically assess the Charter's impact on the EU legal order but they also deal with practical problems that the Court and national courts face in adjudication. Increasingly, either the litigants or referring national judges resort to the Charter's normative potential to challenge the legality of EU acts and national measures. This, in turn, generates further questions on the Charter's precise scope of application, precedence over national constitutions, proportionality test or relation to internal market freedoms to name but a few. First of all, the authors have, mostly successfully, attempted to provide a reader with an exhaustive examination of the said problems. However, of particular interest are those contributions which suggest specific solutions. Supporting and inspiring courts in solving legal problems is one of the traditional tasks of legal doctrinal scholarship. It is desirable that legal scholars, following the example of some of the authors contributing to the book under review, propose practical solutions to the problems surrounding the Charter's application.

Michał Krajewski
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Nina Blum, *The European Convention on Human Rights beyond the Nation-State*. Basel: Helbing Lichtenhahn Verlag, 2015. 266 pages. ISBN: 9783719037888. CHF 64.

Global challenges require States to look beyond national borders. In addressing them, States engage in activities that have consequences abroad and increasingly rely on international organizations. Blum analyses how this may affect the obligations and responsibility of States under the ECHR. She focuses on two specific aspects: the first is the extraterritorial applicability of the ECHR; the second is the responsibility of States in the context of setting up and acting under the auspices of international organizations. The publication is a revised version of her PhD thesis defended in 2012 at the University of Basel, Switzerland.

The book is in two parts. Part I deals with the applicability of the ECHR beyond national borders. Blum opens this Part by pointing out that ever since *Bankovic*, the ECtHR has set out from a presumption against the extraterritorial application of the Convention. She sets out to examine the adequacy of this presumption, even though it remains unclear what factors the author considers relevant in determining adequacy. In the first three sections of Part I, the author deals with the core concepts relevant to the question of the Convention's extraterritorial applicability. She first assesses whether the applicability of the ECHR is dependent on the impugned conduct occurring within the legal space of the ECHR (the "*espace juridique* argument"). Having concluded that this is not the case, Blum focuses her analysis on the notorious concept of "jurisdiction" under Article 1 ECHR. According to Article 1, States incur Convention obligations *vis-à-vis* all individuals that are within their "jurisdiction". Whilst this generally includes everyone within a State's territory, it may also include persons that are within another State's territory. The author is critical of the ECtHR's use of the rules of interpretation, in particular its contradictory reliance on *travaux préparatoires*, of its reliance on the concept of "jurisdiction" under international law, and of its failure to distinguish between the concepts of "jurisdiction" and "attribution" with sufficient clarity. The third concept Blum introduces is, in essence, the distinction between attribution of conduct and responsibility for violation of positive obligations. The main body of Part I then critically analyses the ECtHR's case law on the question of extraterritorial applicability of the ECHR with a view to deducing general principles. For that purpose, the author divides these cases into five categories, roughly corresponding to the conditions under which the ECtHR has been willing to accept the extraterritorial applicability of the ECHR. Essentially, the author's closing argument on Part I is that a State exercises jurisdiction whenever its organs act, whether this is territorially or extraterritorially. This is a significant (and bold) conclusion because it departs from the ECtHR's own interpretation of the Convention and several other scholarly works on this topic.

Regrettably, Part I is very short (occupying less than 40 pages), despite covering a broad question and a large body of case law. The circumstances under which the ECHR limits conduct of contracting States that takes place or has effects outside their territory have intrigued academics for decades. It continues to be a topic of relevance and interest, especially – as Blum rightly points out in the introduction – in times of globalization, military intervention, and cross-border counter-terrorism activities. In light of the wealth of existing literature on the topic one might have wished for a more detailed treatment. This is even more so given the far-reaching and important conclusions reached.

Part II of the book deals with the responsibility of States in the context of setting up and acting under the auspices of international organizations. There is a clear focus on this second part, to which Blum devotes more than three quarters of the entire book. The aim of the author is to establish whether the ECtHR has developed special rules regarding responsibility for breaches of the ECHR that involve the activities of international organization and – if so – whether these rules are adequate. However, similar to Part I, the benchmarks for analysing adequacy remain open.

Part II of the book opens with an introduction to the legal personality, autonomy, and responsibility of international organizations, as well as their typical decision-making mechanisms. It then discusses the main arguments traditionally brought forward against the responsibility of Member States of international organizations, i.e. the separate legal

personality and the independent functioning of international organizations. Blum strongly disagrees with both. In essence, this is based on conceptual as well as rule of law and accountability considerations. The core section of Part II critically analyses the ECtHR's case law related to the activities of international organizations with a view to deducing general principles. Four situations that have given rise to case law are discussed in this context: (1) the implementation by a Member State of a decision of an international organization, (2) decisions of international organizations that produce direct effect, (3) the lending by a Member State of its organs to an international organization, and (4) the grant of immunity to an international organization. The author proceeds to analyse each in turn. Blum forcefully argues that States bear responsibility for decisions of international organizations that negatively affect individuals even in the absence of implementing measures. Basically, according to the author, this is a result of their obligations to protect under the ECHR. Similarly, she concludes that States who place their organs at the disposal of international organizations always retain some of their Convention obligations. Again, this is essentially because these organs "remain the soldiers of a State" on account of which States incur positive obligations. Likewise, in Blum's view, States are responsible for acts of international organizations when no means of redress are available against the latter.

Also in Part II, the conclusions reached by the author are significant. Some of them depart considerably from the ECtHR's case law or existing literature on the topic. Regrettably, arguments that contradict or challenge the author's own are at times dismissed rather summarily and occasionally not referred to at all. However, many of them would have merited in depth treatment. For example, considering the author's strong reliance on the doctrine of positive obligations in order to find States responsible in connection with acts of international organizations, it would have been interesting to draw an (explicit) connection to Part I in this respect. Do these positive obligations also arise in an extraterritorial context, e.g. when States put their organs at the disposal of international organizations?

Overall, the book addresses highly relevant and complex questions and the author offers a perspective inspired by accountability and human rights considerations. Despite the broad range of issues discussed, the book succeeds in giving an overview of the various challenges that States' activities abroad and within the context of international organizations may raise from a human rights perspective. The book is therefore recommended to anyone interested in gaining an overview of these issues.

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Robert Grzeszczak (Ed.), *Challenges of Good Governance in the European Union*. Baden-Baden: Nomos, 2016. 369 pages. ISBN: 9783848731800. EUR 69.

Grzeszczak's book aims to present the concept of good governance, the recommended initiatives and forms of implementation as well as to answer the question related to the crisis influencing the performance of integration tasks and the condition of the Member States. The book concerns one of the most significant problems, namely the functioning of the public sector in theory and practice. The situation in Poland serves as the prime point of reference for the presentation of relevant national policies.

Grzeszczak argues that the EU in the 21st century is confronted with problems that were unknown at its start. Although the period of reforms in the EU continues, the question of existence of the EU internal market of 28 Member States is highly doubtful. A political and substantive crisis of the EU results from the lack of clearly-defined integration goals and indecision as to its current and future shape. The crisis may become a catalyst for the acceleration of the integration project in Europe, Grzeszczak states. Consequently, good governance may lead to a significant improvement in the quality of governance, i.e. the manner and effects of governance. Good governance involves ensuring political stability and efficient foreign policy, including provision of internal and external security.

