70

YEARS OF EU LAW

A UNION FOR
ITS CITIZENS

European
Commission

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Preface by **Ursula von der Leyen**, President of the European Commission

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Printed by Bietlot in Belgium

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Luxembourg: Publications Office of the European Union, 2022

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PDF	ISBN 978-92-76-53403-7	doi:10.2880/02622	KB-08-22-152-EN-N
Print	ISBN 978-92-76-53404-4	doi:10.2880/720389	KB-08-22-152-EN-C

Hard cover

PDF	ISBN 978-92-76-56637-3	doi:10.2880/03956	KB-09-22-493-EN-N
Print	ISBN 978-92-76-56638-0	doi:10.2880/359250	KB-09-22-493-EN-C

PREFACE

Ursula von der Leyen, President of the European Commission

We celebrate 70 years of EU law. For the past 70 years, law has been the driving force behind the ever deeper integration of Europe. In 1963, in a landmark judgment, the Court of Justice held that every citizen could rely on the rights conferred upon them by European law directly before any national judge. As a result, EU law protects every single EU citizen in the same way, across all Member States.

This is a unique feature of the European project: The legal order of the Union is the driver of integration, a supranational Union built on law. The community of law is the foundation of everything we have achieved and everything we are yet to do. It is Europe's hallmark.

In 2019, when I took office, I set the digital and green transitions as key priorities for my Commission. Today, the Digital Market Act and the Digital Services Act form part of our rule book. The Climate Law has been adopted, and there is progress on the negotiations on the Fit for 55 package, which will incorporate the Paris Agreement into EU law to protect our climate.

Our Union has furthermore demonstrated its resilience in standing united in the face of extraordinary challenges and using its legal framework as a tool to successfully tackle

recent crises such as COVID-19 and the repercussions of Russia's war of aggression against Ukraine. The Commission has acted decisively to protect our common values, the life and health of our citizens, and the security of the EU.

These most recent achievements have been possible because of a strong political will to use the full potential of the EU's institutional and legal framework. At the same time, these crises have shown that we must remain vigilant to preserve the single market, which is the basis for our prosperity and for overcoming divisions on the European continent.

The EU has grown into a Union founded on values in which we stand together for fundamental rights, democracy and the rule of law, as directly enshrined in the treaties. As guardian of the Treaties, the European Commission's task is to uphold those values and the Union's legal system. It uses its powers to ensure that Member States respect the common values on which the EU is built, and to ensure that all EU citizens can fully enjoy the rights granted to them by EU law.

Those values are at the core of our common identity. That is what keeps us together. That is what we stand for. And that we will defend at all times.

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ACKNOWLEDGEMENTS

This book is a collaborative project of the Legal Service of the European Commission. It is the result of our reflections on the principles and foundations of EU law. Each team of the Legal Service has written one chapter; many chapters are the fruit of extensive teamwork.

Each chapter provides the names of the lawyers of the Legal Service that are responsible for it. This book should not be considered as representative of the European Commission's official position.

This book would not have been possible without the strong and dedicated support of the Publications Office of the European Union throughout the entire production process.

GUEST CONTRIBUTION

Roberta Metsola, President of the European Parliament

Europe's impact on the world is hard to miss. Its decisions largely determined human development for centuries. Yet much of early 20th-century Europe saw nothing but death, destruction and division. With countries applying their own rules and standards, Europe started the only two world wars our planet has ever seen. The former beacon of global leadership was unable to provide its own citizens with peace and prosperity, and far less able to compete with rising global powers. The Treaty of Paris on 23 July 1952 changed the course of Europe. Our community laid down the foundations of EU law and the path of European integration began.

Over the years, our project saw many treaties that would eventually establish the European Union that we know today. The European single market is one of our greatest achievements. It has fuelled economic growth and made the everyday life of European businesses and consumers easier. Today, EU citizens enjoy borderless travel, a common currency, and guaranteed fundamental rights and freedoms throughout the entire European Union. In the spirit of unity and solidarity, our Union has also been able to respond to the contemporary challenges of an ever-changing world. To counter the effects of climate change, we have the European Green Deal and the Fit for 55 package. To adapt to the digital revolution, we have increased efforts and funding to support Europe's digital transition. Even when faced with a global health crisis, our Union came together to adopt the unprecedented NextGenerationEU, which has helped Member States repair the economic and social damages brought about by the pandemic. Perhaps most crucially, however, our Union has successfully guaranteed 70 years of peace, reconciliation and democracy.

And yet it took a single autocrat to threaten this all again. On 24 February 2022, everything changed when Putin invaded independent and sovereign Ukraine. The horrors of war have returned to our continent and today we are facing the most significant and direct threat to our project's longstanding security, peace and stability in decades. In 1952, during his first address to the Common Assembly of the European Coal and Steel Community, the President of the High Authority, Jean Monnet, said:

> *The tragic events we have experienced and those we are experiencing now may have made us wiser. But we will pass away, others will come to replace us; we will not be able to leave them our personal experience because this experience will disappear with us. What we can leave to them are institutions. The life of institutions is longer than that of men, and thus institutions may, if they are set up in the right manner, accumulate and transmit the wisdom of succeeding generations.*

As I am making this contribution, I am acutely aware – just as the President of the High Authority was himself aware in 1952 – that the asperities of wartime atrocities inevitably fade away with memory and time. Let us not forget war has plagued European history in the past. Peace must never be taken for granted. This is why our unique community based on values and laws is so important. The creation of the European Coal and Steel Community was not in and of itself the goal. Rather, the enactment of EU law was a means to achieve a Europe of everlasting peace and prosperity built upon the pillars of freedom, democracy, the rule of law, and respect for human dignity and human rights; a means to provide equality between all Member States – big or small – and their citizens, through a common governance structure that deals with subject matters that cannot be handled effectively by Member States individually. There is no question that the world – Europe included – will continue to change throughout the course of time. Yet, with steadfast values, solid foundations and meaningful institutions safeguarded by EU law, our project can persist even when faced with autocratic threats. And it will.

Sceptics like to deny this, but the reality speaks for itself. EU law in Europe has been a success. It has brought Europe closer together and its flexibility has enabled us to respond to crisis after crisis, including Putin's war in Ukraine. Having said that, the gaps that inevitably develop over time as an entity grows have started to emerge. If we want to continue preserving the efficacy

of our European peace project and meet the new challenges to it, we need to be ready to adapt. To take the next step. To do more. And we need all Europeans on board.

The Conference on the Future of Europe, a unique and timely year-long citizen-led initiative, has brought European institutions, European and national parliamentarians, regional and local authorities, social partners, civil society and citizens alike around the same table to discuss Europe's challenges and priorities. By involving hundreds of thousands of people from all corners of Europe, the conference has been an intense experience in the power of participatory democracy. If we can sum up the conclusions in a single phrase, it is this: people want more Europe. As the only directly elected European institution, the European Parliament has pledged that it will do everything within its power to deliver on citizens' expectations.

In 1952 the President of the High Authority continued:

> *In these days when the first supranational institutions of Europe are being established, we are conscious of the beginning of the great European revolution of our time: the revolution which, on our Continent, aims at substituting unity in freedom and in diversity for tragic national rivalries.*

This year, as we are commemorating the 70th anniversary of EU law, I believe that Europe is once again at a defining moment for European integration. The conference has shown us that there exists a gap between what people expect and what Europe is able to deliver at the moment. This is why we need to implement the outcomes of the conference as soon as possible. This is why a European convention should be our next step.

INTRODUCTION

Daniel Calleja and Tim Maxian Rusche

On 13 July 2022, a hot and sunny day, the College of Commissioners of the European Commission travelled from Brussels to Luxembourg to hold an extraordinary meeting in the City Hall of Luxembourg. This was where it had all started: the first meeting of the High Authority of the European Coal and Steel Community (ECSC) had taken place in the same venue 70 years before.

President von der Leyen and the commissioners were greeted by the Prime Minister of Luxembourg and the Mayor of Luxembourg City. On arrival, they could contemplate the photographs of the historic first meeting, which feature the familiar faces of some of the Fathers of Europe, including Jean Monnet, the first President of the High Authority.

In her speech, President von der Leyen recalled that, 70 years ago, the main objective behind the Treaty of Paris, which created the ECSC, was to preserve peace in a Europe ravaged by the Second World War by establishing a High Authority (which would later become the European Commission) to steer and manage jointly coal and steel, avoiding conflict between the Member States, within the framework of common institutions.

It is worth quoting here the preamble of that treaty:

> *CONSIDERING that world peace can be safeguarded only by creative efforts commensurate with the dangers that threaten it, CONVINCED that the contribution which an organised and vital Europe can make to civilisation is indispensable to the maintenance of peaceful relations, RECOGNISING that Europe can be built only through practical achievements which will first of all create real solidarity, and through the establishment of common bases for economic development, ANXIOUS to help, by expanding their basic production, to raise the standard of living and further the works of peace, RESOLVED to substitute for age-old rivalries the merging of their essential interests; to create, by establishing an economic community, the basis for a broader and deeper community among peoples long- divided by bloody conflicts; and to lay the foundations for institutions which will give direction to a destiny henceforward shared.*

Extending the pursuit of a functionalist method of integration to economic areas beyond coal and steel, including atomic energy, through the European Economic Community (EEC) Treaty and European Atomic Energy Community (Euratom) Treaty (the Treaties of Rome), allowed Europe

to develop this successful and original process of integration. Never before had sovereign states conferred competences on common institutions at such a scale. At the same time, those institutions can adopt rules that are legally binding for Member States and can be enforced by the Commission, as guardian of the treaties, under the authority of the European Court of Justice (Court of Justice).

Seventy years later, the ideal of peace remains very much at the heart of the European project and, in order to achieve it, the scope of action of the European Union has expanded beyond the remit of a purely economic organisation.

Today, the Union exercises its powers in areas that would have been unthinkable seven decades ago.

Alongside the quest for peace, the second distinctive feature of the EU is undoubtedly the rule of law.

Law has been at the centre of European integration ([1]). At the heart of the European project is the existence of rule-based institutions, which act strictly under the treaties and are subject to law. Everything the EU does is possible first and foremost because it is based on the respect of EU law.

In 1965, President Walter Hallstein stated that the EEC's only weapon was the law ([2]):

> *The Community is not merely a creation of law. There is virtually no other holder of public power that is, like the Community, exclusively dependent on law in order to carry out its functions. The Community has no administrative infrastructure, no direct power of coercion, no army and no police. Its only tool, its only weapon, is the law that it establishes.*

It is symbolic that both topics – the pursuit of peace, made necessary by Russia's war of aggression against Ukraine, and the rule of law – remain at the centre of the European project 70 years after the first meeting of the High Authority. The extraordinary meeting of the Commission of 13 July 2022 had a single item on its agenda: the adoption of the annual report on the rule of law in the European Union.

([1]) In the words of Claus-Dieter Ehlermann, 'Lawyers in the European Communities have an unusually large part to play. Certainly their role is greater than in any other international body and, I would surmise also, than in the Member States' (Ehlermann, C.-D., 'The Role of Lawyers in the European Communities', in *International Business Lawyer*, Vol. 11, 1983, p. 172).

([2]) Historical Archives of the European Commission, 'Speech by Walter Hallstein on 17 June 1965 to the European Parliament in the legal debate on the report "Priorité du droit communautaire sur celui des États membres"', cited in Louis, J.-V., 'Community law 50 years on', in Baquero Cruz, J. and Closa Montero, C. (eds), European Integration from Rome to Berlin: 1957–2007: History, law and politics, PIE-Peter Lang, Brussels, 2009, pp. 65–91.

1. European Union law as the guiding thread of European integration

The first act of EU law, the Treaty of Paris creating the ECSC, entered into force on 23 July 1952. The institutions created by the treaty began their work that year. The Treaty of Paris gave a central law-making function to the High Authority, and put the Court of Justice in charge of the control of the legality of the acts of the High Authority.

The EU is a community of law, a union built on law.

EU law is proposed, negotiated and adopted by the EU institutions. Its enforcement relies to a large extent on national authorities and national courts. This is reflected in the unique structure of the EU legal system, in which the national judge is the common judge of EU law (*juge de droit commun du droit communautaire*). EU citizens and EU companies are the main beneficiaries of the rights granted by EU law. Indeed, throughout its evolution, the law of the Union is the source and basis of rights for EU citizens and EU companies. When those rights are not complied with, they can be invoked before the national courts.

This book celebrates 70 years of EU law. It is written by lawyers whose daily work in the Commission Legal Service ensures that EU law is correctly applied and properly implemented within the Union.

EU law is the guiding thread of European integration. All major steps forward in the process of integration are reflected in acts of EU law. EU law characterises the past 70 years of the EU, from the ECSC to the EU of today. In those 70 years, the EU has transformed from an economic union to a union for its citizens.

Jean Monnet said that 'Europe will be forged in crises, and will be the sum of the response given to each crisis'. When confronted with such crises, the law of the Union has been the tool to successfully deal with them, to bring change and to adapt to new challenges. Furthermore, EU law also offers plenty of opportunities and is very adaptive to new challenges.

2. The evolution of European Union law

In 1951, Belgium, Germany, France, Italy, Luxembourg and the Netherlands signed the Treaty of Paris establishing the ECSC, which entered into force in 1952. Five years later, in 1957, the same countries signed the Treaties of Rome establishing the EEC and the Euratom, which entered into force in 1958.

2.1. The first 30 years: from the Treaties of Rome and the Treaty of Paris to the Single European Act

Initially, the three treaties had different executives: the High Authority of the ECSC, the Euratom Commission and the EEC Commission. From 1958, the three executives had a common Legal Service ([3]). They also shared a single Court of Justice. During that period, the Legal Service and the Court of Justice preserved the unity of the EU legal order ([4]). The three executives were merged in the Treaty of Brussels, which was signed in 1965 and entered into force in 1967.

The High Authority implemented the ECSC, actively removed discriminatory tariffs and organised the restructuring of the coal and steel industries. The Euratom Treaty was of geopolitical importance because it enabled the founding members to exploit nuclear energy, while ensuring control over fissile material. Finally, the EEC laid the foundations for the common market, the common commercial policy and the common customs area, and introduced the Common Agricultural Policy. The implementation of those policies and of the competition rules of the ECSC and the EEC gave rise to a series of cases before the Court of Justice that firmly established the administrative law principles of EU law.

More importantly for EU law, the Court of Justice established the major principles that ensure that, to this day, EU law is first and foremost a law for citizens.

In the *Van Gend en Loos* case ([5]), the Court of Justice established that every citizen has the right to enforce those provisions of EU law that provide for a clear and unconditional right directly before a national judge – the *juge de droit commun du droit communautaire*. In the *Costa* v *E.N.E.L.* case ([6]), the Court of Justice clarified that Member States could not 'turn back the clock' and overwrite EU law using later provisions of national law. Rather, EU law enjoys primacy over national law. In the *Internationale Handelsgesellschaft* case ([7]), the Court of Justice decided that EU citizens can invoke their fundamental rights, which are common to the constitutional traditions of the Member States, against acts of the EU institutions. Later, in 1990 and 1991, in

([3]) See, for more detail, Rasmussen, M., 'Establishing a constitutional practice of European law: the history of the Legal Service of the European executive, 1952–65', *Contemporary European History*, Vol. 21, No 3, 2012, pp. 375–397; Boerger, A. and Rasmussen, M., 'The making of European law: exploring the life and work of Michel Gaudet', *American Journal of Legal History*, Vol. 57, No 1, 2017, pp. 51–82; Bailleux, J., 'L'Europe et ses légistes. Le service juridique des exécutifs européens et la promotion d'un droit communautaire autonome (1957–1964)', *Politique européenne*, Vol. 41, 2013, pp. 84–113; and Vauchez, A., *L'Union par le Droit*, Presses de Sciences Po, Paris, 2013, pp. 52–62 (and the adapted English version of his book, *Brokering Europe: Euro-lawyers and the making of a transnational polity*, Cambridge University Press, Cambridge, 2015).

([4]) See, for more detail, Bailleux, J., 'L'Europe et ses legistes. Le service juridique des exécutifs européens et la promotion d'un droit communautaire autonome (1957–1964)', *Politique européenne*, No 41, 2013, pp. 97–101; and Vauchez, A., *L'Union par le Droit*, Presses de Sciences Po, Paris, 2013, pp. 52–62.

([5]) Judgment of 5 February 1963, *Van Gend en Loos* v *Administratie der Belastingen*, 26/62, EU:C:1963:1.

([6]) Judgment of 15 July 1964, *Costa* v *E.N.E.L.*, 6/64, EU:C:1964:66.

([7]) Judgment of 17 December 1970, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 11/70, EU:C:1970:114. See in more detail on the development of fundamental rights the chapter 'Fundamental values of the European Union: from principles to legal obligations' in the first part of the book.

the *Foster and Others* v *British Gas* case ([8]), the Court of Justice clarified that citizens can rely on the direct effect of directives against any state body, including publicly controlled companies. In the *Factortame* case ([9]), the Court of Justice decided that Member States must ensure the effectiveness of EU law, including by providing for interim protection against national measures that violate EU law, even when national law does not provide for this protection. Furthermore, in the *Francovich* case ([10]), the Court of Justice established that, when EU law has no direct effect, but a Member State violates its obligations under EU law and causes damage to a citizen by doing so, the citizen has the right to claim damages against the State.

Finally, in the *Roquette* v *Council* case ([11]), the Court of Justice held that democracy is a fundamental principle of EU law and, in the *Les Verts* case ([12]), it established that the Union should be characterized as a community of law – a concept forged by the first President of the Commission, Walter Hallstein.

The Court of Justice also handed down landmark judgments confirming the concrete rights of citizens.

For example, in the *Defrenne* v *SABENA* case ([13]), the Court of Justice put an end to discrimination regarding salaries between men and women, and, in the *Walrave* case ([14]), the Court made it clear that professional athletes can rely on the principle of non-discrimination against international and national sport federations that restrict their free movement rights, paving the way for a later judgment in the *Bosman* case ([15]).

During those first 30 years, the European Communities passed legislation in many different economic areas, and developed common policies. They took the first steps towards environmental protection with the adoption of the birds directive in 1979 ([16]), and created the conditions for the cross-border application of social security systems. The European Communities also agreed to create a common system of value added tax, and adopted the first common rules on transport and in the field of energy ([17]).

([8]) Judgment of 12 July 1990, *Foster and Others* v *British Gas*, C-188/89, EU:C:1990:313.

([9]) Judgment of 19 June 1990, *The Queen* v *Secretary of State for Transport, ex parte Factortame*, C-213/89, EU:C:1990:257.

([10]) Judgment of 19 November 1991, *Francovich and Bonifaci* v *Italy*, Joined Cases C-6/90 and C-9/90, EU:C:1991:428.

([11]) Judgment of 29 October 1980, *Roquette* v *Council*, 138/79, EU:C:1980:249.

([12]) Judgment of 23 April 1986, *Les Verts* v *Parliament*, 294/83, EU:C:1986:166

([13]) Judgment of 8 April 1976, *Defrenne* v *SABENA*, 43/75, EU:C:1976:56.

([14]) Judgment of 12 December 1974, *Walrave and Koch* v *Association Union Cycliste Internationale and Others*, 36/74, EU:C:1974:140.

([15]) Judgment of 15 December 1995, *Union royale belge des sociétés de football association and Others* v *Bosman and Others*, C-415/93, EU:C:1995:463.

([16]) Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, OJ L 103, 25.4.1979, p. 1.

([17]) See, for a more detailed summary of the first 30 years of EU law, Olmi, G., 'Introduction', in European Commission (ed.), *Thirty years of Community law*, Office for Official Publications of the European Communities, Luxembourg, 1983, pp. 1–17. The other contributions in that book give a detailed picture of the state of EU law prior to the entry into force of the Single European Act.

EU law was used to bring down national rules that hampered the freedoms guaranteed by the EU treaties. This is exemplified by the *Cassis de Dijon* ([18]) case.

Finally, the Court laid the foundations for the action of the Union on the international scene. In the *AETR* case ([19]), it rejected the view that the Union did not have the power to conclude international agreements outside the few cases expressly provided for in the treaties. Rather, it held that there was a parallelism between the Communities, internal and external competences. And in the *Kupferberg* case ([20]), it held that the citizens could directly rely on the international agreements concluded by the Union, provided they contained a clear, precise and unconditional right or obligation ([21]).

2.2. The Single European Act and completion of the internal market

The situation changed dramatically with the entry into force of the Single European Act in 1987 and the implementation of the single market programme of the Delors Commission. Qualified majority voting in the Council, the new, true decision-making role given to the European Parliament and political support from the Member States enabled the Commission to pass an impressive amount of legislation put into reality Commission President Jacques Delors' historic White Paper Completing the Internal Market submitted to the European Council of Milan in 1985 ([22]).

At around the same time, in 1985, the Schengen agreement laid the foundation for travelling in the EU without internal border controls.

Internally, the Union completed the internal market by 1992. That meant, in particular in the network industries, the opening of markets hitherto closed to competition ('liberalisation') ([23]).

The Commission continued to propose internal market legislation throughout the 1990s and 2000s. The EU increased its regulatory activity at EU level (including the creation of regulatory agencies to support the EU) with the support of the newly created national regulatory authorities. EU law developed new regulations for the internal market at EU level in all areas of the economy.

([18]) Judgment of 20 February 1979, *Rewe* v *Bundesmonopolverwaltung für Branntwein*, 120/78, EU:C:1979:42.

([19]) Judgment of 31 March 1971, *Commission* v *Council* ('AETR'), 22/70, EU:C:1971:32.

([20]) Judgment of 26 October 1982, *Kupferberg*, 104/81, EU:C:1982:362.