There have been calls for a considerable change in how the EU and its Member States are governed, which has been reflected in the concept of good governance. The idea has been discussed among international scholars for over two decades, but it is now becoming increasingly applicable in the practice of the European integration process. The objectives of the book were formulated from the discussion, initiated a decade ago, concerning the role of the State in the 21st century, the future of EU integration and challenges of globalization. In this book, the hypothesis is also posed that an element of good governance is the ability to fulfil the social needs of the EU citizens. To evaluate this hypothesis, selected issues are analysed. Efficiency in fulfilling the social needs of the EU citizens is an essence of this concept. Grzeszczak tries with success to verify the hypothesis that the 21st century as the time of transition from government to governance is connected with the proposal to introduce the good governance system in the EU and in the Member States. Therefore, the issues which have been examined by the various authors involve theoretical considerations regarding political and legal initiatives related to the good governance programmes.

The book has three parts: theoretical, governmental view and case study. The first part entitled: "Change of the paradigms: From government to good governance?" provides an overview of the concept of good governance in the EU, good governance and public administration, an analysis of human rights and good governance, the policy advice in the transition process, and finally good governance in the judicial system. The book's second part focuses on the selected issues of public participation and government effectiveness. Here attention is paid to the development of the concept of the EU citizenship through incremental acceptance of citizens' rights and anti-discrimination framework and employment. The next contribution analyses the relationship between good governance and security policy, and that between the digitization of the citizen's life and the level of development and functionality of information and communication systems. Furthermore, the second part summarizes the good governance rule and balancing interests of employers and employees in the EU, the concept of better regulation is presented and access to e-justice. The third part of the book includes case studies related to the practice of good governance at the EU and national level. It deals with the initiatives supporting the internal and external security of the EU and its Member States, the issue of transparency of global health law in the context of its constitutionalizing, the impact of government informatization on the efficiency and effectiveness of public duties, the impact of the principles of good governance in European investment law, good governance at the local level, mutual recognition of official documents as an example of an initiative that brings the EU closer to its citizens and good governance at the metropolitan level.

The main aim of the book is to verify the hypothesis that the concept of good governance, both in the EU and its Member States, expresses a wider tendency observed in the last years, i.e. the transfer from government to governance. The thesis posed is that the essence of government is to hold power supplemented by the horizontal solutions having participatory and networking character. Governing should be effective, which means that actions, costs and expenditures must be correlated, and then compared with the results achieved at the EU level and on the Member States. Hence, the objective of the book is to investigate the concept of good governance system about the EU and national initiatives. In relation to the above-mentioned issues, the following detailed book's objectives are stated. They are formulated to specify, systemize and analyse the aspects of good governance and realization of public missions. In other words, the book aims to verify another hypothesis saying that the core of good governance is efficiency in meeting the needs of the citizens. Such hypothesis will be verified by specifying the applicability value of many EU initiatives, i.e. improvement of the legislative environment, fight against discrimination in the broad sense, making the justice system more efficient, judicial control of European public administration, building the structure of European investment law and creating investor protection, the initiatives bringing Europe closer to its citizens and supporting the guarantee of internal and external safety of the EU and its Member States.

The book analyses precisely and systematically issues which constitute the concept of good governance in the EU. The only question is whether the article entitled "Good governance and

human rights” (Part 1) is separated from one entitled “The development of the concept of EU citizenship ...” and “Tackling discrimination in the European Union” (Part 2). Both articles refer to the same matter, i.e. human rights. The same question concerns “Good governance in the judicial system ...” (Part 1) and “The access to e-justice ...” (Part 2), both related to the judicial system.

This book displays many of the strengths that readers will associate with Grzeszczak’s rich and important body of work. It is empirically informed and historically nuanced. Drawing on his broad knowledge of different literatures, he and the other authors offer insightful empirical speculations, illuminating parallels, and suggestive observations. The objective of the book is to determine optimal measures for wielding power, to formulate a coherent concept of good governance and the methods of its realization in practice, were undoubtedly executed.

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Jean-Claude Barbier, Ralf Rogowski and Fabrice Colomb (Eds.), *The Sustainability of the European Social Model. EU Governance, Social Protection and Employment Policies in Europe*. Cheltenham: Edward Elgar Publishing, 2015. 384 pages. ISBN: 9781781951767. GBP 90.

This study assembles a collection of fifteen essays on the sensitive issue of the evolution of the European social model. This book comes at the right time, as the topic of social integration is a subject of major interest in European academic studies. The economic crisis has proved a tough test for European social law and, more broadly, for the effectiveness of a social market economy. Therefore, the authors’ desire to appraise the efficiency of the European social model in a context of crisis and uncertainty is very relevant. This collective work is part of a larger project called GUSTO, Governance of Uncertainty: meeting the challenges of economic uncertainty and sustainability through employment, industrial relations, social and environmental policies.

The book’s first part deals with general issues related to social and employment policies. It analyses interactions between EU law and national policies from a comparative perspective and discusses the role of the main institutions responsible for interpreting and enforcing EU law, mainly the ECJ and the Commission. This part encompasses a study on the “Janus face of EU” (Barbier and Colomb), a contribution on “EU governance of sustainable development” (Begg), an article on “European social dialogue as multi-level governance” (Margison and Keune), and two sectoral studies focusing on the Open Method of Coordination in the field of pensions (Hartlapp) and on the European Employment Strategy, through its influence on the construction of the “job quality” agenda at the European level (Erhel, Gautié and Gazier). The book’s second part aims to assess a more specific issue: the regulation of working time in Europe. In that respect, it assembles a general study on the substantive case law of the Working Time Directive (2003/88) and four national reports on France (Colom), Netherlands (Sol), Czech Republic (Sirovatka) and the UK (Rogowski). These analyses provide a very interesting appraisal of this core Directive, which is certainly a key dimension of the harmonized social law. Lastly, the third part focuses on the social services of general economic interest. It contains a body of studies, which are consistent with a more general tendency in academic research to understand the influence of EU law in delivering and the functioning of social public services, both on the grounds of internal market law, State aid law (with the influence of *Altmark*) and social law. The reader will find interesting comments on legal uncertainty in social services (Barbier), as well as on the link between State aid and social housing (Sol and van der Vos), and also national studies in the UK (Koukiadaki), the Czech Republic (Sirovatka) and France (Barbier).

Each of these contributions adds real value for the understanding of the European Social Model. Special attention may be paid to contributions which deliver an empirical study of national legislations. The reader will find a true interest in discovering the reception of the

Working Time Directive by national courts or the soft influence of EU guidelines in the financing of specific social services, such as social housing. More generally, this book appears as a good actualization, in the light of the consequences of the economic crisis, of the trend of research over the last decade on new modes of governance and their influence in the modernization of national social policies.

However, despite these interests, slight reservations remain on the general rationale of the study. First, the concept of European Social Model in itself, and the way it is defined in the book. On this topic, this collective research leaves the reader with a feeling of observing a mosaic of meanings. The contributors consider this social model as a mix between EU formal regulation (such as the Working Time Directive), financial redistribution (in the framework of cohesion policy), soft influence with the Open Method of Coordination, European social dialogue (agreements and contractual relations on the ground of Arts. 154 and 155 TFEU) and a “a communicative discourse” of the institutions. This broad conception of the type of legal norms and tools which are at stake is relevant on the whole, but it should not be considered entirely new. For many contributors, such a conception is too often presented as the product of a body of studies, which began with the studies on the new mode of governance, whereas the Commission and the institutions endorsed at the beginning of the 2000s a general vision of the social model as a mix of several tools (e.g. in the first social agenda, at the end of the final conclusions of the Nice European Council in 2000). To put it differently, the reader may have the impression that the several models and schemes of representation contained in the book are sometimes disconnected both from the institutional practice and the documents produced by the Commission.

This general consideration may relate to another dimension of the book, whose general understanding of the relations between EU law and national legislations rely on the catch-all concepts of governance and so-called new modes of governance. A scientific appraisal in terms of governance does certainly present a number of interests, such as the capacity of combining concepts of several social sciences, for example law, economics or sociology. But, on the other hand, it can leave a lawyer perplexed as to understanding the influence of European Social Law. Indeed, the current complexity of EU social norms, whether binding or not, rests on a range of different legal influences between the supra-national and national levels. The most visible and significant influence can be found in the transposition of several directives, such as the Working Time Directive. As rightly said by several contributors, the ECJ case law has had decisive consequences, for instance on the distinction between leisure time and working time, or for qualification of hours on-call as working time (*Jaeger*). But this traditional method of influence coexists with the search for a cognitive convergence between Member States, with the use of tools such as the Open Method of Coordination, which has deeply evolved in the framework of the European semester (the book lacks in substance on this point). In that respect, the EU’s aim is not to produce a common set of social rules, but rather to foster a common vision of economic and social national policies, which has to be consistent with the requirement of the EMU and the convergence criteria. The latter form of influence is quite far from the classic conception of “*integration par le droit*”. It may be deceptive *vis-à-vis* citizens’ expectations on European integration. In a context of uncertainty – which forms the spine of the book – there is certainly a strengthened need to recognize, at the EU level, specific rights to secure the social position of many citizens, those who are unemployed, or in a precarious situation or the ones facing measures of social dumping. This might be the rationale of the latest initiative of the Commission with the presentation, in April 2017, of a Communication on the establishment of a European Pillar of Social Rights (COM(2017)250). Through this general perspective, there is certainly a need to reintroduce the requirements of integration by law, which should be enforced with a modernization of the set of rules in the field of working time, posting workers, or health and safety at work.

In summary, this collective research has the merit of giving the reader a broad vision of the state of EU influence on specific aspects of social law and redistributive policies. The usefulness of the book is increased by a complete Table of Cases and a well-structured Index.

This book is undoubtedly valuable for academics and lawyers interested in the evolution of EU social and economic integration.

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Luca Prete, *Infringement Proceedings in EU Law*. Alphen aan den Rijn: Kluwer Law International, 2017. 496 pages. ISBN: 9789041169006. EUR 145.

Much has happened in the world of infringement proceedings since the inception of the European integration project, both in terms of scale – from a handful of cases per year in the 1970s to 10% of the Court’s caseload today – and in terms of the very philosophical underpinnings of the procedure. As Prete reminds us, under Article 88 ECSC, infringements were for the High Authority “to take note of the delinquency in a decision accompanied by a justification”; going to Court was merely an optional appeal stage to which the condemned State could resort. While the Treaties of Rome departed from this perspective entirely, ironically, recent Lisbon revisions making it easier to police the proper transposition of directives, together with the scholarly debate on the effectiveness of Articles 258–260 TFEU in the context of the enforcement of the ordinary *acquis* (as opposed to the values of Art. 2 TEU), points in the direction of a likely development in a rondo form, as it were: going back to what was already the law more than half a century ago would make all the sense in the world, it seems, at least in some cases.

Prete’s book is a detailed take on EU infringement proceedings, which is a must for every practitioner and every scholar of infringement proceedings and enforcement of EU law, ranging alongside works by Ibáñez, Smith, Wennerås and others. Prete’s book provides a definitive restatement of the current state of EU infringement proceedings law, drawing on the broadest range of literature and available case law. The detail does not prevent the work from also being critical and forward looking: even the most experienced practitioners will make important discoveries about this field of law. All the issues and instruments of interest in relation to the enforcement of EU law are covered here. Infringement proceedings deserve such a book-length treatment, not only due to its obvious importance in the context of EU law, but also due to its theoretical significance. As opposed to the Permanent Court of International Justice’s take on enforcement in *Eastern Carelia*, where it stated that “no State can, without its consent, be compelled to submit its disputes with other States . . . to arbitration”, EU Treaties, not allowing for self-help, in what could be presented as the true start of the really autonomous legal order, gives States and institutions no other option: the ECJ is the institution to go to, marking a radical departure from international law *sensu stricto*, of which “enforcement constitutes a particularly weak aspect” (p. 14). In this sense it is in the large part through enforcement proceedings that the Union as we know it has been born.

Commendable as the book is, the core issue to look at, once one focuses on infringement proceedings, probably lies one step further than the book’s main focus: it is the issue of the actual effectiveness of the procedures the book so meticulously analyses in the context of the day-to-day operation of the complex reality of EU law. Once effectiveness is the focus, the book under review emerges as a radically more optimistic take, compared with the established literature, including the writings of Smith, Jack, Wennerås and others, on the procedures it engages with. There is nothing wrong with being an optimist, but the actual attention to the broader context of compliance or non-compliance with EU law throughout the territory of the Union could be given more attention, while this book is focused more on the legal-procedural detail than global compliance considerations. And once the effectiveness of the achievement of compliance takes centre stage, as it should, since this is the ultimate expectation of any fine-tuned legal system, a radical gap emerges, in particular, between the enforcement of the *acquis* proper and the remedies attached thereto on the one hand and, on the other, ensuring that the values of the EU as mentioned in Article 2 TEU are observed.

With this in mind, more emphasis could be put on the cleavage between the effectiveness of some tools in the context of the *acquis* and those same tools' absolute helplessness in the context of values – a subject Cosa, Pech and Scheppele, among others, have written about in detail. Prete even cites some of the cases proving the cleavage (e.g. p. 144), without, however, quite driving the ball home: C-286/12, *Commission v. Hungary* on the retirement of judges could not result in any improvements on the rule of law front in a captured neo-authoritarian Member State, because the very idea of compliance in the context of age discrimination – the ground on which the Commission bought the case – and the undermining of the independence of the judiciary – which was the actual problem – are different. Tragic as it may seem in a situation where more Member States “back-slide” – to use Müller’s language – the Commission fails to learn from the bitter mistakes it keeps making, winning wrong cases on the wrong grounds, only exacerbating the situation in the Member States in trouble. The ongoing drama of the dismantlement of hard-won constitutionalism in Poland and the silence of the Commission and other institutions on the issues of foundational importance – leaving aside the “Rule of Law Protection Mechanism”, rightly criticized by Prete – the story of the EU’s involvement with the core values on which all the edifice is built cannot but cause bewilderment. It is this reviewer’s fundamental belief that the astonishing lack of effectiveness of all the institutions in bringing the core principles of the law back on track in Poland and Hungary should be clearly mentioned and analysed. This is *the* battle the EU is fighting – and losing – at the moment, which will to a great degree determine the future of the whole project.

This troublesome context requires what Scheppele calls “systemic infringement” cases, which would then necessarily require “systemic compliance”, which by definition cannot be *acquis*-specific, thus requiring a significant revision of the established approaches to the idea of compliance in the case law.

While such problems are mentioned by Prete *en passant* – especially in his very informed discussion of Article 7 TEU – the next project for him could be to build on the admirable foundations provided by the book under review and to push the discussion further, capturing the existential problems the EU is facing which lie not exactly, at least not neatly, within the realm of the *acquis*.

This being said, there is no doubt about the fact that no discussion about the future of compliance, enforcement and infringement procedures in EU law will be possible without a serious engagement with Prete’s spectacular work, which will take a key place on many shelves around the world.

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Magnus Strand, *The Passing-On Problem in Damages and Restitution under EU Law*. Cheltenham: Edward Elgar Publishing, 2017. 436 pages. ISBN: 9781786430175. GBP 145.