([21]) See, for a more detailed discussion of the external relation litigation of those years, Ramirez-Pérez, S., 'The Legal Service', in Bussiere, E., Dujardin, V., Dumoulin, M., Ludlow, P., Brouwer, J. W. and Tilly, P. (eds), *The European Commission 1973–1986: History and memories of an institution*, Publications Office of the European Union, Luxembourg, 2014, pp. 119 and 120.

([22]) *Completing the Internal Market*, White Paper from the Commission to the European Council (Milan, 28–29 June 1985), COM(1985) 310 final.

([23]) See in more detail the chapter 'The European Commission: the clock master of the European Union internal market' in the fifth part of this book.

The Single European Act introduced a new 'Environment Title'. It provided the first legal basis for a common environment policy with the aims of preserving the quality of the environment, protecting human health, and ensuring rational use of natural resources.

Externally, the so-called Uruguay Round led, after more than seven years of negotiation, to the creation of the World Trade Organisation in 1994, and significantly increased the importance of trade policy and trade dispute settlement by legal proceedings ([24]).

2.3. From the European Economic Community to the European Union: the Treaties of Maastricht, Amsterdam and Nice

The fall of the communist regimes in central and eastern Europe and German reunification created a new dynamic, reflected in the Treaty of Maastricht. The treaty, which entered into force in 1993, set out to define the role of Europe in the new world order. Member States decided to create a European Union; to establish EU citizenship; to have a common currency; and to create an area of freedom, security and justice (incorporating the ideas of the Schengen agreement into EU law). The Treaty of Maastricht also contains the embryo of today's common foreign and security policy. This profoundly changed the nature of EU law, which now governs broad areas of the daily lives of citizens.

Subsequently, the Treaties of Amsterdam (entry into force: 1999) and Nice (entry into force: 2003), the introduction of the euro in 1999 and the creation of the European Central Bank made those ideas into a reality, and gradually furthered the powers and competences of the EU.

The Court of Justice continued to hand down important judgments. In parallel, the two co-legislators, the European Parliament and Council, acting on proposals of the Commission, adopted many rules of EU law, which were the origin of new rights for EU citizens. To name but a few with particular significance for our daily lives, these rights included passenger rights in transport, consumer protection rights and the detailed regulation of chemical products.

The Union also took its first decision to ensure what is called today 'strategic autonomy', when it began to develop its own satellite navigation system Galileo under the leadership of Commission Vice President Loyola de Palacio ([25]).

([24]) See for an example of the significance of WTO law for EU law the chapter 'The European Union Carbon Border Adjustment Mechanism and its consistency with the balance of the European Union's obligations and rights under World Trade Organization law' in the fourth part of this book.

([25]) European Commission, Communication from the Commission: GALILEO - Involving Europe in a New Generation of Satellite Navigation Services, COM(1999) 54.

2.4. Towards a democratic and reunited Europe: the Treaty of Lisbon

The Treaty of Lisbon, which entered into force in 2009, was the result of the European Convention (2001 - 2003). The treaty's main objective is to make the EU more democratic and to bring it closer to its citizens. The Treaty of Lisbon brings many innovations, particularly for the political life of the EU. It introduced the European citizens' initiative, significantly increased the areas in which the Parliament and Council act in what is now called the ordinary legislative procedure and strengthened the role of the national parliaments. The Treaty of Lisbon also integrated the Charter of Fundamental Rights of the European Union, declared in 2000, giving it legal force.

The Treaty of Lisbon also envisages many possibilities for further integration, in particular through the 'passerelle' clauses, which allow the replacement of voting by unanimity in certain remaining areas with voting by qualified majority ([26]).

Finally, the Treaty of Lisbon is the first treaty the former East and West together negotiated and agreed following the accession of the central and eastern European countries to the EU in 2004 and 2007.

2.5. The years of crisis: banking and sovereign debt crisis, refugee crisis and COVID-19 pandemic

In the years following the entry into force of the Treaty of Lisbon, the Union was confronted with three major crises: the bank crisis, followed by the sovereign debt crisis; the refugee crisis following the war in Syria; and the COVID-19 pandemic.

In reaction to the economic and financial crisis and the sovereign debt crisis, the Union centralised banking regulation by creating a quasi-federal regulatory structure. In addition, the euro-area Member States created the European Stability Mechanism outside the system of EU law. The refugee crisis showed the difficulties of agreeing on a just mechanism for distributing refugees between Member States. Finally, the COVID-19 crisis demonstrated the full potential of EU law through the joint purchase of vaccines, the creation of a new health authority (the Health Emergency Preparedness and Response Authority) and the issuing of EU debt to finance the reconstruction of the EU economy.

The Union's action to defend the values in Article 2 of the Treaty on European Union (TEU) and of the rule of law has also intensified considerably in recent years through different instruments: the procedure under Article 7 TEU, the infringement cases pursued by the European Commission, the annual reports and the conditionality regulation. The aim of all these instruments is to defend the values at the heart of the European project ([27]).

([26]) See in more detail the chapter 'The future of European Union law' at the end of this book.

([27]) See in more detail the first part of this book 'EU law protects and promotes EU values'.

2.6. European Union law today

The von der Leyen Commission pursues six priorities, among which are achieving the digital and green transitions. The EU has adopted a European climate law, aiming to become the first region in the world to be carbon neutral by 2050. The EU has shown decisive leadership in the implementation of the Paris Agreement to tackle global climate change ([28]). The EU has adopted two major instruments to regulate the digital economy (the Digital Markets Act and the Digital Services Act) ([29]).

To respond to Russia's war of aggression against Ukraine, the EU has adopted numerous EU restrictive measures ('sanctions'), adopted rules that help refugees from Ukraine find protection in the EU, put in motion the legal process that provides Ukraine (and other countries) a European perspective, and significantly overhauled its energy legislation to strengthen the security of supply in this field.

3. The Commission Legal Service

EU law is the guiding thread of European integration. Within the European Commission, the Legal Service has actively contributed to its development and enforcement.

3.1. The mission of the Commission Legal Service

In the Legal Service's mission statement of 2021, that mandate is set out as follows:

> *The mission of the Commission's Legal Service is rooted in the provisions of the founding Treaties and in the specific institutional functions and responsibilities assigned to the Commission, in particular as guardian of the Treaties.*
>
> *Our mission is to advise and represent the Institution and in performing those tasks, to ensure that the law is respected, thereby contributing to upholding the rule of law.*
>
> *In particular, as a single, horizontal service, under the authority of the President, the Legal Service:*
>
> — *Provides independent legal advice to the Commission as a whole, in order to assist it to achieve its policy objectives. Taking the time to consider carefully all relevant elements of law and fact, and to listen to all points of view, the Legal Service strives*

([28]) See in more detail the chapter 'Protecting the environment and tackling climate change' in the third part of this book and the chapter 'The European Union Carbon Border Adjustment Mechanism and its consistency with the balance of the European Union's obligations and rights under World Trade Organization law' in the fourth part of this book.

([29]) See in more detail the chapter 'The European Commission: the clock master of the European Union internal market' in the fifth part of this book.

to guide the institution as to the limits of, and opportunities provided by, the law, based on our best assessment of how the law is to be interpreted and applied;

— *Represent the Institution before the EU, national and international courts and arbitration bodies. In so doing, the Legal Service pursues the enforcement of EU law and defend measures attributable to the Commission and/or the European Union. It also assists the Court of Justice by presenting the Commission's position in all preliminary reference procedures that are notified to the Commission. The Legal Service informs judges and arbitrators as amicus curiae on relevant points of EU and international law;*

— *Provide advice to the Commission in its legislative and regulatory tasks seeking to ensure that all legal texts adopted by the Commission fully respect the Treaties and are drafted with the necessary legal clarity and in the interest of EU citizens.*

The Legal Service continuously strives to achieve, maintain and develop legal excellence in all aspects of its work and adheres to the highest ethical standards.

What started with three lawyers from France and Germany in 1952 ([30]) is today a service of nearly 300 highly qualified and motivated lawyers from 27 Member States and more than 100 officials supporting them in various capacities (assistants, paralegals, documentalists, IT experts, etc.).

The existence of the Legal Service is anchored in the rules of procedure of the Commission, Article 21 of which provides that the Legal Service must always be consulted before initiating any of the procedures for the Commission to adopt decisions. This rule applied from the early days of the Commission ([31]).

The Legal Service is under the direct authority of the Commission President.

The Director-General of the Commission Legal Service serves as jurisconsult of the College of Commissioners and attends the meetings of the Commission ([32]). The Legal Service's status as a 'presidential service' is crucial for it to be able to fully exercise its mission.

([30]) See for the origins of the Legal Service European Commission, 'Service juridique. Histoire administrative', in *Haute Autorité CECA: Inventaire des dossiers 1958-1967*, Publications Office of the European Communities, Luxembourg, 1999, Vol. 2, pp. 1–7. That publication gives an overview of all documents available in the historical archives in the Commission, and provides an overview of all the members of the Legal Service of the High Authority in those years (pp. 299–302).

([31]) See the description in Dumoulin, M. (ed.), *The European Commission 1958–72: History and memories of an institution*, Publications Office of the European Union, Luxembourg, 2014, p. 225: 'Gaudet was determined there should be a clear and simple rule about the role of the Legal Service in the Commission. No document was to be submitted to the Commission without having been seen and checked by the Legal Service. This was very simple, but it gave the service considerable power over the working of the Commission and the administration.'

([32]) See in detail on that role Dewost, J. L., 'Le jurisconsulte du Conseil et le directeur général du Service juridique de la Commission: Partenaires ou rivaux ? Ou 28 ans de conseil juridique au service de l'Europe', in *A man for all treaties. Liber amicorum en l'honneur de Jean-Claude Piris*, Bruylant, Brussels, 2011, pp. 147–156.

According to the case-law of the Court of Justice, the public interest requires that the Commission (and the other institutions) should be able to benefit from the advice of their legal service, given in full independence ([33]). That advice should be 'frank, objective and comprehensive' ([34]). The Legal Service has the task, based on its role and particular knowledge, of providing the institution with all necessary information so that the institution adopts, in the exercice of its competences, legal acts that are in conformity with EU law ([35]).

3.2. The organisation of the Commission Legal Service

The Commission Legal Service has had only nine Directors-General since 1952 ([36]). Many of them had worked in the Legal Service earlier in their careers. This fact, combined with the low turnover of lawyers, has fostered stability and the transmission of knowledge in the Commission Legal Service ([37]).

Every individual lawyer has a great level of responsibility, advising the other Commission services and representing the Commission and the EU in court.

The Commission Legal Service has a very flat organisational structure, with the Director-General and the Deputy Director-General at its head. The Legal Service is divided into 13 thematic teams – each under the supervision of a head of team, who has the rank of Principal Legal Adviser (i.e. an official with the grade of Director) – and the Quality of Legislation team. These teams have remained very stable over time. New teams have typically been created as 'spin-offs' when new fields of EU law first emerged and then took on significant importance ([38]). In addition, there is a small directorate

([33]) Standing case-law, see most recently Judgments of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, EU:C:2022:97, paragraph 53, with further references; and of 16 February 2022, *Poland* v *Parliament and Council*, C-157/21, EU:C:2022:98, paragraph 50, with further references.

([34]) Judgment of 1 July 2008, *Sweden and Turco* v *Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 62.

([35]) Judgment of 2 June 2016, *Moises Bermejo Garde* v *Economic and Social Committee*, F-41/10 RENV, EU:F:2016:123, paragraph 67.

([36]) Until 1958, Michel Gaudet and Robert Krawielicki served together as Director-Generals (referred to as Directors at the time) of the Legal Service of the High Authority. From 1958 to 1967, there was a common Legal Service for the three executives, with one director for each branch: Michel Gaudet for the EEC, Robert Krawielicki for the ECSC (replaced after his death in 1966 by Walter Much) and Theo Vogelaar for the Euratom. After the merger of the three executives, Michel Gaudet served as Director-General of the Legal Service from 1967 to 1969. He was succeeded by Walter Much (1969–1973), Claus-Dieter Ehlermann (1977–1987), Jean-Louis Dewost (1987–2001), Michel Petite (2001–2007), Claire Durand (2008), Luis Romero (2009–2020), and Daniel Calleja Crespo (2020–present).

([37]) Flett, J., 'A world wide web of law(yers): the lawyer function catalysing and mediating change in international economic regulations – the EU experience', in Qureshi, A. H. and Gao, X. (eds), *International Economic Organizations and Law: The perspective and role of the legal counsel*, Kluwer Law International, Alphen aan den Rijn, 2012, pp. 345-6.

([38]) Today, the teams are the following: (1) AFFAIR, specialising in business law, including transport and digital; (2) BUDG, specialising in budget and customs taxation; (3) JLS, specialising in justice, freedom and security, private law and criminal law; (4) TRADE, specialising in trade law; (5) AGRI, specialising in agriculture and fisheries; (6) COMP, specialising in antitrust and mergers; (7) MIME, specialising in internal market, energy, enterprise and environment; (8) ECS, specialising in European Civil Service law; (9) AIDE, specialising in state aids and trade defence; (10) INST, specialising in institutions; (11) RELEX, specialising in international relations and international law; (12) EEI, specialising in euro zone and economic issues; and (13) SOC, specialising in employment and social affairs.

in charge of resources, which provides support services (IT, finances, access to documents of the Legal Service, human resources, and document management).

An important rule, introduced in 1977 by the then Director-General, Claus-Dieter Ehlermann, as part of the first reform and modernisation of the Legal Service, is the rotation of lawyers between the teams. The purpose of that rule, then and now, is to prevent lawyers from being too influenced by the directorate-general they are advising and becoming too set in the ways and routine of their field. This mobility gives them an overview of EU law, enabling them to draw up opinions that take account of not only the sector covered but also other sectors, thereby promoting the consistency of EU law ([39]).

3.3. The tasks of the Commission Legal Service

The Commission Legal Service does not have a precise equivalent in national administrations. It has sometimes been compared to the Conseil d'État of France because the Legal Service provides independent advice ([40]) to the College of Commissioners, and because a member of the Conseil d'État, Michel Gaudet, had decisive influence on its role and structure in the early years. But, in contrast to the Conseil d'État, the Commission Legal Service provides advice from inside the Commission, not from outside (as the Conseil d'État in France and its equivalents in Belgium, Luxembourg and the Netherlands do). The Commission Legal Service has a seat at the table of the government, thus being possibly more comparable to the position of the Irish Attorney General or the Finnish Chancellor of Justice ([41]).

([39]) For the historic origin of rotation, see Ramirez-Pérez, S., 'The Legal Service', in Bussiere, E., Dujardin, V., Dumoulin, M., Ludlow, P., Willem Brouwer, J. and Tilly, P. (eds), *The European Commission 1973–1986: History and memories of an institution*, Publications Office of the European Union, Luxembourg, 2014, pp. 116–117. On rotation, see also Flett, J., 'A world wide web of law(yers): the lawyer function catalysing and mediating change in international economic regulations – the EU experience', in Qureshi, A. H. and Gao, X. (eds), *International Economic Organizations and Law: The perspective and role of the legal counsel*, p. 323.

([40]) See, for example, the autobiography of the former Principal Legal Adviser of the Legal Service Peter Gilsdorf, who explains the perception that the Legal Service is 'much more than a classical legal department, a service that has the overarching function of control of legality, a small Conseil d'État' (translation from German by the authors) (Gilsdorf, P., *Europäische Erinnerungen: Ein Brüsseler Tagebuch*, Manuela Kinzel Verlag, Göppingen, 2006, p. 7). More recently, that comparison has also been used by Jean-Louis Dewost, another former member of the Conseil d'État, who became Director General of the Legal Service of the Commission (Dewost, J.-L., 'Le jurisconsulte du Conseil et le directeur general du service juridique de la Commission: partenaires ou rivaux? Ou 28 ans de conseil juridique au service de l'Europe', in *A Man for All Treaties: Liber amicorum en l'honneur de Jean-Claude Piris*, Éditions Bruylant, Brussels, 2011, p. 148).

([41]) See paragraph 10-2 of the 'Rules giving effect to the Rules of Procedure', annexed to the Commission's Rules of Procedure, Decision C(2010)1200, not published, quoted and extensively discussed in Flett, J., 'A world wide web of law(yers): the lawyer function catalysing and mediating change in international economic regulations – the EU experience', in Qureshi, A. H. and Gao, X. (eds), *International Economic Organizations and Law: The perspective and role of the legal counsel*, Kluwer Law International, Alphen aan den Rijn, 2012, p. 322.

Contrary to the Conseil d'État, the Legal Service represents the Commission and the EU in court ([42]), just as state attorneys do in Spain, Croatia, Italy, Cyprus, Malta and Slovenia. Austria has a similar institution, but with a more limited remit (the Verfassungsdienst).

The combination of the two functions, independent advice to the College of Commissioners and defence of the Commission and the EU in court, makes the Commission Legal Service unique.

3.3.1. Providing independent legal advice

Emile Noël, the first Secretary General of the Commission, wrote the following on the role of the Legal Service within the Commission ([43]):

> *the Legal Service has the vital role of ensuring a uniform interpretation of the treaty and regulations for the whole of the services of the Commission, and the coherence of the Commission's legal position in the development of its activities. The fact that the whole of the Community system rests on the three Treaties which have to be strictly respected gives to the Legal Service of the Commission (as to that of the Council) extremely important and wide responsibilities.*

It is useful to distinguish categories of legal advice ([44]). Legal advice can be divided into legislative advice, administrative law advice and advice on international negotiations.

Legislative advice is mainly conceptual. The Commission Legal Service assists in preparing legislative proposals that the Commission submits based on its right of initiative. This work can require creative reflection on the possibilities and limits of EU law, and ensuring that the EU has the competence for the proposed action.

Administrative advice concerns the legality of the acts the Commission adopts as administrative authority, mainly in the fields of competition law, state aid law, trade defence law, chemicals and medicine law, banking law, and civil service law cases brought by officials against their institution (staff cases). Here, the Commission is the author of the final act, and the Commission Legal Service must ensure that the final act is legal and withstands court scrutiny.

([42]) The legal basis for the Legal Service's monopoly of the representation of the Commission and the Union in court and arbitration tribunals can be found in Commission Decision EEC of 8 July 1959, Minutes of the 67th meeting of the Commission, 14, point XXV, and document S/04218, including Note JUR/86/59 and the annex.

([43]) Noël, E., 'Participation of the Commission in the Community legislative process', *International Business Lawyer*, Vol. 11, 1983, p. 165. See, for a recent external analysis of the role of the Commission Legal Service in decision-making, Leino-Sandberg, P., *The Politics of Legal Expertise in EU Policy-making*, Cambridge University Press, Cambridge, 2021, pp. 163–173.

([44]) See, for more detail, Flett, J., 'A world wide web of law(yers): the lawyer function catalysing and mediating change in international economic regulations – the EU experience', in Qureshi, A. H. and Gao, X. (eds), *International Economic Organizations and Law: The perspective and role of the legal counsel*, Kluwer Law International, Alphen aan den Rijn, 2012, pp. 325–332.

Advice on international negotiations is mainly advice on public international law, and on its interplay with EU law.

3.3.2. Representation in court

From the point of view of the Court of Justice, one can quote the long-time judge Pierre Pescatore, who wrote the following on the role of the Legal Service representing the Commission before the Court ([45]):

> *La Commission dispose d'un service juridique, bien organisé et dirigé, qui a la mission de la représenter devant la Cour. Ce service, composé de juristes qualifiés appartenant aux diverses systèmes juridiques de la Communauté, est animé d'un réel esprit de corps, en ce sens qu'il est capable de développer sur les divers sujets contentieux une doctrine commune et d'agir dans un esprit de cohérence.*

Representing the Commission and the EU before the EU courts, national courts of Member States, courts of non-EU countries, international courts and arbitration tribunals covers a wide range of proceedings ([46]).

The most common area of representation is in proceedings before the EU courts. The Legal Service defends the Commission in all cases brought against the Commission, particularly in competition law, State aid law, trade defence law, chemicals and medicine law, banking law, and staff cases. The Commission Legal Service brings infringement actions against Member States to the Court of Justice, brings cases against other institutions, and defends itself if another institution brings the Commission to court. The Legal Service also represents the Commission in cases brought to the EU courts based on an arbitration clause in a contract, and in damages cases brought against the Commission or the EU.

([45]) Pescatore, P., 'Le recours, dans la jurisprudence de la Cour de justice des Communautés européennes, à des normes déduits de la comparison des droits des Etats membres', *Revue internationale de droit comparé*, Vol. 32, 1980, pp. 337–359. In English, the quote reads: 'The Commission has a Legal Service, well organised and managed, which has the mission of representing the Commission before the Court. This service, consisting of lawyers qualified to practise in the national legal systems of the Member States, is animated by a strong team spirit, in the sense that it is capable of developing a common doctrine on the different subjects before the Court and acting in a spirit of coherence'.

([46]) For a detailed description, see Romero Requena, L., 'La Commission devant la Cour de Justice: L'exemple de la procedure préjudicielle', in Rosas, A., Levits, E. and Bot, Y. (eds), *The Court of Justice and the Construction of Europe: Analyses and perspectives on sixty years of case-law*, T.M.C Asser Press, The Hague, 2012, pp. 155–166; Dewost, L., 'Allan's legal battles before the Court, acting as the Commission's agent', in Lenaerts, K., Bonichot, J.-C., Kanninen, H., Naômé, C. and Pohjankoski, P. (eds), *An Ever-Changing Union? Perspectives on the future of EU law in honour of Allan Rosas*, Hart, Oxford, 2019, pp. 177–181; Lyal, R., 'Compatibility of National Tax Measures with EU law: The role of the European Commission in Tax Litigation before the European Court of Justice', *EC Tax Review*, Vol. 24, No 1, pp. 5–14; Flett, J., 'A world wide web of law(yers): the lawyer function catalysing and mediating change in international economic regulations – the EU experience', in Qureshi, A. H. and Gao, X. (eds), *International Economic Organizations and Law: The perspective and role of the legal counsel*, Kluwer Law International, Alphen aan den Rijn, pp. 335–345; Ronkes Agerbeek, F., 'The Legal Service of the Commission', in Guinchard, E. and Granger, M.-P. (eds), *The New EU Judiciary: An analysis of current judicial reforms*, Kluwer Law International, Alphen aan den Rijn, p. 224–232; Leino-Sandberg, P., *The Politics of Legal Expertise in EU Policy-making*, Cambridge University Press, Cambridge, 2021, pp. 173–181.

A very important role is played by preliminary references. When references concern the interpretation of EU law, the Commission Legal Service presents its view systematically in all cases, assisting the Court of Justice in a role that has been compared to that of an amicus curiae. That is, it brings to the Court of Justice all the elements it may need to decide the case, but has no direct stake in the main proceedings. When references concern the validity of an act of the EU institutions, the Commission Legal Service defends the validity of that act if it is an act of the Commission, or the Commission, in the legislative process, has agreed with the text adopted.

It is in its interventions before the EU courts that the need for the Commission Legal Service to include lawyers of all nationalities becomes apparent, as the Commission has to make its oral and written observations in the language of the case, which can be any of the 24 official languages of the EU.

The Commission represents the EU before national courts – both those of the Member States and those of third countries -, international courts and arbitration tribunals, in accordance with Article 335 of the Treaty on the Functioning of the European Union (TFEU). The role is different depending on the case: the EU may be a party to the court proceedings, for example seeking payment from a private contractor or damages, or the EU can be the defendant. In other cases, the Commission may intervene as amicus curiae, for example before the European Court of Human Rights or the courts of third countries, when the EU has specific knowledge of or interest in those cases. In this regard, the cases before the World Trade Organization dispute settlement body play a very important role when the Commission Legal Service represents the EU. The EU has also appeared before the International Tribunal for the Law of the Sea and, most recently, before the International Court of Justice.

Arbitration proceedings can be commercial arbitration proceedings or investor–state arbitration proceedings, in which the EU either is the defendant or intervenes as amicus curiae.

3.3.3. Some statistics

According to its *Annual Activity Report 2020*, the Commission Legal Service defended the interests of the EU and its citizens in almost 1 956 ongoing EU court cases and 689 cases before national courts. It dealt with 15 336 consultations and 6 853 parliamentary questions, gave its opinion on 8 923 proposed legal acts, and undertook legal revision of 2 090 legal acts. The Legal Service assisted the Commission in 1 786 ongoing infringement procedures, assisted the courts in 569 preliminary rulings, and recovered debts of EUR 7 million on behalf of the Commission directorates-general and services ([47]).

([47]) European Commission Legal Service, *Annual Activity Report 2020*, European Commission, Brussels, 2020 (https://ec.europa.eu/info/system/files/annual-activity-report-2020-legal-service_en.pdf).

4. Presentation of the book

This book is a collaborative project of the Commission Legal Service. It is the result of discussions within the service and in each of its teams on the principles and foundations of EU law, and the contribution of the Commission Legal Service. Each chapter was written by one of the teams; many chapters are the fruit of extensive teamwork. Each chapter provides the names of the lawyers that are responsible for it ([48]).

The book is structured around five thematic axes: how EU law protects and promotes the EU's values; how EU law provides rights to EU citizens; how EU law improves EU citizens' lives; how EU law ensures fair competition in the EU internal market; and the role of the Commission, supported by the European Civil Service, as a central actor in EU law and policy.

4.1. European Union law protects and promotes the values of the European Union

Article 2 TEU sets out the values on which the EU is founded. These are respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of those belonging to minority groups. That provision, introduced by the Treaty of Lisbon, constitutes the culmination of a long journey in which the case-law of the Court of Justice and successive treaties have put increasing emphasis on the importance of these values, which are common to all the Member States.

Chapter 1 describes that journey and how those values have evolved from principles to legal obligations.

Chapter 2 presents the importance of the conditionality mechanism for the protection of the EU budget in order to ensure the respect of those values.

Chapter 3 analyses how the EU promotes and enhances those values worldwide in its role as a geopolitical actor, in line with its obligation according to Article 205 TFEU.

4.2. European Union law provides rights to European Union citizens

Based on the judgment in the *Van Gend en Loos* case ([49]), EU citizens can invoke the rights granted to them before their national judge. Initially, those rights were mainly economic rights.

([48]) In addition, the Commission Legal Service would like to thank the following young lawyers, who have completed a traineeship in the Legal Service in spring/summer 2022 as 'blue book trainees' under the Commission's 5-month traineeship programme and who have significantly contributed to this book in different ways: Garvita Sethi, Claudia Perez Zapico, Timothee Ceurremans, Monika Murauskė and Olga Molina Tomey.

([49]) Judgment of 5 February 1963, *Van Gend en Loos v Administratie der Belastingen*, 26/62, EU:C:1963:1.

Over time, the EU legislator has introduced increasing numbers of concrete rights for EU citizens in the different fields of EU law.

Chapter 4 introduces the concept of EU citizenship, first developed by Advocate General Jacobs ([50]) and shortly thereafter introduced into EU law by the Treaty of Maastricht.

Chapter 5 moves to the digital age and sets out the regime for data protection, including the 'right to be forgotten' in its different facets. It presents the challenges and opportunities for EU law when faced with modern technology.

Chapter 6 compares the lives of European Union citizens now and 70 years ago. It demonstrates how the EU has evolved from an economic community to a union for its citizens, offering a broad range of rights to its citizens that we now take for granted but were unthinkable 70 years ago.

4.3. European Union law improves the lives of European Union citizens

EU law has achieved very tangible improvements in the lives of citizens.

Chapter 7 takes stock of how the EU helps to protect our environment and tackle global climate change since the first environmental legislation was adapted in the 1970s.

Chapter 8 describes how the common agricultural policy and the common fishery policy have ensured sufficient and high-quality food for EU citizens since the early days of the community, and how, over time, these policies are increasingly relevant to protect the environment and the climate, as well as to ensure animal welfare.

Chapter 9 deals with an entirely different matter that affects everyone's life (and death): taxes. It shows how EU law has removed tax obstacles to live, work, invest, retire and die in another Member State.

4.4. European Union law ensures fair competition in the internal market

EU competition law is a 'traditional' field of EU law. From the beginning, it has been considered crucial to ensure a level playing field in the internal market.

Chapter 10 tackles an old prejudice, according to which competition law is mainly a playground for corporate lawyers. It shows how EU competition law enforcement benefits consumers, and can be invoked before any national judge.

([50]) Opinion of Advocate General Jacobs delivered on 9 December 1992 in *Konstantinidis* v *Stadt Altensteig and Landratsamt Calw*, C-168/91, EU:C:1992:504, paragraph 46, in which the advocate general concludes that Mr Konstantinidis 'is entitled to say "civis europeus sum" and to invoke that status in order to oppose any violation of his fundamental rights'.

Chapter 11 deals with another longstanding concern that can already be found in the Treaty of Paris establishing the ECSC: the distortion of competition by subsidies. The chapter shows how today's EU law restores the level playing field, avoiding distortions, so that subsidies that are incompatible with the internal market are recovered systematically from their beneficiaries.

Chapter 12 brings in a new challenge: ensuring a level playing field not only within the EU, but worldwide. In particular, this applies to carbon pricing, which is an important tool for tackling global climate change. The Commission has proposed introducing a Carbon Border Adjustment Mechanism for that purpose.

4.5. The role of the Commission within European Union law

The final axis looks at the role of the Commission within EU law.

Chapter 13 sets out the role and powers of the Commission as guardian of the treaties, in particular through the infringement procedure.

Chapter 14 describes the Commission more broadly as 'clockmaster of the EU'. The chapter shows the Commission's central role in the modern administrative system of multilayer governance. The Commission has several important roles: making legislative proposals, based on its right of initiative; applying EU law, as central administrative authority; and coordinating the actions of Member States when Member States apply EU law.

Chapter 15 presents the Commission's contribution to the quality of EU legislation. It focuses on how the Commission protects EU citizens' rights by ensuring legal certainty when drafting legal acts. It also gives an overview of the codification and recasting techniques, and the rules for correcting errors in Commission legal acts.

Chapter 16 describes the European Civil Service and its role in promoting and enforcing EU law. The responsible officials, by virtue of their status as European civil servants, are afforded the necessary independence in the performance of their tasks.

Throughout all of these chapters the reader is invited to follow the journey leading from the original essentially economic-based Communities to a union for its citizens, which now spreads its action to a vast number of fields increasingly relevant to all Europeans.

PART 1

EU LAW PROTECTS AND PROMOTES EU VALUES

1 Fundamental values of the European Union: from principles to legal obligations **30**

2 Fundamental values, constitutional identity and the protection of the European Union budget against breaches of the rule of law **54**

3 The European Union as a worldwide promoter of the universality and indivisibility of human rights **72**

FUNDAMENTAL VALUES OF THE EUROPEAN UNION: FROM PRINCIPLES TO LEGAL OBLIGATIONS

Friedrich Erlbacher and Katarzyna Herrmann

1. Introduction

The cradle of the supranational law that became modern EU law was based on ideals of a better future, revolutionary ideas of the shared management of national sovereignty to avoid future confrontations, and a clear understanding of the methods to achieve these goals: 'Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a *de facto* solidarity' ([51]). The integration of markets has notably been the outer form of the EU, whereas ideals have been the inner driver. However, 70 years of putting one stone on another have brought the inner idealistic heart of the EU into the daylight of the ongoing political and legal construction of the EU. The corpus of EU values is no longer limited to fine speeches or doctrinal debates: EU values, as set out in Article 2 of the Treaty on European Union (TEU), have become hard law.

In this chapter, we will start by briefly explaining the genesis of EU values and will then discuss questions of interpretation of the values in general terms. Based on that, we will look closer at the EU value that has been most prominent in recent years, not least in litigation before the EU courts: the rule of law. Finally, we will try to answer the question 'Why do EU values matter?'

2. Genesis of the values, as set out in Article 2 of the Treaty on European Union

Prior to the inclusion of values in the treaties and following a 'stone by stone' approach ([52]), the Court of Justice progressively integrated a number of general principles into the EU legal order, thereby endowing these principles with legal effects. First, the Court introduced 'fundamental

([51]) Declaration of Robert Schuman on 9 May 1950 (https://european-union.europa.eu/principles-countries-history/history-eu/1945-59/schuman-declaration-may-1950_en).

([52]) Lenaerts, K., 'EU citizenship and the European Court of Justice's "stone-by-stone" approach', *International Comparative Jurisprudence*, Vol. 1, No 1, 2015, pp. 1–10.

human rights' as a general principle of EU law ([53]). Then, in the *Les Verts case*, it went on to cast the EU's legal order as a 'community based on the rule of law' ([54]) and increasingly fleshed out the constitutive principles of the rule of law through judgments elaborating on legal certainty ([55]), the prohibition of arbitrariness of the executive ([56]), legality ([57]), the right to a fair trial before independent and impartial courts ([58]) and separation of powers ([59]). Early on, therefore, procedural aspects of the EU's rule of law were recognised. Although they have sometimes subsequently been interpreted in a more restrictive manner ([60]), the Court of Justice has repeatedly upheld the view that the EU, based on the rule of law, has established a complete system of legal remedies and procedures ([61]). As a result, the EU's rule of law took a substantive turn.

Equality also made its way into the Court of Justice's case-law by inclusion of Article 119 of the Treaty of Rome ([62]). In the same vein, the principle of democracy found early consecration in the Court's case-law ([63]).

In textual terms, Article 2 TEU has its roots in the Treaties of Rome and Paris.

Being resolved to create European institutions that would 'give direction to a destiny henceforward shared', the original six Member States of the European Communities laid the foundations for the establishment of a common denominator to prevent the resurgence of 'age-old rivalries' and 'bloody conflicts' ([64]). When the European Communities enlarged in the 1970s, the issue of the finality and identity of the Communities became all the more pressing. This prompted European leaders

([53]) Judgments of 12 November 1969, *Stauder* v *Stadt Ulm*, C-29/69, EU:C:1969:57; and of 14 May 1974, *Nold KG* v *Commission*, C-4/73, EU:C:1974:51.

([54]) Judgment of 23 April 1986, *Les Verts v Parliament*, C-294/83, EU:C:1986:166, paragraph 23.

([55]) Judgment of 12 November 1981, *Meridionale Industria Salumi and Others*, Joined Cases C-212 to C-217/80, EU:C:1981:270, paragraph 10.

([56]) Judgment of 21 September 1989, *Hoechst* v *Commission*, Joined Cases C-46/87 and C-227/88, EU:C:1989:337, paragraph 19.

([57]) Judgment of 29 April 2004, *Commission* v *CAS Succhi di Frutta*, C-496/99 P, EU:C:2004:236, paragraph 63.

([58]) Judgment of 15 May 1986, *Johnston* v *Chief Constable of the Royal Ulster Constabulary*, C-222/84, EU:C:1986:206, paragraph 18.

([59]) Judgments of 22 December 2010, *DEB*, C-279/09, EU:C:2010:811, paragraph 58; and of 19 November 2019, *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*, Joined Cases C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 124.

([60]) Judgments of 25 July 2002, *Unión de Pequeños Agricultores* v *Council*, C-50/00 P, EU:C:2002:462; and of 1 April 2004, *Commission* v *Jégo Quéré*, C-263/02 P, EU:C:2004:210.

([61]) Judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission*, Joined Cases C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 281.

([62]) Judgments of 15 June 1978, *Defrenne* v *Sabena*, 149/77, EU:C:1978:130; and of 13 May 1986, *Bilka* v *Weber von Hartz*, 170/84, EU:C:1986:204, paragraph 15.

([63]) Judgment of 29 October 1980, *Roquette* v *Council*, C-138/79, EU:C:1980:249, paragraph 33. This ruling was handed down just a year after the first direct elections to the European Parliament in 1979.

([64]) Last paragraph of the preamble to the Treaty establishing the European Coal and Steel Community (the Treaty of Paris).

to adopt the Copenhagen Declaration, which, for the very first time, laid out the principles forming the European Communities' basis ([65]):

> *The Nine wish to ensure that the cherished values of their legal, political and moral order are respected, and to preserve the rich variety of their national cultures. Sharing as they do the same attitudes to life, based on a determination to build a society which measures up to the needs of the individual, they are determined to defend the principles of representative democracy, of the rule of law, of social justice – which is the ultimate goal of economic progress – and of respect for human rights. All of these are the fundamental elements of European identity.*

It is only in the Treaty of Maastricht that the masters of the treaties decided to refer textually to some of the basic principles by which the EU had to abide. Article F TEU provided that the EU is bound to respect the national identities of its Member States, provided their 'systems of government are founded on the principles of democracy' and that the EU is called on to 'respect fundamental rights'. In the Treaty of Amsterdam, that article was amended to include the following sentence:

> *The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.*

Quite tellingly, this reformulation caused a paradigmatic shift inasmuch as the EU was no longer just bound by the principles laid out, but was in fact founded on them. Consequently, this provision grew from a restrictive obligation to a constitutive and forward-looking one. This shift is a tributary of the willingness to create a political union, one that is based on principles common to all the Member States that intended to inform and influence future EU action. In 2001, in the Laeken Declaration, the founding principles were first referred to as values ([66]). In the context of the European Convention, the Praesidium included the values of social justice, solidarity and equality in the Constitution ([67]). The eventual failure of the Constitutional Treaty did not lead the drafters of the Treaty of Lisbon to substantially change the provision's wording; they opted to, in essence, keep the formulation of Article I-2 of the Constitutional Treaty.

([65]) Commission of the European Communities, 'The declaration on European identity', *Bulletin of the European Communities*, No 12, December 1973, Office for Official Publications of the European Communities, Luxembourg, 1973, pp. 118–122.

([66]) European Commission, 'Laeken Declaration on the future of the European Union', *Bulletin of the European Union*, No 12, March 2001, Office for Official Publications of the European Communities, Luxembourg, 2001, pp. 19–23.

([67]) The European Convention, The Secretariat, *Draft Constitution, Volume 1 – Revised text of part one*, CONV 724/03, 26 May 2003, p. 2, Article I-2.

Since the Treaty of Lisbon, Article 2 TEU is formulated as follows:

> *The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.*

3. Selected legal considerations regarding, in general, the values set out in Article 2 of the Treaty on European Union

Even – or even more so – after their integration into Article 2 TEU, the legal nature of these values has been, and to some extent continues to be, a headscratcher for lawyers. Without seeking to be exhaustive, some of the questions raised will now be addressed briefly, based on the case-law of the Court of Justice and, most importantly, the Court's landmark rulings in the conditionality cases ([68]).

3.1. Which elements in Article 2 of the Treaty on European Union are values?

The first question appears surprising, but, even after being enshrined in Article 2 TEU, the drafting of that provision raises doubts as to which elements are actually values. Looking at the text of Article 2 TEU, one can see that it is made up of two sentences. The first explicitly states the values on which the EU is founded, whereas the second one evokes characteristics of 'a society' wherein the first sentence's values are common. Does that mean that a distinction should be made between the values listed in the first sentence and the characteristics set out in the second?

It is interesting to note in this regard that, during the European Convention, amendments were tabled to either delete the second sentence or merge both sentences in order to establish a single list of values. However, despite these efforts, the Praesidium opted to leave the architecture untouched, even though it had repeatedly put forward the need for a clear and uncontroversial list of values. Whether the choice to maintain the separation of the first and second sentence was motivated by the fact that the characteristics of the second sentence did not have a sufficiently clear and uncontroversial legal content is unclear from the preparatory documents ([69]).

([68]) Judgments of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, EU:C:2022:97; and of 16 February 2022, *Poland* v *Parliament and Council*, C-157/21, EU:C:2022:98.

([69]) See, in that context, Ladenburger, C. and Rabourdin, P., 'La constitutionnalisation des valeurs de l'Union: commentaire sur la genèse des articles 2 et 7 du Traité sur l'Union européenne', *Revue de l'Union européenne*, Vol. 4, No. 1, April 2022, Lefebvre Dalloz, Paris, 2022, p. 5.

The case-law handed down at the time of writing, without being entirely conclusive, suggests that no distinction should be made between these two sentences. Indeed, in its rulings on the conditionality regulation, the Court of Justice sometimes uses the term 'values' when referring to the characteristics of the second sentence ([70]). In other places, it adopts a combined reading of the first and the second sentence to respond to certain arguments of the applicants. Paraphrasing the terms of Article 2 TEU, the Court of Justice states that a 'Member State whose society is characterized by discrimination cannot be regarded as ensuring respect for the rule of law, within the meaning of that common value' ([71]). On the legal effects associated with the characteristics in the second sentence, the Court of Justice affirms that, if asked to review a decision under the conditionality regulation with regard to those characteristics, 'it would exercise only the powers conferred on it by the Treaties, in particular by Article 263 TFEU' ([72]).

Consequently, one can say that, despite its wording, Article 2 TEU contains a single corpus of values of the EU.

3.2. Are they values or legal rules?

This question is nearly provocative. Still, the term 'value' may indeed indicate that, despite being anchored in the operative part of the treaties and not merely in the preamble, Article 2 TEU does not unfold legal effects, but rather should programmatically guide the EU's and Member States' actions in all areas. This, however, is clearly not the reading of the Court of Justice.

In its rulings on the conditionality regulation, the Court of Justice made it utterly clear that 'the European Union must be able to defend those values' ([73]), and that by 'defending' the Court of Justice did not mean (only) upholding them in the political arena ([74]):

> *Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which [...] are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States.*

([70]) Judgments of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, EU:C:2022:97, paragraphs 157–158; and of 16 February 2022, *Poland* v *Parliament and Council*, C-157/21, EU:C:2022:98, paragraphs 193–194. See, for a detailed discussion, the chapter 'Fundamental values, constitutional identity and the protection of the European Union budget against breaches of the rule of law' in this part of the book.

([71]) Judgments of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, EU:C:2022:97, paragraph 229; and of 16 February 2022, *Poland* v *Parliament and Council*, C-157/21, EU:C:2022:98, paragraph 324.

([72]) Judgment of 16 February 2022, *Poland* v *Parliament and Council*, C-157/21, EU:C:2022:98, paragraph 329.

([73]) Judgments of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, EU:C:2022:97, paragraph 127; and of 16 February 2022, *Poland* v *Parliament and Council*, C-157/21, EU:C:2022:98, paragraph 145.

([74]) Judgments of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, EU:C:2022:97, paragraph 264; and of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, EU:C:2022:97, paragraph 232.

Building on these considerations, and with regard to the rule of law value, the Court of Justice underlines on several occasions that ([75]):

> *[O]bservance of the principles of the rule of law constitutes an obligation as to the result to be achieved on the part of the Member States, which flows directly from their membership of the European Union.*

3.3. Are the values the same for all?

Reassuringly, immediately following that important postulate – that the values contain 'legally binding obligations for the Member States' – the Court of Justice adds that Member States 'enjoy a certain degree of discretion in implementing the principles of the rule of law' ([76]). This other side of the coin, however, is not as shiny as it may appear from the perspective of those who may want to see the EU values watered down.