The so-called “passing-on problem” refers to the not-uncommon scenario whereby an economic burden, unlawfully imposed on a trader operating upstream, is passed on, wholly or partly, down the supply chain. The problem of passing-on is typically conceived as a defence, whereby a defendant seeks to resist a claim for repayment or damages on the basis that the immediate claimant shifted the burden to its customers and thus incurred no actual loss. Yet, as this meticulously researched and written work demonstrates, the passing-on problem is in fact a rather broader issue, particularly considered in light of the nominal “full compensation” standard for harms arising as a result of infringements of EU law. Thus, in certain circumstances passing-on might be invoked as a barrier to private enforcement, where the claimant would otherwise be over-compensated; while in others it functions as a bridge to enforcement for indirect claimants, who might otherwise go un(der)compensated and thus lose the benefit of rights derived from EU law.

The stated aim of this book is, accordingly, “to analyse and to discuss the approach of the passing-on problem that has been chosen in EU law” (p. 19). The author undertakes this

primarily through a detailed examination of existing case law on the topic. First, he identifies three core legal problems that reoccur across EU law in passing-on situations: access to the court (that is, standing); proximity, to establish the necessary causal link between breach and indirect harms; and estimation of the size and impact of any pass-on, to award or adjust damages as required. Next, after relatively detailed consideration of the general principle of effective judicial protection, he examines the core legal problems identified in relation to three broad categories of defendants. Chapters 3 and 4 examine passing-on issues in actions against the EU, via the formal route for non-contractual liability under Article 340(2) TFEU, and more speculative consideration of the scope for raising such issues in other money actions, respectively. Chapters 5 and 6 examine passing-on in the context of claims against Member States, considering both restitutionary claims for repayment of charges levied in breach of EU law, and damages claims under the *Francovich* principle. Chapters 7 and 8 address passing-on in horizontal actions, mainly the well-developed case law and legislative innovations in the antitrust damages context, with brief discussion of the scope for such issues to arise in other private damages or restitutionary contexts. Finally, the book concludes with what is, in essence, a summing up of the discrete strands of case law teased out in earlier chapters. It culminates in what Strand describes as a “modest proposal” (p. 427) for future legal development, namely a set of broad principles intended to unify or resolve “seemingly contradictory tendencies” in the case law arising from different categories of defendants, the distinction between damages and restitution actions, and the varying strength of public enforcement of EU law (p. 425).

The work presents an archetypal example of detailed and thoughtful doctrinal scholarship, rich in relevant case law and commentary. The author’s treatment of the subject-matter is clear, systematic and fairly exhaustive in coverage. Each of the six substantive chapters follow broadly the same pattern, starting with what are styled “general observations” on the nature of the action under examination – for instance, the overall parameters of Article 340(2) TFEU claims – followed by more targeted discussion of the extent to which passing-on issues have arisen or might arise in future in that context. As the author acknowledges, several of the causes of action considered are significantly more established and fleshed out in terms of their jurisprudence than others. Thus, particularly Chapter 4 on restitutionary claims against the EU and Chapter 8 on horizontal actions outside the competition law context necessarily veer towards more abstract and speculative assessment, though not without containing worthwhile and perceptive observations.

The author proceeds primarily by means of a close and careful reading of relevant existing case law, coupled with generally persuasive reasoning by analogy in the considerable number of situations in which the Union Courts have yet to address the precise aspect of the passing-on problem under examination. Key decisions receive extended treatment, with detailed descriptions of their facts set apart from the main bulk of the text alongside extensive reporting and discussion of the Courts’ analysis and findings, including relevant contributions of the Advocates General as appropriate. The author also makes wide-ranging reference to leading academic commentary that has considered the scope and prospects of the passing-on problem within EU law, which serves both to aid the reader’s understanding of the case law and to provide greater substance and nuance to the author’s own investigation of these points. The result is a weighty work that is notably heavy on description and detail, which, although presented as a monograph, arguably functions more effectively as a reference work into which readers can dip for appropriate guidance on specific elements of the passing-on problem as required.

The author’s decision to concentrate so squarely on a systematic and substance-focused examination of case law has, unsurprisingly, necessitated certain trade-offs within the text. First, its considerable length is attributable, at least in part, to a somewhat diffuse focus, and in particular, the addition of often quite extensive “general observations” (including the fairly generic discussion in Ch. 2) alongside specific discussion of passing-on related issues that are more obviously relevant to the author’s research question. Inclusion of this material doubtlessly has the effect of making the text accessible to a wider audience, as the reader does not require significant prior knowledge of existing EU law on causes of action and remedies to engage with

its claims. Yet it nonetheless has the effect of slowing down, and to an extent distracting from, the author's consideration of more central questions. Similarly, the very detailed accounts of relevant cases, though providing a helpful and reasonably comprehensive primer on the law, occasionally threatens to obscure the author's (generally convincing) argument and analysis, so that it is not always clear what precise points are most relevant within the great bulk of detail considered.

Second, the author's approach to the assessment of the core legal problems throughout the six substantive chapters, addressing each issue in turn in respect of each case scenario, can be praised for its clarity and consistency, but results in occasional repetition. This is arguably most acute in relation to more speculative causes of action discussed in the text, which necessarily borrow heavily from earlier analysis in relation to similar or broadly equivalent scenarios. Such repetition is by no means fatal to the author's underlying claims, and is perhaps inescapable in light of the structure of the book; yet it might be considered whether a different approach to the material would have resulted in a more concise and coherent treatment.

Finally, the work presents little in the way of a theoretical framework for the divergent issues it explores, either prior to or within its substantive chapters. The absence of a theoretical grounding has the effect of reinforcing the descriptive nature of the author's approach; that is, the book examines almost exclusively what the law in this area is and/or what it might become extrapolating from existing case law. This, of course, is precisely its stated aim, and again the author cannot be criticized for, for instance, failing to produce a work of private law theory as opposed to descriptive doctrinal analysis. Yet a greater engagement with more overarching theoretical considerations would arguably have enhanced the existing analysis. This is particularly so to the extent it might assist the author in synthesizing the very substantial range of distinct concerns considered within the work, to make the case more convincingly that passing-on presents a single cohesive problem within EU law, as opposed to a bundle of discrete though broadly similar issues. As it stands, the author arrives at conclusions that are interesting and persuasive, albeit rather brief, and which arguably merit further consideration in terms of both application and implications.

This thoughtful, thorough and elegantly-written work provides a clear and systematic assessment of a practically important and conceptually interesting topic. Underpinned by detailed and careful discussion of relevant case law, the book succeeds both in illuminating the parameters of the existing law relating to passing-on issues and in providing a persuasive account of the potential – and optimal – future development of EU law. Though largely descriptive in its approach, the book contains some impressively nuanced and helpful analysis of the evolution of the jurisprudence, and thus provides an authoritative and valuable reference point for any reader interested in passing-on issues, broadly construed, within the EU context.

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Herwig C.H. Hofmann and Claire Micheau (Eds.), *State Aid Law of the European Union*. Oxford: Oxford University Press, 2016. 656 pages. ISBN: 9780198727460. GBP 145.

Until it received public attention because of its impact on preserving the single market during the 2008–2010 financial crisis, State aid law in the EU used to be considered a specialized, rather obscure and less important area of competition law. Since then, however, considerable attention has been devoted to it from both academics and law practitioners. A flurry of books have been published as a result, which often have some similarities in their content. In addition to more specialized publications tackling one area of State aid law or policy – e.g. one sector like aviation, one policy area like services of general economic interest, or one legal angle like the link with trade anti-subsidy law – many of these books aim to provide an overview of the current applicable legal frameworks; case law as well as explanations on the foundations of State aid law. Typically, these books or handbooks include a variety of contributors and look at the notion of aid, its compatibility, describe the many notices or guidelines published by the

Commission and the State aid procedural rules. Some of the most established handbooks (e.g. by Quigley, Hancher, Ottervanger and Slot, or Flynn) are in their second or third editions and have been revised to update the content to the latest developments in State aid law and policy.