The Court of Justice does not accept the argument that, based on Article 4(2) TEU – pursuant to which the 'Union shall respect [the Member States'] national identity' – key features of the rule of law lie within the sole competence of the Member States. Instead of going down that road, the Court of Justice accepts that, as mentioned, Member States enjoy a 'certain degree of discretion' but only with regard to the 'implementation' of the rule of law value; that does not mean, however, that the result that must be achieved (to which we will turn below) may vary from one Member State to another ([77]). The Court of Justice emphasises in that context that the principles that form the rule of law have their source in common values that are also recognised and applied by the Member States in their own legal systems ([78]); that is to say they are also part of the Member States' national identities.

The other noteworthy aspect is that the Court of Justice does not refer, in this context, to its earlier ruling in the *Repubblika* case ([79]), pursuant to which Member States must, in the light of the rule of law value, prevent any regression of their laws on the organisation of justice by refraining from adopting rules that would undermine the independence of judges. That ruling was criticised for, among other things, potentially leading to divergences in the level of protection of the rule of law from one Member State to the other, depending on their time and

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([75]) Judgments of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, EU:C:2022:97, paragraphs 231 and 233; and of 16 February 2022, *Poland* v *Parliament and Council*, C-157/21, EU:C:2022:98, paragraphs 169 and 265.

([76]) Judgments of 16 February 2022, *Hungary* v *Parliament and Council,* C-156/21, EU:C:2022:97, paragraph 233; and of 16 February 2022, *Poland* v *Parliament and Council,* C-157/21, EU:C:2022:98, paragraph 265.

([77]) Judgments of 16 February 2022, *Hungary* v *Parliament and Council,* C-156/21, EU:C:2022:97; paragraphs 232–234 and of 16 February 2022, *Poland* v *Parliament and Council,* C-157/21, EU:C:2022:98, paragraphs 264–266.

([78]) Judgments of 16 February 2022, *Hungary* v *Parliament and Council,* C-156/21, EU:C:2022:97, paragraphs 236–237; and of 16 February 2022, Poland v Parliament and Council, C-157/21, EU:C:2022:98, paragraph 291.

([79]) Judgment of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 64, cited later in the judgments of 15 July 2021, *Commission* v *Poland (Régime disciplinaire des juges)*, C-791/19, EU:C:2021:596, paragraph 51; and of 18 May 2021, *Asociația 'Forumul Judecătorilor din România'*, C-83/19, EU:C: 2021:293, paragraph 162.

context of accession ([80]). Regardless of whether or not this means that the concept of non-regression has been abandoned, the message is this: the EU values are the same for all, and are so forever. Not only must candidate countries abide by them as a condition of accession, but these values continue to be binding after accession ([81]):

> *Compliance with those values cannot be reduced to an obligation which a candidate State must meet in order to accede to the European Union and which it may disregard after its accession.*

So, yes, they are the same values for all – or, as the President of the Court of Justice has put it: 'no Member State is more equal than others' ([82]).

3.4. Can the respect of Article 2 of the Treaty on European Union be enforced autonomously?

Several recent rulings and passages of the rulings in the conditionality cases set out above appear to admit that EU values could be enforced separately and not only in combination with other rules of the treaties or of secondary law. In particular, the statement that 'the observance of the rule of law constitutes an obligation as to the result to be achieved on the part of the Member States' can be invoked to support that view. At the same time, other passages of those rulings point in the opposite direction. In particular, in various places, the Court of Justice notes that the values contained in Article 2 TEU 'are given concrete expression in principles comprising legally binding obligations for the Member States' ([83]).

From a purely legal perspective, this is a very tricky question, and groups of enthusiastic lawyers, such as the Commission Legal Service, like to bang their heads together to crack such nuts, even if the practical relevance of this fascinating debate may be limited. The fact is, indeed, that the values in Article 2 TEU have, to a very large extent, found concretisation in other rules of EU law. Table 1 at the end of this chapter gives an overview of the situation ([84]).

Here, and here only, we would like to answer the question we have put forward with 'maybe, maybe not'.

([80]) See, for example, Lelou, M., Kochenov, D. V. and Dimitrovs, A., *Non-regression: Opening the door to solving the 'Copenhagen Dilemma'? All the eyes on Case C-896/19 Repubblika v Il-Prim Ministru,* Reconnect Working Paper No 15, June 2021.

([81]) Judgements of 16 February 2022, *Poland* v *Parliament and Council,* C-157/21, EU:C:2022:98, paragraph 144; and of 16 February 2022, *Hungary* v *Parliament and Council,* C-156/21, EU:C:2022:97, paragraph 126.

([82]) Lenaerts, K., 'No Member State is more equal than others: the primacy of EU law and the principle of the equality of the Member States before the treaties', VerfBlog, 8 October 2020 (https://verfassungsblog.de/no-member-state-is-more-equal-than-others/).

([83]) Judgments of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, EU:C:2022:97, paragraphs 161 and 232; and of 16 February 2022, *Poland* v *Parliament and Council*, C-157/21, EU:C:2022:98, paragraphs 264 and 328.

([84]) See also Boekestein, T., 'Making do with what we have: on the interpretation and enforcement of the EU's founding values', *German Law Review*, Vol. 23, No 4, May 2022, Cambridge University Press, Cambridge, 2022, p. 451.

3.5. Only 7 for 2?

In the conditionality rulings, the Court of Justice dismisses the grievance of the alleged circumvention of Article 7 TEU by the Horizontal Conditionality Mechanism established in Regulation (EU) 2020/2092 ([85]). According to the Court of Justice, Article 7 TEU does not provide for an exclusive procedure for determining breaches of or for penalising breaches of the values in Article 2 TEU, and in particular the rule of law. The Court of Justice refers to various treaty provisions and rights in the EU Charter of Fundamental Rights (the Charter) that give concrete expression to those values and, as frequently implemented through acts of secondary legislation, grant the EU institutions the power to find and sanction breaches of those values, including through preliminary references from national courts and infringement proceedings ([86]).

The Court of Justice notes ([87]) that the procedure laid down in Article 7 TEU allows the Council to penalise serious and persistent breaches of the values contained in Article 2 TEU, in particular with a view to compelling the Member State concerned to put an end to the breach. For the Court of Justice, the EU legislator cannot therefore establish a parallel procedure that would have the same subject matter and objective and allow the adoption of identical measures, while providing for the involvement of different institutions or for different material and procedural conditions from those laid down in Article 7 TEU ([88]).

Still, it remains possible for the EU legislator to establish other procedures/mechanisms relating to the values of Article 2 TEU if they rely on a sufficient legal basis and are different in terms of their aim and their subject matter from the procedure laid down in Article 7 TEU ([89]). That is the case for the conditionality regulation ((EU, Euratom) 2020/2092), which provides for a procedure different in purpose and subject matter from that of the procedure provided for in Article 7 TEU. The acts adopted by EU institutions within the first procedure are thus subject to a full judicial review of the Court of Justice, pursuant to Article 263 of the Treaty on Functioning of the European Union (TFEU), but not to the limited review, which Article 269 TFEU reserves for acts taken by the Council and the European Council under the procedure in Article 7 TEU ([90]).

([85]) Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433, 22.12.2020, p. 1.

([86]) Judgments of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, EU:C:2022:97, paragraphs 156–162; and of 16 February 2022, *Poland* v *Parliament and Council*, C-157/21, EU:C:2022:98, paragraph 195.

([87]) Judgments of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, EU:C:2022:97, paragraph 170; and of 16 February 2022, *Poland* v *Parliament and Council*, C-157/21, EU:C:2022:98, paragraph 209.

([88]) Judgments of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, EU:C:2022:97, paragraph 167; and of 16 February 2022, *Poland* v *Parliament and Council*, C-157/21, EU:C:2022:98, paragraph 206.

([89]) Judgments of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, EU:C:2022:97, paragraph 168; and of 16 February 2022, *Poland* v *Parliament and Council*, C-157/21, EU:C:2022:98, paragraph 207. These cases refer to case-law distinguishing infringement proceedings from the procedure for clearing European Agricultural Guidance and Guarantee Fund accounts.

([90]) Judgments of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, EU:C:2022:97, paragraphs 192–193; and of 16 February 2022, *Poland* v *Parliament and Council*, C-157/21, EU:C:2022:98, paragraphs 225–226.

3.6. Are national authorities bound by European Union values only when they are implementing European Union law?

As will be discussed in more detail below, it has become consistent case-law that the obligation laid down in the second subparagraph of Article 19(1) TEU to ensure effective judicial review by an independent and impartial court, as a concrete expression of the rule of law, is independent of whether or not, in the individual case, the national authorities and hence, in judicial review, the judiciary are implementing EU law. The rationale of that case-law is that a properly functioning judiciary is a general condition for allowing citizens to avail themselves of the rights granted by EU law and, more generally, for the participation of any Member State in EU policies.

Could a similar logic be applied to other EU values? We argue that, for any value that finds its concrete expression solely in fundamental rights granted by the Charter, Article 51(1) thereof must prevail: the provisions of the Charter are addressed to the Member States only when they are implementing EU law. If, however, that EU value could be said to find its concrete expression in other rules of the treaties or of secondary law (or could be invoked autonomously; see Section 3.4), a similar line of argumentation does not seem to be excluded. To that effect, it would have to be argued that the specific value establishes a general *conditio sine qua non* (essential condition) for a Member State's participation in EU policies in a similar way to that of effective judicial control.

Pluralism or tolerance could be candidates for further reflection in that direction, as '[p]luralism, tolerance and broadmindedness are hallmarks of a "democratic society"' ([91]), according to the principled finding of the European Court of Human Rights (ECtHR). This could, arguably, be linked to the equally principled postulate in Article 10(3) TEU that '[e]very citizen shall have the right to participate in the democratic life of the Union.' There is no doubt that Member States are free to organise their democracies as they see fit and that EU law does not prescribe any form of government, but there is a hard limit below which Member States may not go: a national parliament based on a single-party election could not possibly be said to lawfully adopt the necessary transposition of EU law. For more refined appreciations, however, it remains to be seen if those values are given sufficient concrete expression in EU law.

After these general considerations of the interpretation of Article 2 TEU, we will now turn to one value in more detail, on which a number of lawyers in the Commission Legal Service, and elsewhere, have spent innumerable hours in recent years. Just as a gardener carefully considers the earth in which to plant, a lawyer scrutinises the very foundation of the legal construction that they serve.

([91]) Judgment of the ECtHR of 10 November 2005, *Leyla Şahin* v *Turkey*, 44774/98, paragraph 108.

4. The rule of law: a value ensuring effective legal protection for all

EU law has developed gradually over 70 years. But, as has happened with several other areas of EU law, history has accelerated and, within a few years, many fundamental legal questions regarding the content and the enforcement of EU values have been answered. This is certainly true of the EU value specifically addressed in this section: the rule of law.

4.1. What is in the rule of law?

The concept of the rule of law first emanated from the legal orders of the Member States, finding its way into the EU treaties. Indeed, as stressed repeatedly by the Court of Justice ([92]), the values on which the EU is founded – such as the rule of law – are shared by the Member States. The values in Article 2 TEU are, in fact, present in national constitutions and in the Charter. Therefore, when reminding national authorities of their obligation to observe EU values, the Commission does not invent new concepts. However, the autonomous nature of the EU legal order led the Court of Justice to develop the rule of law value in an autonomous way ([93]).

It should therefore come as no surprise that the rule of law comprises universal legal principles such as legal certainty, separation of powers, the principle of legality and the hierarchy of norms ([94]). An exhaustive catalogue would not be appropriate, as the relationship between public powers and society is dynamic, so the content of the rule of law is subject to continuous development.

The rule of law has been qualified as an aggregate notion composed of a set of subprinciples organising the relationship between a society and its governing institutions, obliging public powers to act within the law and subjecting their actions to effective judicial control.

The Commission has attempted to describe the rule of law in its communication of 11 March 2014 (A new EU framework to strengthen the rule of law) ([95]). Building on this, the EU legislator has included a definition of the rule of law in Article 2(a) of Regulation (EU, Euratom)

([92]) Judgment of 21 December 2021, *Euro Box Promotion and Others*, Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraphs 160 and 161, and the case-law cited; of 16 February 2022, *Poland* v *Parliament and Council*, C-157/21, EU:C:2022:98, paragraphs 143 and 145; and of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, EU:C:2022:97, paragraphs 125 and 127.

([93]) See, for instance, judgments of 16 February 2022, *Poland* v *Parliament and Council*, C-157/21, EU:C:2022:98, paragraph 143; and of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, EU:C:2022:97, paragraph 125.

([94]) See Schroeder, W., 'The rule of law as a value in the sense of Article 2 TEU: What does it mean and imply?' in von Bogdandy, A., Bogdanowicz, P., Canor, I., Grabenwarter, C., Taborowski, M. and Schmidt, M. (eds), *Defending Checks and Balances in EU Member States, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*, Vol. 298, Springer Berlin, Heidelberg, 2021, pp. 105–126 (doi:10.1007/978-3-662-62317-6_5).

([95]) European Commission, Commission communication – A new EU framework to strengthen the rule of law, COM(2014) 158 final, p. 4: 'Those principles include legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law.'

2020/2092 ([96]). That definition has been construed solely for the purposes of Regulation (EU) 2020/2092 and cannot limit the content of the rule of law as an EU value in Article 2 TEU. It was necessary for legal certainty to legally frame the scope of situations liable to trigger the Horizontal Conditionality Mechanism and the procedure provided for in Article 6 of that regulation. It should be made clear that this by no means shifts the rule of law from an EU value enshrined in primary law to a mere legal concept of secondary EU law.

4.2. The rule of law at risk: when should the European Union step in?

The EU institutions, as organs of the 'community of law', are bound by the rule of law just as the Member States and national authorities are. The enforcement of the rule of law in this context takes place principally through judicial review of the EU's acts before the EU courts according to the procedures provided by the EU treaties. The enforcement of national authorities' respect of the rule of law appears to be more complex. It seems rather obvious that the national authorities' observance of the rule of law is enforced, in the first place, at national level before domestic courts, in particular by constitutional and supreme courts. National constitutions provide for the necessary rule of law framework, which contains guarantees for effective judicial protection and other fundamental rights; regulates the separation of powers between legislature, executive and judiciary; and organises the exercise of democratic rights. Following the logic of subsidiarity, it can be argued that the EU should only intervene to defend the rule of law when national institutions fail to ensure its respect at national level because of generalised and systemic deficiencies. This would be the case, in particular, when the legitimacy of constitutional review is impaired.

The EU has a wide variety of tools at its disposal: purely political tools, soft law and those that are legally binding with financial consequences.

In its communication of 2019 (Further strengthening the rule of law within the Union) ([97]), the Commission laid out the toolbox of instruments helping to enforce the rule of law.

The activation of the rule of law 'Defence Mechanism' at EU level may, however, lead to a clash with how the rule of law is perceived by national authorities relying on the interpretations of their national constitution. In such a context, the delicate question of the primacy of EU law over national constitution may emerge (see Section 4.4). The abovementioned risk has unfortunately materialised with regard to the recent evolution and application of one of the subprinciples of the rule of law, namely that of judicial independence.

([96]) That regulation defines 'the rule of law' in Article 2(a) as referring 'to the Union value enshrined in Article 2 TEU. It includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU.'

([97]) European Commission, Commission communication – Further strengthening the rule of law within the Union – state of play and possible next steps, COM(2019) 163 final.

Its jurisprudential development and application shows how effective and multifaceted the protection of rule of law can be.

4.3. Judicial independence: an indispensable ingredient of the rule of law

Over the last five years, judicial independence has emerged as the rule of law's most discussed subprinciple owing to the determination of domestic judges in some Member States. As is well known, Member States are obliged to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law pursuant to the second subparagraph of Article 19(1) TEU. Judicial independence can be described as the overarching element ensuring this protection, which, as will be shown below, gathers the main characteristics of the fundamental right to a fair trial before an independent and impartial tribunal previously established by law. A closer look into the Court of Justice's recent case-law reveals that it aims to protect, in the first place, the national judges whose independence is being threatened by legislative and political changes in the Member States ([98]).

4.3.1. Judicial independence under Article 47 of the EU Charter of Fundamental Rights

The Charter, in the second paragraph of its Article 47, explicitly provides the individuals with the fundamental right to a fair trial before an independent and impartial tribunal previously established by law whenever they are relying on rights or freedoms guaranteed by EU law or are the subject of proceedings constituting the implementation of EU law within the meaning of Article 51(1) of the Charter.

For instance, the case *A.K.* raised the question of whether a disciplinary chamber of the Polish Supreme Court should hear the case brought by a judge of the Supreme Court, appealing against the negative opinion on his aptitude to continuing service after reaching the retirement age, claiming it was a breach of the non-discrimination principle provided in Directive 2000/78/EC ([99]). The Grand Chamber of the Court of Justice held that ([100]):

> *the requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded.*

([98]) The rulings of the Court of Justice pertaining most to judicial independence mainly originate from cases brought by the judges or judges' associations as parties to the proceedings. Infringement actions have also first targeted the national legislative provisions affecting the status of the judiciary through the legislative changes in the retirement and disciplinary regimes of judges.

([99]) Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16.

([100]) Judgment of 19 November 2019, *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*, Joined Cases C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 120.

The Court of Justice has defined the independence of a court using two well-known aspects ([101]). The first aspect, which is external in nature, requires that the court concerned exercises its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body, and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgement of its members and to influence their decisions. The second aspect, which is internal in nature, is linked to impartiality and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. This aspect requires objectivity and the absence of any interest in the outcome of the proceedings, apart from the strict application of the rule of law. In fact, this amounts to the impartiality requirement.

In this regard, the Court of Justice, referring to the ECtHR case-law on Article 6(1) of the European Convention on Human Rights (ECHR), stressed the importance of the principle of the separation of powers, which characterises the operation of the rule of law for the judiciary. The principle requires that the judiciary is independent from the legislator and, especially, the executive ([102]).

To ensure those guarantees of independence and impartiality, the domestic legal framework must provide rules for the judiciary – particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members – that dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it ([103]).

However, it is not sufficient for domestic rules relating to the composition, appointment procedure, etc., to exist on paper. The Court of Justice has referred to the absence of doubts in the minds of individuals, objectivised by the adjective 'reasonable'. This additional layer to the absence of doubts may render the outcome of the assessment of the domestic framework less predictable, as it will normally depend on the ultimate assessment carried out by the domestic court. In the *A.K.* judgement, in full respect of its role pursuant to Article 267 TFEU, the Court of Justice has only given the referring judge a list of criteria to be assessed in order to assess the independence of the Disciplinary Chamber and consequently its competence to hear the main case brought by the judge of the Supreme Court.

([101]) These two aspects of independence have already been used by the Court of Justice in the judgments of 19 September 2006, *Wilson,* C-506/04, EU:C:2006:587; of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraphs 63 and 65, and the case-law cited; and of 19 November 2019, *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*, Joined Cases C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraphs 121 and 122.

([102]) Judgment of 19 November 2019, *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*, Joined Cases C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraphs 124–126.

([103]) Judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 66; and of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 74.

It remains unclear whether, by doing so, the Court of Justice deliberately delegates responsibility to the national court to avoid (unjustified) accusations of interference in national judicial organisation. It is common practice for the Court of Justice to provide the national judge with certain elements of appreciation while leaving the final assessment to the referring judge. In the *A.K.* case, and in further cases, the Court of Justice has followed this approach; however, the Court has gone into quite some detail when providing elements of assessment regarding the independence of domestic courts.

4.3.2. Article 19(1) of the Treaty on European Union: an effective guardian of judicial independence

The *A.K.* case concerned an individual's typical application of the right to a fair trial pursuant to the second paragraph of Article 47 of the Charter – in that case, a national judge defending his statutory rights by invoking Directive 2000/78/EC ([104]). As that directive imposes a specific obligation of equal treatment in employment situations and requires effective remedy for the persons considered wronged by the failure to observe that obligation, the judge's situation fell within the implementation of EU law pursuant to Article 51(1) of the Charter. However, the issue of (domestic) judicial independence seen so far mostly concerns situations in which there is no implementation of EU law within the meaning of Article 51(1) of the Charter.

It can be argued that preserving the status quo would have meant shielding the adjudicating activities of a judge in cases falling outside the implementation of EU law from the application of the requirement of judicial independence. This would eventually deprive the individuals of effective judicial protection in line with EU requirements in cases outside the scope of Article 51(1) of the Charter. The same domestic judge would have worn one of two 'independence hats' depending on whether or not the party in the specific case invoked rights conferred by EU law. It also became clear that it would be difficult to address systemic judicial independence shortcomings using only Article 47 of the Charter.

Aware of such limitations, the Court of Justice, in its seminal judgment *Associação Sindical dos Juízes Portugueses* of 27 February 2018 ([105]), had already extended the application of judicial independence requirements beyond the cases of Article 51(1) of the Charter by linking the material scope of the second subparagraph of Article 19(1) TEU with the rule of law.

The case concerned a dispute between the Trade Union of Portuguese Judges and the Portuguese Court of Auditors about the temporary reduction of remuneration paid to that court's members, in the context of the Portuguese state's budgetary policy guideline. The Court of Justice recalled, first, the material scope of the second subparagraph of Article 19(1) TEU

([104]) Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16.

([105]) Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117.

relating to 'the fields covered by Union law', irrespective of whether the Member States are implementing EU law, within the meaning of Article 51(1) of the Charter. Then the Court of Justice recalled the importance of justice for the value of the rule of law and considered that the second subparagraph of Article 19(1) TEU gives concrete expression to that value as mentioned in Article 2 TEU. Furthermore, as Article 19(1) TEU entrusts the responsibility for ensuring judicial review in the EU legal order to not only the Court of Justice but also national courts and tribunals, the interpretation and application of EU law by domestic courts creates the obligation for the Member States to establish a system of legal remedies and procedures ensuring effective judicial review in the fields covered by EU law. Therefore, they must guarantee the independence of judges by ensuring, among other things, an appropriate level of remuneration. Eventually, the Court of Justice held that the salary reduction measures at issue in the main proceedings did not impair the independence of the members of the Court of Auditors.

That judgment, however, has produced far-reaching consequences for the requirements of judicial independence imposed by EU law on the Member States.

As a consequence, to the extent that the domestic court may rule as a 'court or tribunal' on questions concerning the application or interpretation of EU law, the Member State concerned must ensure, by means of an appropriate legal framework, that the domestic court meets the requirements essential to effective judicial protection, in particular the guarantee of independence, in accordance with the second subparagraph of Article 19(1) TEU. In practice, it is very difficult to rule out that a given domestic court can apply or interpret EU law, and the number of domestic courts left outside the scope of Article 19(1) TEU seems to be very limited. Thus, practically each domestic court and judge will find a spot under the protective umbrella of Article 19(1) TEU, shielding them from domestic rules affecting their independence and, henceforth, the Court of Justice will have jurisdiction to reply to preliminary ruling requests by such courts, independent of whether or not the conditions of admissibility are fulfilled ([106]).

Such interpretation of the second subparagraph of Article 19(1) TEU has enabled the Commission to launch infringement proceedings pursuant to Article 258 TFEU addressing the systemic deficiencies in domestic legislation on judiciary ([107]). Subsequently, the Court of Justice assessed whether the provisions of national legislation governing disciplinary proceedings

([106]) See, to that effect, order of 2 July 2020, *S.A.D. Maler und Anstreicher*, C-256/19, EU:C:2020:523.

([107]) Judgments of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531; and of 15 July 2021, *Commission* v Poland (*Régime disciplinaire des juges)*, C-791/19, EU:C:2021:596; and *Commission* v *Poland (and vie privée des juges)*, C-204/21, case ongoing.

were in breach of judicial independence and impartiality requirements solely under the second subparagraph of Article 19(1) TEU ([108]). According to the Court of Justice ([109]):

> *the rules applicable to the status of judges and the performance of their duties must, in particular, be such as to preclude not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned, and thus preclude a lack of appearance of independence or impartiality on their part likely to prejudice the trust which justice in a democratic society governed by the rule of law must inspire in individuals.*

As for Article 47 of the Charter and Article 6(1) ECHR, for concluding that there is a systemic deficiency in domestic legislation contrary to Article 19(1) TEU, the focus has been on individuals' perception of the judiciary.

4.3.3. Impact of a judicial appointment procedure on judicial independence

The rule of law logic of separation of powers and judicial independence has also influenced the concept of the third requirement of effective judicial protection – the 'tribunal established previously by law' as thus far applied by the Court of Justice ([110]). In a nutshell, the individuals should receive judicial remedy from a 'regular court', composed of judges appointed in a procedure dispelling any reasonable doubts as to their independence from external factors when exercising later judicial functions.

In this regard, the Court of Justice relied, to a great extent, on the ECtHR's interpretation of Article 6(1) ECHR and the right to a 'tribunal established by law' guaranteed therein ([111]). Following the ECtHR, the Court of Justice included the process of appointing judges as an inherent element of the right to a 'tribunal established by law' and described the breach thereof as follows ([112]):

> *The requirement of the 'tribunal established by law' would be infringed, in particular, when the irregularity in the appointment process would be of such a kind and gravity as*

([108]) Although in infringement rulings the Court of Justice did not explicitly refer to Article 2 TEU when declaring the existence of infringement, in subsequent preliminary rulings it more prominently combined Article 19(1) TEU with Article 2 TEU – see judgments of 15 July 2021, *Commission* v *Poland* (*Régime disciplinaire des juges)*, C-791/19, EU:C:2021:596; and of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim*, Joined Cases C-748/19 to C-754/19, EU:C:2021:931.

([109]) Judgments of 18 May 2021, *Asociația 'Forumul Judecătorilor din România'*, Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 197; and of 2 March 2021, *A.B. and Others (Nomination des juges à la Cour suprême – Recours)*, C-824/18, EU:C:2021:153, paragraphs 119 and 139, and the case-law cited.

([110]) Judgments of 26 March 2020, *Réexamen Simpson* v *Council*, Joined Cases C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232, paragraphs 71–75; and of 6 October 2021, *W.Ż. (and des affaires publiques de la Cour suprême – nomination)*, C-487/19, EU:C:2021:798, paragraphs 129–130.

([111]) Judgment of the ECtHR of 1 December 2020, *Guðmundur Andri Ástráðsson* v *Iceland*, 26374/18, CE:ECHR:2020:1201JUD002637418, paragraphs 227 and 232.

([112]) Judgment of 26 March 2020, *Réexamen Simpson* v *Council*, Joined Cases C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232, paragraph 75.

> *to create a real risk that other branches of the State, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process and thus give rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge or judges concerned, which is the case when what is at issue are fundamental rules forming an integral part of the establishment and functioning of that judicial system.*

In other words, the requirement of a 'tribunal established by law' aims to ensure the independence of the judiciary from the legislator and executive after appointment, while assessing the circumstances that occurred prior to it.

It thus follows from the requirements of Article 19(1) TEU, as construed by the Court of Justice, that the independence of the court must be ensured in a twofold manner.

First, it is ensured by the existence of national rules – particularly regarding the composition of the judicial body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members – that dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it ([113]).

Second, judicial independence will be preserved by the observance of national rules governing the appointment procedure and the judicial review thereof. Judicial independence relates here to the elements preceding the judicial appointment. It should be noted that not every breach of domestic provisions regulating the appointment procedure would impair the independence of the judge appointed at the outcome of such procedure. The Court of Justice has stressed the kind and the gravity of the irregularity committed. However, it left open the question of whether compliance with the national legislation regulating appointments could suffice if breaches of constitutional provisions were claimed by the applicants but their kind was not deemed of sufficient gravity by the competent court ([114]).

The assessment of the regularity of the appointment process to judicial posts of the EU courts by the General Court and the Court of Justice – as in the case *Réexamen Simpson* v *Council* – can naturally be considered to form part of the 'public order issue' to be definitely reviewed at the stage of the appeal procedure assessing the regularity of the composition of the judicial panel that rendered the decision under review. The EU courts are logically able to assess the kind and the gravity of any irregularity in an appointment procedure set up by an EU act. However, such review of the domestic appointment procedure conducted by the Court of Justice with regard to the 'tribunal established by law' requirement satisfied by a domestic court may be problematic.

([113]) Judgment of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 53 and the case-law cited.

([114]) Judgment of 6 October 2021, *W.Ż. (and des affaires publiques de la Cour suprême – nomination)*, C-487/19, EU:C:2021:798, paragraphs 136–137.

In particular, one cannot expect definitive conclusions to be drawn in preliminary reference rulings in which the Court of Justice is confronted with claims of irregularities in the domestic judicial appointment procedure and is asked to assess whether the judge appointed at the end of the procedure satisfied the requirement of a 'tribunal established by law' pursuant to Article 19(1) TEU ([115]). First, it is the responsibility of the referring court to make the final assessment on the regularity of the national appointment procedure and, a fortiori, to appreciate the kind and the gravity of the identified breaches of national provisions, be they of a regulatory, legislative or constitutional nature, as the Court of Justice is limited to providing the interpretation of the relevant provisions of EU law. Secondly, the Court of Justice has only the information provided by the referring court and the interested parties (parties in the main proceedings), which is not always as complete as necessary to come to a final position. The domestic courts' diverging assessments of similar situations do not make things easier.

4.4. Consequences of the violation of judicial independence and European Union law's primacy

4.4.1. Disapplying domestic law affecting judicial independence

Having laid out the assessment methodology applied to the requirements of effective judicial protection provided by Article 19(1) TEU, it is time to turn to the consequences of breaching them.

It is established case-law that, when a judicial body concerned does not satisfy the requirements flowing from the right to a fair trial pursuant to Article 47 of the Charter and, in particular, the requirement of an independent court, the domestic national provisions assigning that body the competence to hear the case must be disapplied ([116]). This is a well-known and straightforward consequence of the EU law primacy principle establishing the pre-eminence of EU law over Member State law ([117]).

For breaches of Article 47 of the Charter, which has direct effect ([118]), disapplying conflicting domestic provisions has been rather a natural consequence ([119]); however, this was not obvious for breaches of Article 19(1) TEU. In fact, the primacy of EU law that concerns the applicability and not the validity of domestic provisions can only be deployed with regard to directly effective EU rules.

([115]) Judgments of 6 October 2021, *W.Ż. (and des affaires publiques de la Cour suprême – nomination)*, C-487/19, EU:C:2021:798; and of 29 March 2022, *Getin Noble Bank*, C-132/20, EU:C:2022:235.

([116]) Judgment of 19 November 2019, *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*, Joined Cases C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 166.

([117]) Judgment of 24 June 2019, *Popławski*, C-573/17, EU:C:2019:530, paragraph 53 and the case-law cited.

([118]) Judgments of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 78; and of 29 July 2019, *Torubarov*, C-556/17, EU:C:2019:626, paragraph 56.

([119]) Judgment of 19 November 2019, *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*, Joined Cases C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 161.

Following the *Associação Sindical dos Juízes Portugueses* judgment, the Commission pleaded for the direct effect of the second subparagraph of Article 19(1) TEU. The Court of Justice needed some time to explicitly award direct effect to this provision ([120]), and required the national judge to disapply the provisions of domestic law, whether they were of a legislative or constitutional origin, when they contravened Article 19(1) TEU ([121]).

In addition to disapplying domestic provisions regulating the competence to adjudicate cases, the primacy of EU law requires national bodies to disapply the rulings of a constitutional court affecting the effectiveness of judicial independence and other (administrative) acts issued by domestic authorities and courts ([122]).

4.4.2. The fate of non-independent judges' rulings

The next question concerns the fate of judicial decisions issued by a court not satisfying the requirements of Article 19(1) TEU. In case *W.Ż.,* the Court of Justice was quite explicit in holding that if the referring court considered that an (inadmissibility) order was made by a body that does not constitute an independent and impartial tribunal previously established by law, within the meaning of EU law, it must, in accordance with the principle of the primacy of EU law, declare the order to be null and void, without any provision of national law being able to preclude this ([123]). Moreover, the Grand Chamber held that no consideration relating to the principle of legal certainty or the alleged finality of a decision can be successfully relied on in order to prevent the domestic court from declaring such an order to be null and void ([124]).

The question then is whether such conclusion is justified in all circumstances in which a judge is considered to have been appointed in breach of the requirements of an independent and impartial tribunal established by law. Where that breach results from the application of national legislation governing appointment procedures that is considered contrary to constitutional principles, should each judicial decision issued by every judge appointed in accordance with such legislation be considered null and void? Should this happen following an extraordinary judicial review or could it be achieved by new legislation remedying the breach? Perhaps this should only happen when a particular judge is found to have bribed the appointment bodies, or was appointed after making certain promises to the ruling powers or deceiving the appointment bodies, in which case all decisions by judicial panels on which that judge was

([120]) Judgment of 22 February 2022, *RS (Effet des arrêts d'une cour constitutionnelle)*, C-430/21, EU:C:2022:99, paragraph 54.

([121]) Judgment of 2 March 2021, *A.B. and Others (Nomination des juges à la Cour suprême – Recours)*, C-824/18, EU:C:2021:153, paragraph 150.

([122]) See, in this regard, judgments of 2 March 2021, *A.B. and Others (Nomination des juges à la Cour suprême – Recours)*, C-824/18, EU:C:2021:153, paragraph 147; and of 22 February 2022, *RS (Effet des arrêts d'une cour constitutionnelle)*, C-430/21, EU:C:2022:99, paragraphs 175–176.

([123]) Judgment of 6 October 2021, *W.Ż. (and des affaires publiques de la Cour suprême – nomination)*, C-487/19, EU:C:2021:798, paragraph 155.

([124]) Judgment of 6 October 2021, *W.Ż. (and des affaires publiques de la Cour suprême – nomination)*, C-487/19, EU:C:2021:798, paragraph 160.

sitting could be considered null and void because legal subjects could no longer trust in the judge's independence and impartiality. It is clear that such questions must be assessed by taking into account other principles contained in the rule of law, such as judicial irremovability and legal certainty.

A related question deserving reflection is whether the non-compliance of a national judge with the requirement of independence or the requirement that a tribunal be established by law may also affect its status of judge so that the appointment decision is considered invalid and the judge is dismissed. So far, the Court of Justice has not addressed this issue. On the one hand, it may be argued that if an irregularity found in the appointment procedure gives rise to reasonable doubts as to the independence of the judge from legislative and executive powers, the consequence may not be limited to the annulment of a judicial decision rendered with the participation of the judge. In fact, each decision issued by this judge would be exposed as having the same deficiencies. Therefore, the consequences may go beyond the annulment of judicial decisions and may require either an objective verification leading to a redo of the appointment procedure or the dismissal of the judge. On the other hand, any radical approach may conflict with the principles of judicial irremovability and legal certainty, principles that are often enshrined in national constitutions as guarantees of judicial independence.

In delicate matters such as the assessment of the regularity of domestic judicial appointments or of the independence of domestic judges, a clash with national constitutions and constitutional courts' case-law seems unavoidable ([125]), especially when the interpretation of the Court of Justice is subject to further implementation by domestic courts in Member States with deficient constitutional review.

Mindful of this, the Court of Justice has stressed that, with regard to the organisation of justice, none of Article 2 TEU, the second subparagraph of Article 19(1) TEU or any other provision of EU law requires Member States to adopt a particular constitutional model between various branches of the state. In this regard, the Court of Justice recalled Article 4(2) TEU, which provides that the EU and its institutions respect the national identity of the Member States inherent in their fundamental political and constitutional structures. That said, when choosing their respective constitutional models, the Member States are required to comply with the principle of judicial independence ([126]).

A recent Romanian case concerned the question of whether Article 19(1) TEU read together with Article 2 TEU precludes that domestic ordinary courts may be bound by a decision of a constitutional court holding a provision of national law to be constitutional and therefore depriving these courts of the jurisdiction to examine the conformity of that national provision with EU law. Here, the Court of Justice made a differentiation. The Court of Justice subjected

([125]) See Polish Constitutional Court rulings of 14 July 2021, P 7/20; and of 7 October 2021, K 3/21.

([126]) Judgment of 21 December 2021, *Euro Box Promotion and Others*, Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 229.

the constitutional court to the obligation to provide the effective judicial protection required under Article 19(1) TEU, so that only constitutional courts that are independent, impartial and established by law within the meaning of Article 19(1) TEU may issue binding decisions on the domestic courts. The Court of Justice did not shy away from assessing whether the domestic legal framework provides the guarantees necessary to ensure the independence of constitutional courts ([127]). If these courts are independent, then Article 19(1) TEU would not oppose the binding force of their decisions on the ordinary courts of the Member State that find national legislation to be consistent with that Member State's constitution. The ordinary court would have no jurisdiction to re-assess that national legislation.

However, the same cannot be said if the domestic courts are precluded from assessing whether national legislation found by the non-independent constitutional court to be consistent with the national constitution is compatible with EU law. This means that despite a declaration issued by such a constitutional court of the constitutionality of a domestic judicial body or of legislation, a domestic ordinary court may still question and assess the compatibility of such a body with EU law, in particular Article 19(1) TEU ([128]). This conclusion applies a fortiori when the constitutional review has been impaired. However, the primacy principle would only step in when the domestic ordinary courts apply the judicial independence requirements correctly, as construed by the Court of Justice.

5. Conclusion: why do European Union values matter?

'Ensuring the protection of EU values laid down in the treaties, including the rule of law and a strong social model, which are at the core of the European democracy', is one of the measures that, at the Conference on the Future of Europe, citizens said they expected from the EU in the coming years ([129]). But why does this matter so much – why should the EU institutions use their scarce resources to that effect and enter into heated debates with Member States? Should the EU not concentrate its attention on ensuring that diplomas are effectively recognised in all Member States, that consumers can use a single type of battery charger throughout the EU, that cartels are quickly detected, that EU products do not suffer discrimination on non-EU countries' markets, and so forth? Does the rule of law not primarily delay the allocation of public tenders; investment decisions or infrastructure plans; and court procedures, including the additional 1.5 years if a case needs to be sent to the Court of Justice for a preliminary ruling?

Perhaps ensuring respect for EU values in an open society will also do all of this. If so, is it worth it?

([127]) Judgment of 21 December 2021, *Euro Box Promotion and Others*, Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 230 and following.

([128]) Judgment of 22 February 2022, *RS (Effet des arrêts d'une cour constitutionnelle)*, C-430/21, EU:C:2022:99, paragraph 46.

([129]) Conference on the Future of Europe, *Report on the Final Outcome*, May 2022, European Union, Brussels, proposal 38, measure 1, pp. 81–82.

In our view, ensuring respect for EU values is not only worth it, but the very foundation of the construction of the EU.

It is so for any open liberal democracy, and probably even more so for the EU, which is not a state, but the strongest of all the supranational unions ever built. The EU is all about mutual trust. Mutual trust is not only the *clé de voute,* or keystone, of judicial cooperation, but also of the relations between the EU and its Member States, each of the Member States and, crucially, the EU and its citizens. The values consolidate that trust. As the aforementioned conclusion of the Conference on the Future of Europe demonstrates, these values are a concern of the citizens.

The EU values are the structuring principles that all EU actors strive to achieve, independently of the demands of the day, seeking to devise consistent and forward-looking policies. These values matter because they steer action in order to promote and strengthen this model of governance in a geo-political context marked by adversity, multipolarity and the overall weakening of the liberal conception of society. The values give a particular hue to EU law, which governs no less than 450 million citizens.

The rule of law, the value that we have specifically addressed in this chapter, has been recognised as having direct effect. Article 19(1) TEU should guarantee that anyone in any type of dispute has the right to be heard before an independent and impartial tribunal established by law. There is no longer a division of effective judicial protection depending on whether or not an EU claim has been made. In this sense, the EU plays a cardinal role, constituting an additional safeguard to prevent backsliding.

The rule of law is there to protect all.

Table 1: EU values and their concretisations (not exhaustive)

Values in the TEU	Primary law concretisation	Secondary law concretisation
HUMAN DIGNITY	Title I of the Charter	–
FREEDOM	Title II of the Charter; Articles 28, 30 and 34 TFEU	Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1; Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180, 29.6.2013, p. 31; Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online, OJ L 172, 17.5.2021, p. 79

Values in the TEU	Primary law concretisation	Secondary law concretisation
DEMOCRACY	Articles 10, 11, 12 and 13 and Title V of the Charter; Articles 10, 11 and 12 TEU	Digital Markets Act and Digital Services Act; Regulation (EU) 2019/788 of the European Parliament and of the Council of 17 April 2019 on the European Citizens Initiative, OJ L 130, 17.5.2019, p. 55; Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, OJ L 305, 26.11.2019, p. 17; 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, OJ L 145, 31.5.2001, p. 43
EQUALITY (between women and men)	Title III of the Charter; Articles 4(2) and 9 TEU; Article 18 TFEU	Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ L 6, 10.1.1979, p. 24; Council Directive 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, p. 22; Council Directive 2000/78; Council Directive 2004/113 of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21.12.2004, p. 37; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, p. 23; Directive 2010/41 of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, OJ L 180, 15.7.2010, p. 1
RULE OF LAW	Articles 47 and 48 of the Charter; Article 19(1)(2) TEU; Article 7 TEU	Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433, 22.12.2020, p. 1
HUMAN RIGHTS	The Charter; Article 6 TEU	Council Regulation 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses, OJ L 410I, 7.12.2020, p. 1; Council Decision (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses, OJ L 410I, 7.12.2020, p. 13; Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, OJ L 130, 19.5.2017, p. 1

Values in the TEU	Primary law concretisation	Secondary law concretisation
PLURALISM	Title II TEU; Articles 14 and 16 TEU	Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, OJ L 305, 26.11.2019, p. 17
JUSTICE	Title VI of the Charter; Article 19(1)(2) TEU; Articles 81–86 TFEU	Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ L 132, 21.5.2016, p. 1; Directive (EU) 2016/343 of the European Parliament and of the Council 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, OJ L 65, 11.3.2016, p. 1; Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ L 297, 4.11.2016, p. 1; 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – statements made by certain Member States on the adoption of the framework decision, OJ L 190, 18.7.2002, p. 1
SOLIDARITY	Title IV of the Charter; Article 4(3) TEU; Articles 80, 122, 143, 174–178, 194(1), 222, 322 and 325 TFEU	Council Regulation (EU Euratom) 2020/2093 laying down the multiannual financial framework for the years 2021 to 2027, OJ L 433I, 22.12.2020, p. 11; Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, OJ L 433I , 22.12.2020, p. 23; Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433, 22.12.2020, p. 1; Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom, OJ L 424, 15.12.2020, p. 1; Regulation (EU, Euratom), 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012, OJ L 193, 30.7.2018, p. 1
NON-DISCRIMINATION	Article 18, 21 and 22 TFEU; Article 21 of the Charter	See 'Equality (between men and women)'

FUNDAMENTAL VALUES, CONSTITUTIONAL IDENTITY AND THE PROTECTION OF THE EUROPEAN UNION BUDGET AGAINST BREACHES OF THE RULE OF LAW

Julio Baquero Cruz and Jean-Paul Keppenne

1. Introduction

The conditionality regulation ([130]) is the general instrument that the EU legislature has adopted to protect the EU budget against the impact of or risks that may be caused by breaches of the principles of the rule of law in Member States. This regulation is an essential addition to the EU's toolbox to protect the budget, in particular in the light of declining respect for the rule of law in some parts of the EU, and to ensure that taxpayers' money is used correctly and effectively.