Faced with many publications of broadly similar content, why should one therefore pay attention to this new publication? One may notice that it complements the OUP collection, which already has a book edited by Bacon QC that rather targets legal practitioners, with a book that is more academically oriented. And there is scope for more diversity in the study of State aid than describing the state-of-the-art of this area of law. For instance, State aid involves political issues like the balance between State and market, and is intimately linked to different conceptions regarding the role of the State in the economy. An interesting feature of this book is its attempt to provide an interdisciplinary perspective to the study of State aid, through a book that can interest both lawyers and scholars of EU policy. In fact, this is to a large extent what Jaeger, President of the General Court, underlines in his foreword: the book has an interdisciplinary approach, it offers a broad overview of the field of State aid, has a global dimension and is written by a mixed team of academics and practitioners.

Looking at the list of contributors, one has to agree that the editors have delivered a group of authors that combine academics (many of them linked to the University of Luxembourg), officials of the Commission, lawyers and last but not least judges or legal secretaries in the CJEU. The book also provides some interdisciplinary perspectives in the chapters covering the rationales for State aid or in its description of the general theory on compatibility of State aid. It is also interesting that the WTO and Trade law perspectives are consistently brought into the picture and used as references to describe some principles of State aid law and procedures, with a full section dealing with the global approach of State aid law. Thus, one should pay tribute to the attempt to provide a publication that goes beyond the mere description of existing State aid rules and adds some useful perspective in the development of that area of law.

However, after promising something different, the book leaves an impression of incompleteness. Firstly, there are a series of gaps in the areas covered, which means that the book cannot really be used as reference for all the areas of State aid law. Looking already at the number of pages for a book of that kind, it is relatively short. A series of guidelines for compatibility are missing or only superficially covered (broadband, capital risk, employment and training, environmental aid). The reader is left with the impression that important themes are not fully explored or should indeed have been given a more interdisciplinary or less descriptive analysis.

This is notably the case for taxation. This area is not treated separately, but rather as a sub-area of the selectivity criteria for State aid. Given the very controversial and complex nature of State aid taxation cases – not least since the *FIAT/Luxembourg* case at the end of 2015, and the *Apple/Ireland* case in 2016 – and the political as well as legal dimensions covered, there would have been scope for more in-depth analysis from an interdisciplinary perspective. Another area that has experienced recent interest and controversy and which would have deserved more attention has to do with State aid for infrastructures. An interdisciplinary perspective on State aid for infrastructures, its link with public procurement, the notion of aid and the market economy investor principle, notably in relation to many recent State aid cases linked to airport financing and privatization, would have been very interesting, but is missing.

Another area that would have deserved greater attention is the refined economic analysis of State aid. This is presented in several chapters as one of the key elements underpinning State aid reform in the last ten years, but the book does not try to properly address its conceptual foundations or to take a critical stance towards it. Only in one chapter is it said – very superficially – that this approach seems to have had a main impact to produce administrative burden. One could easily dispute this view and notice that increased scrutiny based on a competition analysis of the negative effects of State aid was the necessary condition for vastly enlarging the scope of the General Block Exemption Regulation and as a result reducing the effective number of notified cases – and administrative burden. An interdisciplinary analysis would certainly be useful here, involving economists too, instead of inconclusive criticism by one member of the Legal Service of the Commission.

In fact, and this is probably the most frustrating feature of the book, it fails to develop a common narrative across the various chapters, which are different in style and in perspective depending on their authors. This is perhaps inevitable for an edited collection, but the resulting impression is ironically a lack of inter-disciplinarity in the State aid practice, with quite different understanding and perspectives between chapters written by academics and those written by legal practitioners.

Even if the book does not therefore fully deliver on its promises, there are many useful elements in it, and novel issues are included that are worth mentioning. The section on State aid in economic and financial crises is quite comprehensive and well drafted. The section on public procurement and State aid, and the part on WTO law are both eye-opening and put State aid concepts into perspective. The part on judicial review before the ECJ is however probably the most useful in the book – even though it does not develop an interdisciplinary perspective – because it offers a very comprehensive and insightful presentation and guidance for an essential area that is not so well known.

In short, this book is a worthy addition to the growing list of publications on State aid law and policy, but I look forward to a revised edition of it, which should be more comprehensive and written from a more genuinely interdisciplinary perspective.

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Hielke Hijmans, *The European Union as Guardian of Internet Privacy. The Story of Art. 16 TFEU*. Vienna: Springer, 2016. 604 pages. ISBN: 9783319340906. EUR 166.59.

The adoption of the Treaty of Lisbon has further substantiated the EU's leading role in safeguarding privacy and data protection. Article 16 TFEU mandates the Union to ensure the fundamental right to the protection of personal data. Milestone achievements derived from Article 16(2) TFEU include the adoption of the General Data Protection Regulation (Regulation EU 2016/679), which aims to modernize European data protection law, and will repeal the old Directive 95/46/EC in May 2018. By making Article 16's mandate the focus of his book, Hijmans' work extends far beyond the analysis of the legislative framework for data protection and encompasses constitutional and ideological perspectives on how the EU should exercise its leadership in ensuring internet privacy. The author proposes an engaging analysis of how Article 16 equips the Union and other relevant actors (the ECJ, the EU legislative institutions and data protection authorities, including their cooperation mechanisms) with the appropriate tools to ensure an effective and legitimate protection of individuals' fundamental rights to privacy and to data protection on the internet. Ultimately, how and to what extent the Union, acting as a global actor, can ensure internet privacy in a sustainable manner – legitimately and effectively – is the real essence of this ambitious work.

The perceived loss of control of privacy and personal data that the internet has caused constitutes the research hypothesis. The author explains that there is a qualitative change in social communication, now driven by big data and mass surveillance, which is not however accompanied by a change of the legal paradigm. In defining the material scope of his research, Hijmans supports a functional approach that combines privacy and data protection; this is based on a joint reading of Article 16 TFEU and Articles 7 and 8 of the Charter of Fundamental Rights. He argues that, in the era of big data, as all personal data processing potentially affects privacy, an understanding of both fundamental rights as part of one teleological system can be justified. Hijmans' interpretation is consistent with his ideological understanding of the Union as the agent capable of restoring trust on the internet. However, those who understand the concept of data protection to be broader than the notion of privacy (as the former covers all types of data regardless of their private character) may find it difficult to endorse this proposal uncritically.

The architecture of the book is effective in carrying out a dual analysis, positive and normative, of the roles that the Union and the relevant actors under Article 16 TFEU – the ECJ,

the EU legislature and also data protection authorities and their cooperation mechanisms – play in ensuring Article 16’s mandate. Hijmans delineates the constitutional limits of Article 16’s mandate in terms of legitimacy and effectiveness (Ch. 4). This structure is further supported by a precise framework that the author proposes to carefully scrutinize the extent to which the exercise of Article 16’s mandate by all relevant actors remains legitimate and effective (see outline p. 562). This constitutes a valuable contribution to the analysis of data protection and privacy law in Europe. Not only does the proposed framework enhance transparency but also, and perhaps more importantly, it contributes to reinforcing the EU’s credibility in achieving Article 16’s mandate and in reaffirming its leading role in safeguarding privacy and data protection on the internet – something that might be welcomed in politically unsettled times.