The regulation includes a number of important elements. First, it defines 'the rule of law' for the purpose of the regulation (Article 2(a)). Second, it contains a triggering provision with conditions for the adoption of measures (Article 4(1)), together with general and more specific examples (Article 3 and Article 4(2)). The triggering provision provides that '[a]ppropriate measures shall be taken where it is established in accordance with Article 6 that breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way'. Third, the regulation sets out the protective measures of a budgetary nature, related to the EU's expenditure, that can be adopted by the Council of the EU (Article 5). Fourth, Article 6 of the regulation sets out the procedure that should be followed for the adoption of measures. Finally, Article 7 describes the procedure for lifting the measures ([131]).

If the Commission has reasonable grounds to consider that breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the EU budget or the protection of the financial interests of the EU in a sufficiently direct

([130]) Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I, 22.12.2020, p. 1.

([131]) For a more detailed analysis of the conditionality regulation, see de Gregorio Merino, A., 'El nuevo régimen general de condicionalidad para la protección del presupuesto de la Unión', *Revista de Derecho Comunitario Europeo*, No 71, 2022, pp. 11–26.

way, a procedure must be opened vis-à-vis the state concerned pursuant to Article 6 of the conditionality regulation. That state can make its views on the Commission's findings known and may propose remedial measures. If, in spite of the observations received, the Commission continues to consider that the conditions for applying the regulation are met, it will propose measures to the Council after hearing the Member State concerned again, in particular on the proportionality of the measures. The Council will then have 1 month (which may be extended by a maximum of 2 months) to take its decision, by qualified majority, based on the Commission's proposal on the matter.

The regulation was challenged by Hungary and Poland, in Cases C-156/21 and C-157/21, which requested that the Court of Justice annul it.

The Court dealt with the cases through an accelerated procedure. They were brought by the applicant states on 11 March 2021 and were decided 11 months later. The Commission and 10 Member States intervened in support of the Parliament and the Council. The hearing was held on 11 and 12 October 2021. On 2 December 2021, Advocate General Campos Sánchez-Bordona gave his two opinions ([132]).

The Court of Justice assigned these cases to the plenary, which happens very infrequently and confirmed their constitutional importance, also clear in the light of the many states that intervened. The applicants raised many pleas, which included important questions of EU law. They also brought before the Court of Justice some arguments that raised fundamental issues about the nature of the EU, the requirements of EU law and the legal position of Member States within the EU.

With its judgments of 16 February 2022 ([133]), the Court confirmed the validity of the regulation. These are landmark judgments that restate important points of EU constitutional law and break new ground in case-law. This chapter summarises the judgments, analyses their consequences for the regulation and for EU law at large, and considers their impact on the future application and interpretation of the regulation.

([132]) Opinions of 2 December 2021, *Hungary* v *Parliament and Council*, C-156/21, EU:C:2021:974; and *Poland* v *Parliament and Council*, C-157/21, EU:C:2021:978.

([133]) Judgments of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, EU:C:2022:97; and *Poland* v *Parliament and Council*, C-157/21, EU:C:2022:98. Paragraphs from the judgments are quoted directly in the text. Unless otherwise indicated, the first number refers to the paragraph in the judgment in Case C-156/21; the second, to the paragraph in the judgment in Case C-157/21.

2. Judgments

The judgments address numerous arguments brought forward by the applicants, which presented many pleas that included some overlaps. To avoid misinterpretations or an excessive focus on one paragraph, or particular sentences or words of the judgment, they have to be read as a whole.

This summary will focus on the following issues: (i) the correctness of the legal basis of the regulation; (ii) the argument about the circumvention of Article 7 of the Treaty on European Union (TEU); (iii) the arguments based on the principle of legal certainty; and (iv) other aspects of the judgments.

2.1. Legal basis

As further detailed in Section 3 below, the most interesting parts of the reasoning regarding the legal basis are those where the Court of Justice emphasises the fundamental importance and binding nature of the values on which the EU is based (Article 2 TEU).

First, the Court of Justice confirms that Article 322(1)(a) of the Treaty on the Functioning of the European Union (TFEU), which allows the EU legislator to adopt 'financial rules', is the correct legal basis for the regulation (153, 182). After a detailed analysis of its aim and content, the Court considers that it sets out rules for the protection of the EU budget 'during its implementation'. This is clear from its triggering criteria, the financial nature of the measures that can be adopted, and the conditions for the adoption and lifting of measures (110–114, 124–128).

The Court finds, in particular, that the purpose of the regulation is 'to protect the Union budget from effects resulting from breaches of the principles of the rule of law in a Member State in a sufficiently direct way, and not to penalise those breaches as such' (119, 137). Therefore, as regards the proportionality of the measures, the Court holds that they must be 'limited to what is strictly necessary in the light of the actual or potential impact of breaches of the principles of the rule of law on the financial management of the Union budget or the financial interests of the Union' (112, 126).

The Court also notes that the Commission must propose the lifting of the adopted measures 'where the conditions laid down in Article 4 of [the] regulation are no longer fulfilled and, therefore, in particular where the sound financial management of the Union budget or the protection of the financial interests of the Union is no longer affected or at serious risk of being affected, with the result that … those measures must be lifted where the impact on the implementation of the budget ceases, even though the breaches of the principles of the rule of law found may persist' (113, 127).

As regards Article 2 TEU, the applicants argued that a conditionality mechanism must be linked to a specific EU action, cannot be framed as a cross-cutting mechanism linked to the values and cannot concern all areas of EU action. In reply, the Court of Justice holds that 'the European Union is founded on values, such as the rule of law, which are common to the Member States'. '[R]espect for them is a prerequisite for the accession to the European Union of any European State applying to become a member' (124, 142), and 'compliance by a Member State with the values contained in Article 2 TEU is a condition for the enjoyment of all the rights deriving from the application of the Treaties to that Member State'. This 'cannot be reduced to an obligation which a candidate State must meet in order to accede to the European Union and which it may disregard after its accession' (126, 144). Moreover, 'Article 2 is not merely a statement of policy guidelines or intentions' (judgment in Case C-156/21, 232). The Court of Justice holds that those fundamental values 'define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties' (127, 145).

The Court of Justice concludes that 'in accordance with the principle of conferral of powers enshrined in Article 5(2) TEU and the principle of consistency of the European Union's policies laid down in Article 7 TFEU, the rule of law ... is capable of constituting the basis of a conditionality mechanism covered by the concept of "financial rules" within the meaning of Article 322(1)(a) TFEU' (128, 146).

'The implementation of that principle, through the Union budget, is based on mutual trust between the Member States in the responsible use of the common resources included in that budget' (129, 147).

The Court of Justice also notes at this juncture that the EU budget is 'one of the principal instruments for giving practical effect, in the Union's policies and activities, to the principle of solidarity, mentioned in Article 2 TEU'.

The Court states that 'there is a clear relationship between, on the one hand, respect for the value of the rule of law and, on the other hand, the efficient implementation of the Union budget, in accordance with the principles of sound financial management, and the protection of the financial interests of the Union' (130, 148).

The Court adds 'that sound financial management and those financial interests are liable to be seriously compromised by breaches of the principles of the rule of law committed in a Member State, since those breaches may result, inter alia, in there being no guarantee that expenditure covered by the Union budget satisfies all the financing conditions laid down by EU law' (131, 149).

In particular, compliance with those conditions and objectives 'cannot be fully guaranteed in the absence of effective judicial review designed to ensure compliance with EU law; the existence of such review, both in the Member States and at EU level, by independent courts and tribunals, is of the essence of the rule of law' (132, 150).

The Court also states that the conditionality mechanism does not allow the institutions to examine situations outside the scope of EU law. In particular, the procedure 'can be initiated by the Commission only where it finds that there are reasonable grounds for considering not only that there have been breaches of the principles of the rule of law in a Member State, but, in particular, that those breaches affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way' (141, 159). In addition, 'in order to come within the horizontal conditionality mechanism laid down in Article 4(1), breaches of the principles of the rule of law must concern the situations or conduct of authorities listed in points (a) to (h) of Article 4(2), in so far as they are relevant to the sound financial management of the Union budget or the protection of the financial interests of the Union' (142, 160).

For the Court, '[s]uch relevance can be presumed as regards the activities of the authorities implementing the Union budget and carrying out financial control, monitoring and audit' (143, 161). Investigation and public prosecution services, the prevention and sanctioning by national courts or administrative authorities of breaches of EU law, judicial review, recovery, cooperation with the European Anti-Fraud Office and the European Public Prosecutor's Office, and the other situations and conducts of Article 4(2)(h) ([134]) are covered by the regulation only in so far as they are relevant to the sound financial management of the EU budget or the protection of the EU's financial interests (143, 161 and 177). In addition, 'appropriate measures can be adopted under that regulation only where it is established that such situations involve a breach of one of the principles of the rule of law which affects or seriously risks affecting that sound financial management or the protection of those financial interests of the Union in a sufficiently direct way' (144, 162).

The Court understands the term 'in a sufficiently direct way' included in Article 4(1) of the regulation as requiring 'that a genuine link [un lien réel] be established between those breaches and such an effect or serious risk of an effect' (147, 165). The same understanding is reiterated in other passages of the judgments (176, 179 and 215).

In that regard, the Court highlights the procedural requirements set out in Article 6 of the regulation, which mean, in the light of recital 16, that the Commission, when conducting its assessment, has to 'use an evidence-based approach and [has] to respect the principles of objectivity, non-discrimination and equality of the Member States before the Treaties' (148, 166). The assessment of breaches of the rule of law should be 'objective, impartial and fair'. Compliance with these obligations is subject to 'comprehensive judicial review by the Court' (149, 167).

As regards the allegations according to which conditionality is not linked to precise obligations, the Court held that the '[o]bservance of the principles of the rule of law constitutes an obligation

([134]) Article 4(2)(h) is an anti-circumvention clause that covers 'other situations or conduct of authorities', in addition to the more specific situations listed in Article 4(2)(a)–(g).

as to the result to be achieved on the part of the Member States, which flows directly … from their membership of the European Union'. Those principles 'have been the subject of extensive case-law of the Court' (judgment in Case C-157/21, 169) and the 'legislature cannot be required to specify, under such a conditionality mechanism, all situations of breach of the constituent principles of the rule of law, such breach being characterised by disregard for requirements known to Member States in a sufficiently specific and precise manner' (ibid., 171).

While the situations covered by the conditionality mechanism are exhaustive, the list in Article 4(2) remains flexible: 'It follows from a combined reading of Article 4(1) and Article 4(2)(h) of the contested regulation that appropriate measures are to be taken where it is established that a breach of one of the principles mentioned in Article 2(a) of that regulation has been committed and concerns a situation attributable to an authority of a Member State or the conduct of such an authority, in so far as that situation or conduct is relevant to the sound financial management of the Union budget or to the protection of the financial interests of the Union and that that breach affects or seriously risks affecting, in a sufficiently direct way, that sound financial management or those financial interests' (ibid., 174).

Finally, the Court states that the regulation 'can also relate to breaches of the principles of the rule of law affecting the collection of the Union's own resources' (ibid., 186). This idea is repeated in other passages of the judgments (265, 297).

2.2. The circumvention of Article 7 of the Treaty on European Union and Article 269 of the Treaty on the Functioning of the European Union

Article 7 TEU provides for a specific procedure in case of serious and persistent breaches by the Member States of the values referred to in Article 2 TEU. The Court rejects the claim that that procedure is the only way to protect the values of the EU, and that only the European Council, acting by unanimity, can determine breaches of those values.

The Court notes that, 'in addition to the procedure laid down in Article 7 TEU, numerous provisions of the Treaties, frequently implemented by various acts of secondary legislation, grant the EU institutions the power to examine, determine the existence of and, where appropriate, impose penalties for breaches of the values laid down in Article 2 TEU committed in a Member State' (195, 159).

The Court repeats its case-law on Article 19 TEU and on Articles 47 to 50 of the Charter, which give 'concrete expression to the value of the rule of law' (161, 197). Article 19(1) TEU requires Member States 'to establish a system of legal remedies and procedures ensuring that the right of individuals to effective judicial protection is observed in the fields covered by EU law' (161, 197). It imposes 'a clear and precise obligation as to the result to be achieved that is not subject to any condition as regards the independence which must characterise the courts called upon to interpret and apply EU law' (162, 198).

The Court also finds, on the basis of previous case-law, that 'it is permissible for the EU legislature, where it has a legal basis for doing so, to establish, in an act of secondary legislation, other procedures relating to the values contained in Article 2 TEU, which include the rule of law, provided that those procedures are different, in terms of both their aim and their subject matter, from the procedure laid down in Article 7 TEU' (168, 207). Based on a detailed analysis, the Court concludes indeed that the conditionality mechanism has a different purpose and subject matter from the procedure set out in Article 7 TEU (169–180, 208–220).

The Court also makes clear that the involvement of the Council in the procedure is duly justified on the basis of Article 291(2) TFEU and is not in breach of the Commission's power to implement the EU budget pursuant to Article 317 TFEU. That provision entrusts the Commission with the management, monitoring, control and audit of budget appropriations, while the conditionality mechanism goes beyond that (judgment in Case C-156/21, 184–189).

As regards the European Council, the Court holds that, while 'recital 26 of the contested regulation states that the European Council may, at the request of the Member State in respect of which the procedure … has been initiated, discuss whether, during that procedure, the principles of objectivity, non-discrimination and equality of Member States before the Treaties have been respected, it is sufficient to note that such action by the European Council, taken on an exceptional basis, is not provided for in Article 6 or any other provision of that regulation. In those circumstances, in view of the fact that the preamble to an EU act has no binding legal force …, recital 26 cannot be relied on as a ground for derogating from the actual provisions of the contested regulation or for interpreting those provisions in a manner that is contrary to their wording' (ibid., 191).

The Court also dismisses the arguments about Article 269 TFEU, which 'concerns only the review of the legality of an act adopted by the European Council or by the Council under Article 7 TEU' (judgment in Case C-157/21, 225). By contrast, review of the legality of decisions based on the regulation 'does not fall within the scope of Article 269 TFEU and is therefore not subject to the specific rules laid down in that article' (ibid., 226).

2.3. The principle of legal certainty

The Court also rejects the arguments on the principle of legal certainty. That part of the judgment contains some indications on the concrete application of the conditionality mechanism, in particular regarding the concepts of 'risk' and 'link'.

First, the definition of the rule of law in Article 2(a) of the regulation is not exhaustive 'but merely sets out, for the sole purposes of that regulation, a number of the principles which it covers and which are, according to the EU legislature, the most relevant in the light of the purpose of that regulation, which is to ensure the protection of the Union budget' (227, 323).

This concept is understood as referring to 'the Union value enshrined in Article 2 TEU' (judgment in Case C-156/21, 228).

According to the Court, the notion used in Article 2(a) does not go beyond the limits of the concept of 'the rule of law'. Thus, 'the reference to the protection of fundamental rights is made only by way of illustration of the requirements of the principle of effective judicial protection'. The Court adds that, '[a]lthough Article 2 TEU refers separately to the rule of law as a value common to the Member States and to the principle of non-discrimination, it is clear that a Member State whose society is characterised by discrimination cannot be regarded as ensuring respect for the rule of law, within the meaning of that common value' (229, 324).

The Court states that, in accordance with Article 4(2) TEU, 'the European Union respects the national identities of the Member States' (judgment in Case C-156/21, 233), but this does not create legal uncertainty as regards the application of the conditionality mechanism. Indeed, 'notwithstanding the fact that the Commission and the Council must make their assessments taking due account of the specific circumstances and contexts of each procedure conducted under the contested regulation and, in particular, taking into account the particular features of the legal system of the Member State in question and the discretion which that Member State enjoys in implementing the principles of the rule of law, that requirement is in no way incompatible with the application of uniform assessment criteria' (235, 283).

The Court does not shed much light on the interpretation of the expression 'other situations or conduct of authorities' used in Article 4(2)(h) of the regulation. It merely states that it follows 'from a combined reading of Article 4(1) and Article 4(2)(h) of the contested regulation that appropriate measures are to be taken where it is established that a breach of one of the principles listed in Article 2(a) of that regulation has been committed and concerns a situation attributable to an authority of a Member State or the conduct of such an authority, in so far as that situation or conduct is relevant to the sound financial management of the Union budget or to the protection of the financial interests of the Union and that that breach affects or seriously risks affecting, in a sufficiently direct way, that sound financial management or those financial interests' (judgment in Case C-156/21, 253).

As regards the concept of 'risk' in Article 4(1) of the regulation, 'it would be incompatible with the requirements of sound financial management of the Union budget and the protection of the financial interests of the Union to limit the adoption of appropriate measures to cases of proven effects on that sound financial management or those financial interests. That limitation would effectively preclude the adoption of appropriate measures in cases where the effects, although not yet proven, can nevertheless be reasonably foreseen, since there is a high probability that they will occur. That limitation would therefore be liable to compromise the purpose of the contested regulation' (ibid., 262).

The Court adds that the concepts of 'sound financial management' and the 'protection of the financial interests of the Union' are defined in EU legislation: the financial regulation and the European Anti-Fraud Office regulation (263–265, 295–296). They go well beyond combating irregularities and fraud (judgment in Case C-156/21, 265).

For the Court, '[t]he prevention of effects such as those referred to in Article 4(1) of the contested regulation … supplements the correction of such effects, which is inherent both in the concept of "sound financial management" and in that of [the] "protection of the financial interests of the Union" and must therefore be regarded as a permanent and horizontal requirement of EU financial legislation' (266, 298).

Concerning the condition of a serious risk in Article 4(1), the Court holds that it requires 'that it be demonstrated that that risk has a high probability of occurring, in relation to the situations or to the conduct of authorities referred to in Article 4(2) of the contested regulation, and, moreover, appropriate measures may be adopted only on condition that a sufficiently direct link, namely a genuine link, is established between a breach of one of the principles of the rule of law and that serious risk' (267, 299).

The principle of legal certainty is also respected as regards the measures that can be adopted under the regulation. Article 5(1) of the regulation 'lists exhaustively the various protective measures that may be adopted' (269, 301). The measures taken 'must be strictly proportionate to the impact of the breaches of the principles of the rule of law found on the Union budget or on the protection of the financial interests of the Union' (271, 302).

As regards the expression 'insofar as possible' in Article 5(3) of the regulation ([135]), the Court holds that it 'permits the adoption of measures relating to Union actions other than those affected by such a breach only where the latter actions cannot or can no longer be targeted, or can be targeted only inadequately, in order to achieve the objective of the contested regulation …, with the result that those measures are necessary in order to achieve that objective' (judgment in Case C-156/21, 275). The institutions must establish that the adoption of measures as regards other actions is 'essential in order to ensure the protection of the Union budget as a whole' (ibid., 277).

As regards the sources of information to be used in the assessment, 'the Commission is required to carry out a diligent assessment of the facts in the light of the conditions laid down in Article 4 of the contested regulation'. The same applies to the requirement of proportionality of the measures (ibid., 283). In accordance with recitals 16 and 26 of the regulation, the assessment 'should be objective, impartial and fair, should respect the principles of objectivity, non-discrimination and equality of Member States before the Treaties and should be conducted according to a non-partisan and evidence-based approach' (ibid., 284). Therefore, the

([135]) 'The measures shall, insofar as possible, target the Union actions affected by the breaches.'

Commission must ensure 'that the information it uses is relevant and that the sources of that information are reliable' (285, 285).

2.4. Other issues

The Court dismissed the Polish argument that the regulation is unlawful because it was not submitted to national parliaments for subsidiarity review under Protocol No 2 to the Treaties (judgment in Case C-157/21, 242). The regulation, 'which contains financial rules determining the procedure to be adopted for establishing and implementing the Union budget, within the meaning of Article 322(1)(a) TFEU, falls within the exercise of a competence of the European Union relating to its functioning, which, by its nature, can be exercised only by the Union itself. Therefore, the principle of subsidiarity cannot apply' (ibid., 241).

Poland's argument that the regulation breaches Articles 4(1), 5(1) and 4(2) TEU, insofar as it impinges on areas of exclusive national competence and interferes with essential state functions, was also dismissed by the Court on the basis of its statements in other parts of the judgment. The Court recalled that Article 2 TEU 'is not a mere statement of policy guidelines or intentions, but contains values which ... are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles comprising legally binding obligations for the Member States' (232, 264). It adds that '[e]ven though, as is apparent from Article 4(2) TEU, the European Union respects the national identities of the Member States, inherent in their fundamental structures, political and constitutional, such that those States enjoy a certain degree of discretion in implementing the principles of the rule of law, it in no way follows that that obligation as to the result to be achieved may vary from one Member State to another' (233, 265). The Court reiterated that the assessment must be carried out in accordance with uniform criteria (judgment in Case C-157/21, 283).

As regards the proportionality of the measures, this 'is ensured, decisively, by the criterion of the "impact" of breaches of the principles of the rule of law on the sound financial management of the Union budget or on the protection of the financial interests of the Union. As regards the criteria based on the nature, duration, gravity and scope of those breaches, they may be "duly taken into account" only in order to determine the extent of that impact, which may vary depending on the characteristics of the breaches found' (judgment in Case C-156/21, 331).

Finally, as regards breaches that are 'systematic in nature, such that they also affect areas other than those relevant to the sound financial management of the Union budget or to the protection of its financial interests', the Court held that 'where such a breach is also liable to affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union, the Union cannot be criticised for implementing the means necessary to protect that sound management and those financial interests' (judgment in Case C-157/21, 362).

3. Legal analysis

3.1. General considerations

The Commission had originally tabled its legislative proposal as part of its package of legal texts for the multiannual financial framework (MFF) for 2021–2027. This linkage joined the fate of the proposal on the conditionality regulation to the rest of the package. At some point, the applicant states announced that they would object to the MFF package and the NextGenerationEU programme, which required unanimity in the Council, if the conditionality regulation was adopted. It was only in December 2020 that the European Council reached a global political compromise.

The importance and the potential of the conditionality regulation cannot be denied. Indeed, the regulation is a major legal innovation for the EU's budgetary framework as well as for the EU as a whole. Despite the limitation of scope associated with its legal basis, it has the potential to initiate a new trend as regards budgetary protection in relation to the rule of law within the EU, setting an example that could be followed in other fields.

Moreover, while its adoption process was politically linked to the negotiations of the MFF package, this regulation is not temporary like the MFF: it is a permanent legal framework that will continue to be applicable after the current MFF.

The judgments on the validity of the conditionality regulation are useful in this regard. They are very rich as precedents and contain a number of interesting pronouncements as regards the Court's jurisprudence on the fundamental values of the EU. The validity of the regulation was fully confirmed by the Court of Justice.

In its judgments, the Court confirmed the validity of the regulation 'as it is', without making it conditional on particular or restrictive interpretations of its provisions. The Court provides an abstract review of legality on the basis of the provisions and recitals of the regulation. The judgments have to be read with particular care, as some of the language in them may appear novel while in reality reproducing the provisions or recitals of the regulation.

While the judgments contain some useful guidance on specific points of law, as we will explain in Section 3.3 below, they do not prejudge or compromise in the least the potential future application of the regulation as regards specific situations in the Member States. In legal terms, they leave the door wide open for the effective application of the instrument where the conditions are met.

3.2. The values of the European Union and the rule of law

The conditionality regulation itself, as well as the considerations in the Court's judgments, have important ramifications for the place of the rule of law within the EU, beyond financial considerations.

Several points should be highlighted as regards the Court's jurisprudence on EU values, which is the dimension in which the judgments are particularly rich and most instructive.

First, the Court of Justice holds that the EU has its own constitutional identity, based on all the fundamental values of Article 2 TEU – including those of its two sentences, the second sentence being of equal importance to the first.

Respect for those values is not only a prerequisite for accession to the EU: it is also 'a condition for the enjoyment of all the rights deriving from the application of the Treaties to that Member State', including the economic benefits attached to the implementation of the EU budget. For the Court, that condition 'cannot be reduced to an obligation which a candidate State must meet in order to accede to the European Union and which it may disregard after its accession'. It is a permanent obligation attached to the EU's membership. In addition, the EU and their institutions 'must be able to defend' those values, which not only are programmatic 'desires' of the treaties but also contain legally binding obligations as to the result for the Member States, as specified in various rules of the treaties. The overall message of this part of the judgments is a strong restatement of the essence of European integration and that its defence and promotion is a task and responsibility of all the institutions. It should be noted that the 'constitutional identity' of the EU does not have an aggressive, particularistic or apologetic nature, as for the constitutional identity that is put forward by some constitutional courts. It is an identity based on commonality, that is what binds us together as Europeans, and not on what separates the peoples of the EU or their legal orders.

Second, the protection of those values is not and should not be confined to the political procedure under Article 7 TEU. On the contrary, the values permeate the EU legal order as a whole, including primary and secondary law, ensuring its coherence. In consequence, they should be protected and promoted in the framework of all EU policies. In view of the requirement for consistency between all EU policies and actions, and the objectives of the EU, the judgments convey a wider obligation to assess the need to incorporate values in all those policies and actions, insofar as they are relevant and necessary. This seems to indicate that the requirement to respect all EU values, and not just the rule of law, should be assessed by the Commission in the design of all policy projects ([136]).

([136]) See, on this issue, Halberstam, D. and Schroeder, W., 'In defense of its identity: a proposal to mainstream the rule of law in the EU', VerfassungsBlog, 2022 (https://verfassungsblog.de/in-defense-of-its-identity/); and Auriel, P., 'Le régime général de conditionnalité, remède à la crise de l'État de droit?', *Revue de l'Union européenne*, 2022, p. 106.

Third, even though there are differences in the ways the Member States organise themselves to ensure respect for the fundamental values of the EU, for example as regards the rule of law and the organisation of justice or as regards democratic processes, this does not mean that the obligations stemming from them will vary between Member States. As regards the rule of law, the Court holds that respect for it should be assessed based on uniform criteria, and that the content of the different principles of the rule of law is clear and well known to the Member States.

Fourth, the definition of the rule of law principle in Article 2(a) of the regulation is accepted as part of the conditionality mechanism. It is self-standing and, at the same time, closely intertwined with Article 2 TEU. It comprises some of the components of the concept of rule of law and should not be seen as exhaustive. It should also be understood in the light of the other values of the EU, with which it forms a coherent system. The Court clarifies that fundamental rights are part of the definition because of their connection with the principle of effective judicial protection by independent courts. Non-discrimination is covered in its own right, as 'a Member State whose society is characterised by discrimination cannot be regarded as ensuring respect for the rule of law, within the meaning of that common value'.

Finally, among the rule of law principles, the Court gives pride of place, as one would expect, to the requirement for effective judicial protection by independent courts, which is the core rule of law requirement. The Court holds very clearly that without independent and effective courts there can be no guarantee of sound financial management or of the protection of the EU's financial interests. This is understandable. A Member State may have a failing rule of law landscape, with breaches of other principles, and yet maintain that central principle and be able to correct or at least limit the impact of those other breaches. However, without that central element a Member State cannot have a functioning rule of law at all.

3.3. The conditionality regulation

3.3.1. Systemic breaches

The first key take-away as regards the regulation concerns systemic breaches. The Commission proposal was focused on generalised deficiencies, and this is the main area where the conditionality regulation could provide added value, as, with regard to individual breaches, EU legislation generally contains effective means of protecting the budget. The conclusions of the European Council of December 2020 left some ambiguity about whether the regulation extended to systemic breaches. However, the Court has confirmed, in various passages of the

judgments, that systemic breaches are covered as well. In consequence, a breach can be individual or systemic. This is also confirmed by recital 15 of the regulation ([137]).

This differentiates the conditionality mechanism from the procedure under Article 7 TEU, where breaches of all the values may be considered, including when they fall outside the scope of EU policies. Thus, for example, a systemic breach of the requirement for judicial independence would only be relevant to the regulation insofar as it is or may be relevant to judicial activities connected with the sound financial management of the EU budget or with the protection of the EU's financial interests, in civil, administrative or criminal cases where those principles and interests could be at stake.

That being said, the Court correctly held that those breaches are not covered comprehensively, in all their consequences and dimensions, but only insofar as they may be relevant to the protection of the EU budget.

3.3.2. The criteria of 'sufficiently direct way' and 'seriously risk'

As regards the conditionality regulation, the Court is very clear that the protection of the EU budget is crucial to ensure effective EU action and a precondition for solidarity and mutual trust. The judgments include a number of clarifications on how the regulation contributes to maintaining that climate of mutual trust under the rule of law.

It is important to note, first, that Article 4(1) is seen by the Court as 'the very core of the horizontal conditionality mechanism established by that regulation'. Without that provision, the regulation would lose its *raison d'être*. Ample recognition is also given to Article 4(2)(h), the anti-circumvention clause of the regulation, which has to be read in conjunction with Article 4(1). This prevents the formation of gaps and loopholes and ensures the effectiveness of the regulation in a landscape characterised, in some Member States, by 'creative' measures and moving targets.

Second, the judgment clarifies that Article 4(1), with its reference to the financial interests of the EU, applies not only to the EU's expenditure but also to its revenues, which are part and parcel of those interests. The mechanism thus protects the EU's finances as a whole. However, it should be noted that the measures set out in Article 5 concern only expenditure. This is relevant for the application of the last sentence of Article 5(3) of the regulation ('The measures shall, insofar as possible, target the Union actions affected by the breaches'). Since specific measures as regards revenue are not set out in Article 5, and the list of measures is exhaustive, the corrective measures for breaches affecting or risking affecting the EU's revenue would have to target actions involving the EU's expenditure.

([137]) 'Breaches of the principles of the rule of law, in particular those that affect the proper functioning of public authorities and effective judicial review, can seriously harm the financial interests of the Union. This is the case for individual breaches of the principles of the rule of law and even more so for breaches that are widespread or due to recurrent practices or omissions by public authorities, or to general measures adopted by such authorities.'

The Court gives only limited guidance about the meaning of the terms 'sufficiently direct way' and 'seriously risk' in Article 4(1) of the regulation.

The term 'sufficiently direct way' was added to the article during the negotiations. In purely legal terms, it could be seen as a normative pleonasm, as the provision already requires it to be established that the breaches affect or seriously risk affecting the sound financial management of the EU budget, verbs that presuppose the existence of a causal link. As a matter of fact, since it requires only that the breach affects or poses a risk to the management of the EU budget 'in a sufficiently direct way', this addition may actually have weakened the nature of the link that is required.

This notion of 'sufficiently direct way' is interpreted by the Court as meaning that there should be a 'genuine link' (or 'real link', in certain passages of the judgments) between the breaches and their effects on or serious risks to the sound financial management of the EU budget or the protection of the financial interests of the EU. In our view, the insistence of the Court on a 'genuine link' with the financial interests of the Union is made in response to the repetitious arguments raised by the applicants regarding the legal basis. However, correctly understood this is only a synonym of the term 'sufficiently direct way', not adding much to its comprehension and certainly not weakening the effectiveness of the mechanism. The Court therefore confirms the interpretation according to which purely hypothetical, uncertain or vague effects or risks do not fall within the scope of Article 4(1) of the regulation, whereas other effects or risks do fall within its scope. At the same time, the Court seems to connect the requirement for a genuine link with the obligation of the Commission to use an 'evidence-based approach', as stated in recital 26 of the regulation. However, the possible implications of this connection are not detailed. In any event, an 'evidence-based approach' should not have the same implications as regards establishing the effects on the sound financial management of the EU budget or on the protection of the financial interests of the EU, and as regards establishing a serious risk thereof. Concerning effects, hard and fast evidence can be obtained. Regarding risks, however, what the regulation requires is a reasonable inference or deduction between the breach and the ensuing risk. This is also confirmed by the Court in the judgment.

Indeed, as regards the risk, the Court holds that preventive action is a horizontal requirement of sound financial management. It would be incompatible with it to limit the adoption of appropriate measures to cases of proven effects. For the Court, there is a risk where the effects, although not yet proven, can nevertheless be 'reasonably foreseen'.

The Court emphasises that, in accordance with the regulation, the risk must be 'serious'. For the Court, classifying a risk as 'serious' requires 'that it be demonstrated that that risk has a high probability of occurring' in relation to the situations or conducts referred to in Article 4(2) of the regulation. Appropriate measures may be adopted if it is established that there is a sufficiently direct link, that is a genuine link, between the breach and that serious risk. While this may seem circular, in purely logical terms, the obligation to 'demonstrate' a high probability of occurrence

excludes an approach based on legal presumptions. Convincing grounds or arguments for the probability of the risk are required to tackle situations of risk and ensure preventive, rather than corrective, action.

The use of the terms 'reasonably foreseen' and 'high probability' in the judgments indicates that, for the Court, the demonstration of a 'serious risk' should involve some form of statistical analysis, in particular as regards systemic breaches going beyond the field of the management of the EU budget, while including it. For example, in the case of a systemic lack of the guarantees required by the treaties for judicial independence, in particular from the executive branch that is responsible for the delegated implementation of the EU budget as part of the method of shared management, the Commission would need to establish that there is a high probability that the systemic breach could affect the intervention of judicial authorities in a significant number of cases of fraud or irregularity involving the competent authorities of the Member State and concerning the EU budget. As a consequence, there would be no effective guarantee for the sound financial management of the EU budget or for the protection of the financial interests of the EU.

3.3.3. Measures and the procedure for adopting them

As regards the proportionality of the measures, the Court insists in various passages of the judgments that a 'strict proportionality' requirement should be observed. This is an addition of the judgments, as the regulation does not specify what type of proportionality applies. However, it is reasonable and to be expected, as strict proportionality is required to maintain the nature of the regulation as providing for measures to protect the EU budget.

The measures have to be calibrated, in the main, by reference to the financial impact of the breaches on the EU budget, calculated or estimated as the case may be. The seriousness of the rule of law breaches should also be taken into account to fine-tune the assessment of the extent of the impact or risk. The possibility of the last sentence of Article 5(3) of the regulation is preserved. The institutions may therefore adopt measures targeting programmes or actions other than those affected by the breach, if this is necessary to provide adequate protection for the budget as a whole.

The Court repeats at various points the procedural obligations of the institutions, in particular of the Commission, in its assessment of the facts. The Commission remains responsible for its assessment and for the reliability of the information on which it is based. A number of principles set out in the recitals of the regulation that the Commission needs to respect are also recalled. In particular, the Court recalls that the Commission's assessment should be guided by the principles of objectivity, non-discrimination and equal treatment of Member States in line with the treaties. Respect for those procedural requirements and the possibility of a full judicial review of the decisions on measures are highlighted by the Court as sufficient to protect the position of the Member States concerned.

Finally, concerning the possible involvement of the European Council in view of recital 26 of the conditionality regulation, the Court of Justice has clarified that this is not part of the procedure under the regulation but a mere political possibility that is not binding and cannot derogate from the provisions and deadlines contained in the legislation or influence their interpretation in a manner that contradicts their wording.

Recital 26 is the famous 'emergency break', which closely follows a similar recital in the regulation establishing the Recovery and Resilience Facility ([138]). In such a configuration, the European Council is not really giving the EU 'the necessary impetus for its development' or to 'define the general political directions and priorities thereof', as provided for in Article 15(1) TEU. It, rather, exerts a measure of political force in the opposite direction, as a 'break' or 'hiatus' in the normal work of the EU's institutions. It also intrudes on administrative procedures concerning the implementation of the EU's budget. In institutional and legal terms, such a possibility could seem unorthodox. For the Court, there would be no legal problem because it is not legally binding. However, this approach creates the risk of having two parallel worlds: one of law, increasingly formal; and a second of potentially deviant political practices.

If, through the 'emergency breaks' or otherwise, the European Council were to go beyond its proper institutional role, and this was agreed by consensus among all the Member States, it is very unlikely that this would be challenged before the Court of Justice. Holding that the conclusions of the European Council are not legal could appear as a weak defence of the EU's institutional balance, as they have a clear impact in political terms.

4. Conclusion

The judgments confirmed the lawfulness of the regulation and, in policy terms, they paved the way for the adoption of the guidelines by the Commission ([139]). From a legal perspective, the opening of procedures under the regulation was possible since its entry into force. On 17 November 2021, the Commission sent letters to Hungary and Poland requesting information pursuant to Article 6(4) of the conditionality regulation. On 27 April 2022, the Commission opened a procedure concerning Hungary pursuant to Article 6(1) of that regulation. This first case of application of the regulation covers systemic deficiencies in that Member State as regards the management of public procurement, corruption and public prosecution. At this stage, it is difficult to predict what exactly the impact of this instrument will be, but this first case may show that the vigorous use of the instrument could be a powerful tool enabling the EU institutions to protect the EU budget more effectively.

([138]) Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, OJ L 57, 18.2.2021, p. 17, recital 52.

([139]) European Commission, Commission communication – Guidelines on the application of the Regulation (EU, Euratom) 2020/2092 on a general regime of conditionality for the protection of the Union budget, COM(2022) 1382 final, pp. 12–37.

On 8 June 2022, the action for failure to act lodged by the Parliament against the Commission was removed from the register of the Court after the Parliament informed the Court of its intention to discontinue the action ([140]). These developments seem to indicate that the conditionality regulation is being normalised as part of the legislative toolkit for the protection of the budget.

At first glance, the judgments do not have a decisive impact on the way the situations in particular Member States should be assessed under the regulation. At the same time, the emphasis placed by the Court on the preventive dimension of the mechanism and on the crucial importance of judicial independence, without which no guarantee of sound financial management can exist, indicates that the regulation can be used to tackle systemic and widespread breaches related to judicial independence insofar as they affect or risk affecting the EU budget.

The two actions for annulment presented controversial positions on a number of important constitutional issues of EU law. These views were not upheld by the Court of Justice, whose judgments contain a strong restatement of its case-law on values, with further elaborations, and confirm the validity of the regulation in its own terms, without any restriction.

At the same time, it cannot be expected that the judgments will end contestation and polemics around the conditionality regulation, the wider lingering conflict about respect for the EU's fundamental values in some Member States or the general tensions between effective action as part of the Community method and political discussions in the intergovernmental forum of the European Council. In various declarations and reactions, several political figures in the applicant Member States have seemed not to accept the authority of the Court or the finality of the judgments.

Finally, it is clear that the conditionality regulation cannot resolve the wider issues relating to rule of law in some EU Member States. This is not its purpose, as the regulation is not a general instrument about the rule of law but a conditionality mechanism for the protection of the EU budget, and it only applies if and insofar as the budget is affected or at risk. At the same time, it is designed to be an effective instrument to protect the EU's financial interests against the impact of or risks created by breaches of the rule of law in the Member States, and the measures it provides for may indirectly foster respect for the fundamental values of the EU.

([140]) Order of 8 June 2022, *Parliament* v *Commission*, C-657/21.

THE EUROPEAN UNION AS A WORLDWIDE PROMOTER OF THE UNIVERSALITY AND INDIVISIBILITY OF HUMAN RIGHTS

Margherita Bruti Liberati, Thomas Ramopoulos and Daniele Bianchi

1. Introduction

This chapter aims to bring to the fore the role of the EU in the promotion, development and respect of human rights protection standards on a global scale. Having absorbed human rights protection rules from the international legal order and the constitutional traditions of Member States, and having recognised them as part of the inalienable core of its constitution, the EU renders them binding on its Member States and also vigorously exports them around the world in a strengthened fashion. This process has multiple positive effects in today's world, where the universality and indivisibility of human rights are called into question, while the commitment to their protection is often insufficient. In the first place, the commonality of external EU action forces individual Member States to follow common higher standards of human rights protection, thereby also acting as a multiplier of the promotion, development and enforcement of those standards on an international scale. The result is more and better human rights protection worldwide.

2. Human rights as intrinsic values of the European Union constitutional order

Having started as an economic project, the nature of the EU was quickly reshaped, with the introduction of human rights into its constitutional fabric. The constitutionalisation of human rights was the inescapable next step following the seminal judgments of the Court of Justice in *Van Gen den Loos* v *Netherlands Inland Revenue Administration* ([141]), *Costa* v *ENEL* ([142]) and *Les Verts* v *European Parliament* ([143]) where the Court of Justice upheld the primacy and autonomy of the EU legal order, in favour of which Member States have limited their sovereignty. This was

([141]) Judgment of 5 February 1963, *NV Algemene Transport- en Expeditie Onderneming van Gend en Loos* v *Netherlands Inland Revenue Administration*, C-26/62, EU:C:1963:1, p. 12.

([142]) Judgment of 15 July 1964, *Costa* v *E.N.E.L.*, C-6/64, EU:C:1964:66, pp. 593–594.

([143]) Judgment of 23 April 1986, *Les Verts* v *European Parliament*, C-294/83, EU:C:1986:166, paragraph 23.

also recognised by the German Federal Constitutional Court in the *Solange II* case ([144]). When called to rule on the relationship between the EU and national legal orders, and between the Court of Justice and national courts' judicatures in particular, the German Federal Constitutional Court had no qualms in making a direct link between the adequate protection of fundamental rights in the EU legal order and its acquiescence to the primacy of the EU legal order over the German Basic Law.

By the end of last century, it was already convincingly argued that 'a strong commitment to human rights is one of the principal characteristics of the European Union' ([145]). The legal relevance of human rights has progressively been constitutionalised through subsequent treaty reforms, culminating in the Treaty of Lisbon, which recognises the 'foundational and pervasive character of human and fundamental rights in the EU legal order' ([146]). Article 2 of the Treaty on European Union (TEU) mentions respect for human dignity and human rights among the foundational values of the EU to which both EU institutions and Member States are bound. The constitutional value of the principles enshrined in Article 2 TEU has been stressed by the Court of Justice across various policy areas ([147]), and most recently in relation to the rule of law conditionality instrument provided by Regulation 2020/2092 ([148]). In that judgment the Court highlighted that those values 'define the very identity of the European Union as a common legal order' ([149]).

Article 3(5) TEU provides that '[i]n its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens' and contribute, *inter alia*, to the protection of human rights. Furthermore, Article 21(1) TEU states that the 'Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider

Consistent with Article 2 TEU, the Treaty of Lisbon has also expressly mainstreamed the protection of human rights in all EU external action policies, requiring their respect across all EU external action.

([144]) Judgment of 22 October 1986, *Solange II*, BverfGE 73, 339.

([145]) Alston, P. and Weiler, J. H. H., *An 'ever closer union' in need of a human rights policy: The European Union and human rights*, Harvard Law School, Cambridge, MA, 1999, p. 661.

([146]) Wouters, J., Nowak, M., Chane, A.-L. and Hachez, N. (eds), *The European Union and Human Rights: Law and policy*, Oxford University Press, Oxford, 2021, p. 80.