Detailed policy recommendations that the book proposes include a simple taxonomy for fundamental rights which aims at easing the ECJ’s task of balancing privacy and data protection against other fundamental rights. Whilst acknowledging the prominent position of the EU’s legislative institutions in implementing Article 16’s mandate, Hijmans explores the Member States’ role and, interestingly, underlines the importance of engaging the private sector in providing effective protection on the internet (p. 321). At an administrative level, he advocates a layered model of governance based on independent data protection authorities where the development of European methods should not substitute national levels of operation. One point that deserves special attention is when the author addresses the EU’s role in the external relations with third countries. The discussion on personal jurisdiction on the internet is most engaging and includes helpful examples and comparative law references. Somewhat controversially, Hijmans states that private international law instruments do not seem to provide a clear indication on internet jurisdiction (p. 478). Here, I disagree: Article 7(2) of the Brussels Regulation recast (Regulation EU 1215/2012), which has been interpreted by the ECJ in *eDate advertising*, does provide a clear framework for dealing with infringements of personality rights on the internet.

Non-European readers may feel inclined to criticize the export of European values that the author supports, despite this being sufficiently justified in terms of legitimacy and effectiveness. Moreover, considering the challenges deriving from the ubiquitous nature of the internet and from the development of big data industries, it is uncertain how the EU will remain capable of ensuring the protection of privacy and data protection legitimately and effectively without rethinking aspects of the legal paradigm (still based on the principle of purpose limitation and data minimization). None of these considerations, however, alter the final outcome. This superb work contributes to the field of data protection and privacy law by introducing a precise framework in which to scrutinize the Union’s (effective and legitimate) implementation of Article 16’s mandate. Should the near future require a redefining of the current paradigm, the framework that this book proposes provides an essential point of reference.

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Andrea de Guttry, Francesca Capone and Christophe Paulussen (Eds.), *Foreign Fighters under International Law and Beyond*. Vienna: Springer, 2016. 526 pages. ISBN: 9789462650985. USD 249.00.

It is always difficult, as the editors of this timely volume acknowledge, to hit a moving target. Efforts to combat terrorism, into which efforts against “foreign fighters” fit, are such a target. Thus, the editors acknowledge that not only is the policy landscape that they seek to survey subject to change, but so too is the definition of the phenomenon itself a shifting one.

The opening section of the book canvasses multiple disciplines, with authors from academic circles as well as the practice of “CVE” (Countering Violent Extremism) describing the phenomenon of contemporary foreign fighters set in a historical context. These perspectives come from law, international relations, history, defence studies, media studies, as well as new

empirical research, and constitute the first quarter of the book. Although it is not possible in a few short chapters to present a comprehensive account of such a phenomenon, and indeed it would not be desirable to try, the authors have done well to paint a picture with their collage of chapters. These contributions do well, as Strazzari puts it, in bringing foreign fighters into something of an “analytical sharp focus”, notwithstanding the inevitable gaps in knowledge that exist. There is much reliance in these chapters on existing secondary and grey literature, in particular that of the International Center for Study of Radicalization and Political Violence, and the academic work of Malet. There is also new primary (qualitative) data to be found in the chapter by Frenett and Silverman, whose interviews with (former) foreign fighters sit well alongside the more sweeping narratives of other authors. Welcome too is the gendered analysis of the chapter by Van Leuven, Mazurana, and Gordon: a perspective that is too rarely seen in collections on counter-terrorism.

The book’s second part turns to “the legal dimension” with consideration, in particular, of international criminal law, international human rights law, and international humanitarian law. The challenges of applying the latter body of law, in particular, is made clear by the caveat-laden opening section of Chapter 9. Indeed, this entire section of the book demonstrates the problem of contemporary counter-terrorism efforts, wherein observers and participants alike seek to apply categories of law to phenomena that are disruptive and transgressive. Chapter 10, after a detailed and difficult analysis, comes to the conclusion that “the phenomenon of foreign fighters does not create any problems that the current system of [international criminal law] cannot deal with adequately”. This overlooks – or at least underplays – the distinct challenges of actually bringing the law to bear on individuals who might fit into the legal categories the chapter proposes to use to address “foreign fighters”. Furthermore, as a conclusion, it rather discounts the myriad of different problems that the phenomenon may cause. The next chapter considers a range of fields of international law to examine a particular case study: child soldiers. The study is a useful one as it seeks to explore not only the legal response but also the phenomenon itself. It also identifies, and considers, the tension between the need to consider child soldiers as a military element of a conflict and child soldiers as victims. Much of what is in the chapter is not particular to the question of “foreign fighters” – although that is also a strength of the analysis. The final chapter in the section turns to international human rights law. As with other contributions there is much law of potential application. The focus here is on armed opposition groups more than the responsibilities of individuals. The examination of the law is deft, and the summary of the outstanding questions helps make the chapter one of the stronger ones.

It does seem peculiar that throughout this part of the book none of the chapters deal in any depth with UN Security Council Resolution 2178 (2014) – a Resolution that is ground-breaking in several respects and that deals in specific terms with “foreign fighters”. However, the Resolution does feature, extensively, in the third part of the book, which examines efforts at the “supranational” level. There is, therefore, a chapter on obligations of States of nationality, habitual residence, transit, and destination. These obligations arise from international law and, in particular, from UN Security Council Resolutions 2170 and 2178. The chapter points to some of the more prominent difficulties. Thus, “most foreign fighters never get involved in any act of terrorism” – a claim which derives from work by Hegghammer that suggests that fewer than one in nine of those who travel overseas to fight later return to their State of residence to commit acts of “terrorism”. Of course, much of the aim of the law against “foreign fighters” is to criminalize the very act of travel and to render that act itself an act of “terrorism”. Krähenmann does well to demonstrate the ways in which the text of Resolution 2178 is open to differing interpretations as to what constitutes a “foreign terrorist fighter” and may give rise to divergences across jurisdictions. The chapter also provides a helpful summary of UK and US law and the rights individuals enjoy, under the ECHR, of freedom of movement. The UN also features in the next contribution, by de Guttery, and its specific examination of Resolution 2178 entails an inevitable discussion of definitional questions. Despite its acknowledgement of some of the many problems with the resolution, the conclusion is optimistic: “the somehow new approach adopted by the UNSC represents a positive development in the struggle against

terrorism in general". The following chapter, by Conte, re-treads some of this ground, albeit with a greater focus on States' obligations as regards human rights. The analysis draws on comments of the UN Human Rights Committee, the (former) Special Rapporteur Scheinin, and on judgments of the ECtHR, to lament the absence of a human rights-compatible definition in Resolution 2178.

There follows a series of chapters on regional approaches – from authors with a range of different backgrounds. The EU Counter-Terrorism Co-ordinator, de Kerchove, alongside Höhn, examine the EU's "regional answers and governance structure for dealing with foreign fighters" (Ch. 16). In some respects it might be read as a sort of "official history" of EU action in the field. It ends with a call to action because "EU leaders are expecting results". Bonfanti's chapter, where the context is once again the EU, brings us to the question of the collection, and sharing, of intelligence on foreign fighters. It presents a helpful survey of the existing formal and informal mechanisms within and alongside the EU. Given the significant focus on data protection in public debates at present it is perhaps a surprise that human rights are set out as "a final consideration" in the chapter's conclusion. Nevertheless the survey it offers remains a helpful starting point for any such interrogation. Creta's chapter shifts the focus from the EU to the Organization for Security and Co-operation in Europe (OSCE). It examines the OSCE "toolbox" and concludes that the Organization's principal role is as a facilitator.

The focus on the EU, as the most developed supranational legal order in the world, is inevitable and of course necessary. Nevertheless some readers may consider material on other regions to examine less well-trodden ground. Thus, it is most welcome that Darkwa's chapter shifts the focus to the African Union (AU). The AU is, of course, of particular interest owing to the likelihood that foreign fighters would travel not just from AU States, but also to conflicts in those States. Darkwa identifies a lack of political will, as well as a lack of capacity, as being foremost amongst the challenges to effective co-operation. As the final instalment in this part of the book Darkwa's chapter provides a valuable contrast to the Eurocentric chapters that precede it.

The book's fourth part turns to action at the national level. This begins with a chapter by Paulussen and Entenmann examining "select Western European countries" – Belgium, France, Germany, the Netherlands, and the UK. Although the survey is, as the authors acknowledge, more general than comprehensive, it is nevertheless an asset to the book insofar as it provides details across jurisdictions. The chapter concludes with a reminder of the importance of human rights and the rule of law. Zelin and Prohov's chapter turns to the US, Canada, Australia, and New Zealand, and catalogues the myriad efforts in these jurisdictions before it sets out a key challenge to any analysis: "it is difficult to determine the efficacy of these efforts [to counter terrorism]". There follows a further comparative chapter, by Gartenstein-Ross and Moreng, that addresses several Middle Eastern and North African States. In these States the threat of return of "foreign fighters", for instance from Syria, is high – and the chapter details the varying efforts to address this threat. It may well be that, as with the consideration of regional responses, the reader will find greatest interest in this part of the book when they encounter a State of whose efforts they were previously unaware.

The final two chapters in this part of the book consider questions that might be understood as "transnational" in nature. First, there is an analysis of the international law implications of national practices. Public international law is, as a normative body, antipathetic towards the deprivation of nationality, in particular due to the resultant risk that an individual becomes stateless. Van Waas considers not just the lawfulness of strategies that include the deprivation of nationality – but also their wisdom as a policy tool. And then, in Chapter 24, the book turns to those who may suffer most from action taken against "foreign terrorist fighters" – internally displaced persons, asylum seekers, and refugees. Although Vietti and Bisi can but map the dramatic challenges such persons face, this chapter, and the one that precedes it, form part of the book's more critical material. They remind the reader that counter-terrorism policies must look beyond claims of immediate necessity to consider that necessity in a broader geopolitical – and human – context.

In the final, short, chapter, the editors offer their concluding remarks. Those remarks reinforce the remarkable breadth of the volume. In a book such as this, readers will – of course – find greater interest in some chapters rather than others: it could be the inclusion of material from a jurisdiction hitherto unknown to a particular reader, or a new angle of analysis, or a report of new empirical materials. To the book's credit, the various chapters, which overlap but offer distinct contributions, contain plenty of such nuggets, alongside some excellent expositions of what is already known.

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Julian Nowag, *Environmental Integration in Competition and Free-Movement Laws*. Oxford: Oxford University Press, 2016. 368 Pages. ISBN: 9780198753803. GBP 70.

The obligation to integrate environmental requirements into the elaboration and implementation of all other EU policies, laid down in Article 11 TFEU, was often called the most important provision on the environment in the EU Treaties. However, its practical relevance has been, up to now, rather limited. This book undertakes the valuable effort of having a fresh look at the legal importance of Article 11 TFEU so as to demonstrate how the integration of environmental requirements into competition law (Arts. 101–108 TFEU) and free movement law can be made operational in practice. It constitutes the revised and updated version of the author's PhD thesis.

Nowag divided his book into three parts. In the first part, he examines the requirement of Article 11 TFEU, according to which "(E)nvironmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development". He takes the view that this requirement is addressed to the EU institutions but also to the Member States when they implement or apply EU provisions. Furthermore, the requirement applies to the general policies as well as to each individual regulation, directive or decision. This includes decisions in the area of competition and State aid law (p. 31 et seq.). The "requirements" are laid down in Article 191(1), (2) and (3) TFEU. When the requirements are not respected, the EU measure may be annulled (p. 31).

As regards "integration", Nowag differentiates between measures which aim to prevent conflicts between the environment and the relevant sectoral policy (first form of integrating environmental requirements), and the balancing of interests between the environment and the sectoral policy (second form of integrating environmental requirements). Furthermore, he distinguishes between a supportive and a preventative integration. Supportive integration applies the sectoral rules, complemented by the environmental requirements, in a way that allows the adoption of measures which are beneficial for the environment. Preventative integration aims at applying the sectoral rules in the light of the environmental requirements in a way that environmental degradation is prevented. This scheme is then applied to competition law (Arts. 101 and 102 TFEU), Article 106 TFEU, State aid law (Art. 107 TFEU) and to the "free movement law", i.e. free movement of goods, services, people and capital.

This theoretical scheme leads to a very strong preponderance of the discussion on supportive integration (pp. 54–138 and pp. 156–258), while the preventative integration considerations are narrowed down to some 30 pages overall. Indeed, Nowag is of the opinion that applying Articles 101 or 102 TFEU against an undertaking which – via an agreement or the abuse of a dominant position – degrades the environment, is not possible, as the reduction in total welfare, caused by the degradation, is only an indirect effect (p. 141 et seq.). He reaches the same conclusion for Articles 106 TFEU, 107 TFEU and free movement law, though he is not able to quote a single ECJ judgment to support his conclusions in all these sectors.

The author's second part, a discussion of supportive integration, with the aim of avoiding conflicts between the need to protect the environment and the different policies which he examines (pp. 54–149) is very careful. Nowag enters into great details of competition and State

aid law and carefully exploits the ECJ case law and the relevant literature, in particular as regards competition (34 pages) and State aid law (26 pages); the discussion of Article 106 (3 pages) and free movement law (18 pages) is less detailed.

Nowag is very reserved in his criticism of the case law of the ECJ and the competition and State aid decisions of the Commission, treating both on an equal footing. For example, with regard to the judgment in Case T-347/09, he only states (p. 63): “The case remained problematic for four reasons” which he then enumerates. But Nowag does not indicate how the case should have been decided in his opinion. Likewise, as regards case C-487/06 P, he indicates (p. 102): “Some have criticized the ECJ’s judgment” and mentions the criticism, but is not explicit with regard to his own assessment of the judgment. And he voices no criticism at all with regard to the judgment in Case C-379/98, the famous *PreussenElektra* case (p. 104). It is true, though, that he offers (p.106 et seq.) an “alternative interpretation of selectivity and distortion of competition” in the State aid sector, where he discusses in more detail some possible environmentally-friendly interpretations of ECJ case law.

The third part of the book is the most comprehensive (pp. 156–272). Nowag discusses the integration of environmental requirements by balancing the various interests of the sectoral policies with the environment. Quite rightly, Nowag starts with the free movement law – in reality the balancing of the free movement of goods with the need to protect the environment. He comments in detail on the ECJ case law on restricting the free movement of goods by measures which are either distinctly applicable or find their justification in Article 36 TFEU, the possibility for Member States to maintain or introduce more stringent environmental measures than those decided at EU level (Arts. 193 and 114(4) and (5) TFEU), and the application of a proportionality test to balance the Member State’s measures that deviate from the EU standard. In all three cases, though, he describes the status quo of the case law rather than clarifying his own opinion; his concluding remark that “(A)dopting more stringent environmental standards at a national level is possible if the harmonization measure allows more stringent standards (Either explicitly or implicitly)” (p. 176) is not really helpful.

When he examines the balancing of interests in the State aid sector, Nowag comes to the conclusion that such a balancing is only possible in Article 107(3) TFEU. There, the decisive criterion is a proportionality test which assesses whether the State aid ensures, overall, a fair balance of influencing competition and protecting the environment. As regards competition law, Nowag sees a milestone of integrating environmental requirements integrated into competition issues reached in the Commission decision in CECED (Decision 2000/475), where the fact that the restriction of competition was outweighed *inter alia* by the fact that positive “environmental results for society would adequately allow consumers a fair share of the benefits even if no benefits accrued to the individual purchaser” were obtained (p. 229 et seq.). He concludes: “This approach... extends the scope of Article 101(3) TFEU in terms of consumer’s benefit and seems to move from a pure consumer welfare to an all consumer (all citizens) approach” (p. 230).

For Article 102 TFEU, Nowag discusses the case law and concludes that abusive behaviour does not exist where the behaviour may be justified by the protection of the environment, though the ECJ case law is strict in this regard. Also, undertakings may be able to demonstrate that the efficiencies for the environment resulting from the (abusive) conduct outweigh the competitive harm.

The balancing concept with regard to preventative integration is, once more, relatively short (pp. 261–270). Nowag considers its application not to be possible under competition law. As regards State aid law, he raises in particular doubts on the judgment in Case T-57/11, where the Court argued that the Commission, when considering a non-environmental State aid, was not obliged to consider the compatibility of that aid with secondary EU environmental law. “This judgment seems to be problematic for a number of reasons” (p. 267) which Nowag enumerates. Nowag is of the opinion that the Commission needs to take account of primary law provisions (p. 268), basing himself on C-390/06. Why he accepts that the Commission may ignore secondary EU environmental law provisions, remains unclear.

Overall, Nowag finds the possibility of supporting integration in the examined EU sectoral policies much easier than preventative integration. For the ECJ, he sees two options for developing a policy on the integration requirement (p.280 et seq.). On the one hand, the ECJ might apply a full proportionality test, in order to establish whether the effects of the environment on the sectoral policy do not go beyond of what is necessary. On the other hand, the ECJ could adopt a procedural approach: the EU measure would have to specify if and to what extent the environmental requirements were taken into consideration. Nowag does not really elaborate on these options, but concludes that the framework which he developed may be of value, if this procedural approach were adopted.

This rough outline on the book's content and the few examples quoted only give an imperfect impression of the overall content. Nowag applies his concept with great rigidity to the different sectors of his study. Overall, his presentation covers well the whole area of "competition law (Arts. 101 and 102 TFEU) and environmental protection". The same applies to State aid law and environmental law, and – with some reduced completeness – to the area of "free movement law and environmental protection". However, the strict application of his above-mentioned scheme requires from the reader a rather profound knowledge of the diverse sectoral laws and legal policies, all the more as the presentation for example of State aid law and the environment is organized at four different places; for the reader who is less familiar with that sector, the general overview is thus easily lost.

The reading of the book is not facilitated by Nowag's style which is succinct, sometimes laconic and too short (e.g.: "the limit of environmental integration in the areas of market freedoms, State aid, and competition law is set by the extent that the current legal framework allows interpretation in such a manner" (p. 48); "In the context of the integration clauses, a form of procedural seem to have reach even this pre-Lisbon stage" (p. 281)). It all too often presupposes the reader's familiarity with the case law of the ECJ and its ramifications. And Nowag's reserve on unambiguously taking a position with regard to specific ECJ judgments or Commission decisions does not lead to overall clear conclusions. This very rich and densely written book thus seems to be apt in particular for lawyers and officials who are specialized in competition and State aid law and wish to explore possibilities to improve the preservation and protection of the environment in those areas. For them, the book is a rich source of innovative and thought-provoking details. The academic community will have to elaborate and detail Nowag's thoughts and suggestions, in order to transform the effective integration of environmental requirements into other EU policies from – as at present – a theoretical concept into a daily reality. Nowag has undoubtedly opened profound and useful ways to approach this objective.

Ludwig Krämer
Madrid

Tim Maxian Rusche, *EU Renewable Electricity Law and Policy. From National Targets to a Common Market*. Cambridge: Cambridge University Press, 2015. 292 pages. ISBN: 9781107112933. GBP 69.99

This book is based on research carried out by the author for his doctoral thesis defended in September 2013 at the Ecole de Droit de la Sorbonne in Paris. The text of the book is updated to include references to case law, literature and public documents up to 28 February 2015.

The focus of the book is support schemes for electricity based on renewable energy, for instance wind energy, by different EU Member States. The first piece of Union law dealing with support schemes is based on a Council recommendation from 1988. Today, EU legislation assigns to each Member State a binding national target for electricity consumption. Each Member State is, however, free to design its own concrete regulatory policies. The book describes in detail the many different forms of regulation in the EU, where the Commission has tried to promote its own preferred solutions. The author shows a number of examples where the

preferred solution by the Commission is, in his evaluation, far from the optimal solution (to use an understatement).

The book emphasizes in Chapter 2 that the main discussion has been concerned with the choice between a price-based and a quantity-based regulation. A prime example of a price-based instrument is the purchase obligation at fixed prices referred to as feed-in tariffs (FITs). The State fixes the price for electricity produced from renewable energy sources, which is above the market price. Quantity-based instruments include in particular a system based on tradable green certificates (TGCs). Under this scheme, electricity suppliers have to provide a certain amount of electricity from renewable energy sources. This may be fulfilled by the supplier by direct production or by buying green certificates from other electricity suppliers. The economic debate on the respective merits of FITs and TGCs started in the mid-1990s. The Commission wanted to make people believe that only TGC is a real market-based instrument. This was, however, opposed by a number of professional economists and the final conclusion was that the Commission was wrong – probably for ideological reasons. As reviewer of the book, I find this clear conclusion important and useful for historical reasons.

The following chapters describe the evolution of support schemes in Member States over time, Regulatory competition and Union law protecting the Internal Market, and Regulatory options for the creation of a common market.

The book offers a detailed analysis and discussion of the regulation of the part of electricity market in EU Member States based on renewable energy sources like wind. The historical development has been characterized by a number of economic and ideological controversies. Each EU Member State is in principle free to design its own concrete regulatory policies. In spite of that, the Commission has attempted to influence the choice of policy in Member States based on its own interpretation of the optimal solution from the point of view of market orientation. The book exposes the lack of success for the Commission in relation to these efforts.

The book presents a balanced and useful exposition of the complex historical regulation of the EU electricity market based on renewable energy. This is of general interest as electricity based on renewable energy sources is planned to play a dominating role in the EU by the middle of this century.

Niels I. Meyer
Lyngby

Book notices

Despina Anagnostopoulou, Ioannis Papadopoulos and Lina Papadopoulou (Eds.), *The EU at a Crossroads. Challenges and Perspectives*. Cambridge: Cambridge Scholars Publishing, 2016. 310 pages. ISBN: 9781443899291. GBP 68.99.

The book presents a collection of papers by PhD researchers and keynote speeches by established experts in various areas of EU law, from democracy and constitutional issues, to the economic and financial crisis. Urban planning, corporate governance and the Eurasian Economic Union are a couple of other topics which are dealt with. The research was originally presented at a Pan-European Forum of Young Researchers at the University of Macedonia.

Benjamin Docquir (Ed.), *Vers un droit européen de la protection des données?* Brussels: Editions Larcier, 2017. 176 pages. ISBN: 9782804497538. EUR 58.

Five chapters give an introduction to and address various issues relating to the new data protection Regulation, such as compliance by companies and international transfers. This is a useful and informative overview.

Christian Schwab, Geert Bouckaert and Sabine Kuhlmann (Eds.), *The Future of Local Government in Europe*. Baden-Baden: Nomos, 2017. 129 pages. ISBN: 9783848737567. EUR 24.90.

This small book (Introduction, three chapters and conclusion), taking a policy approach to questions of local government, emerged from the EU/Horizon 2020 framework. It will be of interest to specialists

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