([147]) See, for example, judgments of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission*, Joined Cases C-402/05P and C-415/05P, EU:C:2008:461, paragraph 285; of 18 July 2013, *Commission and Others* v *Kadi*, joined cases C-584/10P, C-593/10P and C-595/10P, EU:C:2013:518, paragraph 67; of 6 October 2020, *Bank Refah Kargaran* v *Council*, C-134/19P, EU:C:2020:793, paragraph 35; and of 22 June 2021, *Venezuela* v *Council (Affectation d'un État tiers)*, C-872/19P, EU:C:2021:507, paragraphs 36 and 48.

([148]) Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I, 22.12.2020, p. 1.

([149]) Judgment of 16 February 2022, *Republic of Poland* v *European Parliament and Council of the European Union*, C-157/21, EU:C:2022:98, paragraph 145. See for a detailed analysis of this judgment the following chapter, 'Fundamental values, constitutional identity and the protection of the European Union budget against breaches of the rule of law'.

world', among which are 'the universality and indivisibility of human rights and fundamental freedoms, [and] respect for human dignity' ([150]).

Article 6 TEU contains a threefold human rights protection clause, which links the EU human rights protection system with the protection afforded by the European Convention on Human Rights (ECHR). The first paragraph of Article 6 TEU provides for the legally binding nature of the EU Charter of Fundamental Rights (the Charter), conferring on it the same constitutional status as the treaties. Given this, all EU bodies are always bound by the Charter 'even when acting outside the EU legal framework' ([151]), for instance because Member States have delegated to the EU institutions certain tasks related to the implementation of international agreements to which the EU is not a contracting party ([152]). The Charter exercises both a 'validity' and 'interpretative function' ([153]) in relation to EU secondary law, requiring that EU secondary law complies with it and that it is interpreted in the light of the fundamental rights enshrined therein. The Charter provides in Article 52(1) for the cumulative conditions to be fulfilled for the lawful limitation of rights protected by it. Such a limitation is only justified if it is provided for in law, respects the essence of the right in question and complies with the principle of proportionality. The Charter also acts as a 'comprehensive catalogue' ([154]) of human rights, to be dynamically applied in coordination with other human rights regimes. This assertion is corroborated by Article 52(2)–(4) of the Charter on the scope and interpretation of rights and principles under the Charter. This article links the scope and interpretation of rights in the Charter that are covered in the EU treaties (paragraph 2), that correspond to rights under the ECHR (paragraph 3) or that are the result of the common constitutional traditions of Member States (paragraph 4) to their meaning in these sources. In addition, the last sentence of Article 52(3) of the Charter expressly allows EU law to provide for more extensive protection of rights guaranteed under the ECHR. This is in recognition of the fact that the ECHR came into force more than 70 years ago and that human rights law has developed since then. Furthermore, it is consistent with the view that the ECHR was crafted to establish a minimum binding standard for human rights protection, a 'single European reference point which is determinative of the minimum content of all other fundamental rights' ([155]). It is noteworthy in this respect that, in cases where the Charter provides for human rights protection that is higher than that accorded in the ECHR, the European Court of Human rights (ECtHR) interprets the corresponding provision in the ECHR in a way that improves the

([150]) In the Treaty on the Functioning of the European Union, this provision is recalled by Article 205.

([151]) Kellerbauer, M., Klamert, M. and Tomkin, J. (eds), *The EU treaties and the Charter of Fundamental Rights: A commentary*, Oxford University Press, Oxford, 2019, p. 2242.

([152]) See, in this regard, judgment of 20 September 2016, *Ledra Advertising*, Joined Cases C-8/15 P to C-10/15 P, EU:C:2016:701, paragraph 51-54.

([153]) Wouters, J., Nowak, M., Chane, A.-L. and Hachez, N. (eds), *The European Union and Human Rights: Law and policy*, Oxford University Press, Oxford, 2021, p. 84.

([154]) Wouters, J., Nowak, M., Chane, A.-L. and Hachez, N. (eds), *The European Union and Human Rights: Law and policy*, Oxford University Press, Oxford, 2021, p. 90.

([155]) Callewaert, J., 'No more common understanding of fundamental rights? About the looming fundamental rights patchwork in Europe and the chances for the current negotiations on EU-accession to the ECHR to help avoid it', *La Revue Des Juristes De Sciences Po*, No 22, 2022, p. 25.

protection of human rights under that convention as well ([156]). For instance, in *Goodwin* v *United Kingdom*, in relation to transgender individuals' right to marry, the ECtHR extensively interpreted Article 12 ECHR by referring to the broader protection provided by the Charter ([157]). Furthermore, the ECtHR has helped enforcing EU law by finding that, in some instances, national courts' failing to make a preliminary reference to the Court of Justice amounts to a breach of Article 6(2) ECHR ([158]). This is a very significant indirect effect of the EU legal order, in particular its Charter, increasing the level of protection of human rights beyond the EU's borders. In the same logic within the EU legal order, Article 53 of the Charter 'establishes a minimum protection beyond which national authorities and courts are free to apply a higher standard under national constitutions as far as the domain concerned has not been harmonised at EU level' ([159]). Thus, the Charter creates a common denominator of human rights protection and at times even instigates a levelling up of the said protection between the EU and the continental human rights regime in Europe, the ECHR, as well as within the EU constitutional order when EU law is being implemented.

However, the Charter is future-proof in that it does not freeze the level of human rights protection within the EU level order. On the contrary, its drafters have allowed for potentially even higher protection of human rights.

The second paragraph of Article 6 TEU further specifies the relationship between EU law and the ECHR by laying out the legal basis for the EU's accession to the ECHR. Such accession would make the convention binding on EU institutions and enable the ECtHR to have external control over EU acts. The EU is still to become a party to the ECHR, notably because a 2013 Court of Justice opinion found that the draft treaty of accession to the ECHR negotiated at that time would be contrary to the EU treaties, as it 'did not provide for sufficient protection of the EU's specific legal arrangements and the Court's exclusive jurisdiction [on the interpretation of EU law]' ([160]). Additional negotiations on a revised draft of an accession treaty are still ongoing, with a view to overcoming the obstacles identified by the Court in 2013.

Until that process is completed, the ECtHR has developed a doctrine that allows for an indirect review of Union acts against the ECHR, through the assessment of Member States' acts implementing EU law. In particular, the ECtHR asserted its competence to review the legality of Member States' acts adopted 'in the framework of the Union against the ECHR in so far

([156]) Lenaerts, K. and Van Nuffel, P., *EU Constitutional Law*, Oxford University Press, Oxford, 2021, p. 669.

([157]) Judgement of the ECtHR of 27 March 1996, *Goodwin* v *United Kingdom*, Application No 28957/95, paragraph 100.

([158]) Craig, P. and de Búrca, G., *EU Law: Text, cases, and materials*, 7th edn, Oxford University Press, Oxford, 2020, p. 461.

([159]) Wouters, J., Nowak, M., Chane, A.-L. and Hachez, N. (eds), *The European Union and Human Rights: Law and policy*, Oxford University Press, Oxford, 2021, p. 93.

([160]) Mańko, R., *EU accession to the European Convention on Human Rights (ECHR)*, European Parliamentary Research Service (EPRS), Brussels, 2017.

as the Union legal order itself does not afford equivalent protection' ([161]). The ECtHR then complemented this approach with the *Bosphorus* presumption, according to which Member States' actions in implementing the 'legal obligations flowing from [their] membership of the European Community' were presumed to be in line with the ECHR insofar as 'the protection of fundamental rights by Community law can be considered to be … "equivalent" … to that of the Convention system' ([162]).

In any case, as discussed previously, the ECHR is given legal relevance in the EU *acquis* by virtue of the third paragraph of Article 6 TEU. That paragraph grants autonomous normative value to fundamental rights, as guaranteed by the ECHR but also as they result from the common constitutional traditions of Member States, stating that they constitute 'general principles of the Union's law'. This provision reflects the longstanding jurisprudence of the Court of Justice, since *Stauder* v *Stadt Ulm* ([163]), according to which 'respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice' ([164]). The general human rights principles of EU law complement the protection afforded by primary law, both informing its interpretation and allowing for the protection of human rights not explicitly provided therein ([165]).

The EU's commitment to protecting human rights is further illustrated in the preparedness of the Court of Justice to often rely on human rights recognised in the international legal order, rendering principles of international treaties or customary law enforceable against EU institutions and Member States in the implementation of EU laws and policies.

Indeed, human rights and principles of international law can become binding on the EU. This might be because the EU is party to a human rights treaty, whose provisions thus become an integral part of the EU *acquis*, in accordance with Article 216(2) of the Treaty on the Functioning of the European Union (TFEU); because human rights under international law are recognised as general principles of EU law; or because human rights under international law come to constitute customary international law.

The first case, that is where the EU is part of international law treaties concerning human rights protection, is rather limited in practice, as most international human treaties, and notably the UN ones, do not allow international or regional organisations to become members. However,

([161]) Lenaerts, K. and Van Nuffel, P., *EU Constitutional Law*, Oxford University Press, Oxford, 2021, p. 672, referring to judgments of 18 February 1999, *Matthews* v *United Kingdom*, Application No 24833/94, paragraphs 33–34; and of 30 June 2005, *Bosphorus* v *Ireland*, Application No 45036/98, paragraphs 155–156;

([162]) Judgment of 30 June 2005, *Bosphorus* v *Ireland*, Application No 45036/98, paragraph 165.

([163]) Judgment of 12 November 1969, *Stauder* v *Stadt Ulm*, C-29/69, EU:C:1969:57.

([164]) Judgment of 17 December 1970, *Internationale Handelsgesellschaft* v *Einfuhr- und Vorratstelle for Getreide und Futtermittel*, C-11/70, EU:C:1970:114, paragraph 4.

([165]) Wouters, J., Nowak, M., Chane, A.-L. and Hachez, N. (eds), *The European Union and Human Rights: Law and policy*, Oxford University Press, Oxford, 2021, p. 93.

there are some exceptions, such as the Convention on the Rights of Persons with Disabilities. The EU ratified this convention in 2010 and thus it is now part of the EU legal *acquis* ([166]).

Secondly, rights in international human rights conventions can also become part of the EU legal system as general principles of EU law when adopted by a sufficient number of Member States. Indeed, the Court of Justice has recognised its jurisdiction with regard to fundamental rights enshrined in international conventions to which the EU was not party and insofar as they constitute general principles of EU law. For instance, in *Defrenne v Sabena* ([167]), the Court of Justice recognised that the right to elimination of discrimination based on sex forms in employment, as derived from the European Social Charter and the International Labour Organization Convention concerning Discrimination in Respect of Employment and Occupation ([168]), belonged to the general principles of the then Community law that the Court of Justice was called on to assert. In *European Parliament* v *Council,* the Court of Justice stated that, in ensuring respect for fundamental human rights as a general principle of EU law, it 'draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories' ([169]). In particular, the Court of Justice acknowledged the relevance, in the context of family reunification, of rights consecrated in the International Covenant on Civil and Political Rights and in the UN Convention on the Rights of the Child, of which the Court of Justice 'takes account in applying the general principles of Community law' ([170]). Likewise, in *Salahadin Abdulla and Others* ([171]), the minimum standards and reception conditions for asylum seekers were interpreted in the light of the 1951 Convention Relating to the Status of Refugees.

Thirdly, the Court of Justice has recognised in numerous instances that the EU must also respect human rights principles that are part of customary international law. Therefore, in *Polisario* ([172]) the Court of Justice recognised the constitutional relevance and applicability of the principle of self-determination of peoples, an international customary law principle, within the EU legal order. In particular, the Court of Justice recalled an International Court of Justice judgment ([173]) stating that that principle constitutes 'a legally enforceable right *erga omnes* and one of the essential principles of international law' forming 'part of the rules of international

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([166]) See Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, OJ L 23, 27.1.2010, p. 35.

([167]) Judgment of 15 June 1978, *Defrenne* v *Sabena*, C-149/77, EU:C:1978:130, paragraphs 26–28. See, in this regard, Craig, P. and de Búrca, G., *EU Law: Text, cases, and materials*, 7th edn, Oxford University Press, Oxford, 2020, p. 420.

([168]) International Labour Organization, Convention No. 111, 1958.

([169]) Judgment of 27 June 2006, *Parliament* v *Council*, C-540/03, EU:C:2006:429, paragraph 35.

([170]) Judgment of 27 June 2006, *Parliament* v *Council*, C-540/03, EU:C:2006:429, paragraph 37.

([171]) See, for example, judgment of 2 March 2010, *Salahadin Abdulla and Others*, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, EU:C:2010:105, paragraph 53.

([172]) Judgment of 21 December 2016, *Council* v *Front Polisario*, C-104/16, EU:C:2016:973, paragraphs 87–89.

([173]) Judgment of 30 June 1995, *East Timor* (*Portugal* v *Australia*), General List No 84, p. 90.

law applicable to relations between the European Union and the Kingdom of Morocco, which the General Court was obliged to take into account' ([174]). In the light of that principle, the Court of Justice ruled that the General Court erred in law in considering that the EU–Morocco association and liberalisation agreements were applicable to the territory of Western Sahara. Similarly, the Court of Justice stated in *Sea Watch III* ([175]) that the provisions of the port State control directive ([176]) had to be applied in the light of the customary international law on the duty to rescue at sea, as derived from the UN Convention on the Law of the Sea ([177]) and the International Convention for the Safety of Life at Sea ([178]).

Thus, in line with the liberal democratic traditions of EU Member States, the EU has been imbued with the protection of human rights as one of its inalienable values.

It draws constantly from a number of sources within and outside its constitutional order, having created a framework that aims to continually increase the protection of human rights. The following sections discuss in a non-exhaustive fashion a variety of ways in which the EU safeguards and promotes human rights in its Member States and abroad.

3. The European Union's impact on Member States in the promotion and protection of human rights

By making international human rights and principles part of the EU legal *acquis,* the EU also renders them binding on its Member States. Member States are thereby forced to respect principles and standards regardless of whether or not they are recognised by their national laws or international commitments. The role of the EU as a catalyst of human rights protection thus takes place first of all through the levelling up of national human rights protection standards in each and every one of its Member States.

Firstly, the EU imposes respect for and commitment to human rights in candidate countries, even before they accede to the EU. Indeed, pursuant to Article 49 TEU, respect for the values referred to in Article 2 TEU and commitment to their promotion constitute a precondition even for applying for EU membership. Once the countries join the EU, they are bound by the fundamental human rights and principles that are part of the EU legal system by virtue of EU primary law. As recently stated by the Court of Justice in the 'rule of law conditionality' case, '[c]ompliance with those values cannot be reduced to an obligation which a candidate State must meet in order to

([174]) Judgment of 21 December 2016, *Council* v *Front Polisario*, C-104/16, EU:C:2016:973, paragraphs 88–89.

([175]) Judgment of 1 August 2022, *Sea Watch*, Joined Cases C-14/21 and C-15/21, EU:C:2022:604, paragraphs 105–108.

([176]) Directive 2009/16/EU of the European Parliament and of the Council of 23 April 2009 on port State control, OJ L 131, 28.5.2009, p. 57

([177]) United Nations, United Nations Convention on the Law of the Sea, 1983, Article 98

([178]) International Maritime Organization, International Convention for the Safety of Life at Sea, 1974, Article IV(b).

accede to the European Union and which it may disregard after its accession' ([179]). On the contrary, 'once a candidate State becomes a Member State, it joins a legal structure that is based on the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, the common values, contained in Article 2 TEU, on which the European Union is founded' ([180]). The Court also clarified that this premise is based on the autonomy of EU law from the laws of Member States and from international law and 'implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the EU law that implements them will be respected' ([181]).

In accordance with the Charter, the primacy of the protection of the individual suffers the least possible limitation, neither deriving from the internal or external source of the applicable law nor based on artificially drawn categories of competence.

As will appear evident in the following paragraphs, the present development of EU law makes it possible to affirm that EU action, as guided by the ECHR, the Charter and the jurisprudence of the Court of Justice, is centred on the individual.

In fact, the obligation to respect human rights also applies to Member States when acting alone. The Court of Justice has clarified that the exercise of retained or reserved national competences by Member States is subject to certain limits. Among them is respect for the general principles of EU law ([182]), in particular human rights as broadly defined by the Court of Justice as incorporating sources of international law and customary international law. Respect for human rights constitutes a deeper and more consistent, horizontal limit to Member States' actions than would result from the application of their individual constitutional obligations in isolation, even within the scope of their retained or reserved national competences. For example, the Court of Justice found in *Rutili* ([183]) that, when exercising their powers to limit the rights of a national of any Member State to enter the territory of another Member State, to stay there or to move there on the grounds of national security or public safety, Member States must comply with general principles of EU law stemming from the ECHR. In particular, when they impose such restrictions, these have to be 'necessary for the protection of those interests "in a democratic society"' ([184]).

Article 51(1) of the Charter sets out a limitation to its applicability to Member States by stating that Member States must respect the Charter 'only when they are implementing Union law'. This clause is based on a conception of Member States as 'agents' of the EU when implementing EU law, whereby 'the level of fundamental rights protection in areas of EU activity should not

([179]) Judgment of 18 March 2022, *Poland* v *Parliament and Council*, C-157/21, EU:C:2022:98, paragraph 144.

([180]) Judgment of 18 March 2022, *Poland* v *Parliament and Council*, C-157/21, EU:C:2022:98, paragraph 143.

([181]) Ibid.

([182]) Judgments of 2 March 2010, *Janko Rottman* v *Freistaat Bayern*, C-135/08, EU:C:2010:104, paragraphs 39–45; and of 5 May 2011, *Ze Fu Fleischhandel and Vion Trading*, Joined Cases C-201/10 and C-202/10, EU:C:2011:282, paragraph 30.

([183]) Judgment of 28 October 1975, *Rutili* v *Ministre de l'intérieur*, C-36/75, EU:C:1975:137.

([184]) Ibid., paragraph 32.

depend on whether an EU body or a MS [Member State] authority is acting' ([185]). This limitation has been consistently interpreted narrowly by the Court of Justice. In C-617/10, *Åklagaren* v *Hans Åkerberg Fransson*, the Advocate General put forward the principle of a sufficient 'degree of connection' with EU law as the criterion for subjecting Member States' action to the human rights obligations stemming from the Charter ([186]). In that case, the Court found that even though the national legislation concerned had not been adopted in order to transpose an EU directive in the national legal order of the Member State, it nevertheless fell within the scope of application of EU law insofar as 'its application is designed to penalise an infringement of that directive and is therefore intended to implement the obligation imposed on the Member States by the Treaty' ([187]).

Subsequently, in the *Cruciano Siragusa* case, the Court of Justice clarified that to determine whether national legislation entails the implementation of EU law for the purposes of Article 51 of the Charter it must be determined 'whether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it' ([188]). Furthermore, in *Julian Hernandez and Others,* the Court of Justice explained that the concept of implementing EU law under Article 51 of the Charter 'presupposes a degree of connection between the measure of EU law and the national measure at issue which goes beyond the matters covered being closely related or one of those matters having an indirect impact on the other' ([189]). Likewise, in *Pfleger and Others* ([190]), the Court of Justice clarified that the Charter also applies in derogation situations, that is when Member States apply some exceptions provided for in EU law in order to derogate from a right guaranteed by the EU treaties. In essence, as indicated by the Court of Justice in *Cruciano Siracusa*, the rationale for carrying out a human rights-based review of Member States' actions falling within the scope of EU law is to preserve the 'unity, primacy and effectiveness of EU law' ([191]).

([185]) Kellerbauer, M., Klamert, M. and Tomkin, J. (eds), *The EU treaties and the Charter of Fundamental Rights: A commentary*, Oxford University Press, Oxford, 2019, p. 2243.

([186]) Opinion of Advocate General Cruz Villalón of 12 June 2012, *Åkerberg Fransson*, C-617/10, EU:C:2012:340, paragraph 57.

([187]) Judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraphs 27 and 28. See also judgment of 18 June 2020, *Commission* v *Hungary (Transparency of associations)*, C-78/18, EU:C:2020:476, paragraph 101, where the Court stated that 'where a Member State argues that a measure of which it is the author and which restricts a fundamental freedom guaranteed by the FEU [Functioning of the European Union] Treaty is justified on the basis of that Treaty or by an overriding reason in the public interest recognised by EU law, such a measure must be regarded as implementing Union law within the meaning of Article 51(1) of the Charter, such that it must comply with the fundamental rights enshrined in the Charter'.

([188]) Judgment of 6 March 2014, *Siragusa*, C-206/13,EU:C:2014:126, paragraph 25.

([189]) Judgment of 10 July 2014, *Julian Hernández and Others*, C-198/13, EU:C:2014:2055, paragraph 34.

([190]) Judgment of 30 April 2014, *Pfleger and Others*, C-390/12, EU:C:2014:281, paragraphs 35 and 36.

([191]) Judgment of 6 March 2014, *Siragusa*, C-206/13, EU:C:2014:126, paragraph 32.

This broad interpretation of Member States' obligations with regard to the rights enshrined in the Charter and the general principles of EU law reinforces EU human rights legislation in two fundamental ways:

— by using a 'judicial "human rights mainstreaming" technique' ([192]);

— by applying a standard of protection that, as explained, is homogeneous and potentially significantly higher than the national constitutional protections taken in isolation.

The second point above is exemplified, in the context of Member States' external action, by Article 53 of the Charter, which provides that the norm applying the highest level of protection – be that a norm of EU, international or national constitutional law – should prevail. This means that even 'when the territorial scope of Union legislation is limited to the territory of the Union … it is possible for national authorities to extend those obligations to the rest of the world on the basis of national constitutional standards' ([193]). For instance, in the *Google* case ([194]), the Court of Justice found that, although EU law did not impose certain obligations on search engine operators outside the EU, 'a supervisory or judicial authority of a Member State remain[ed] competent to weigh up, in the light of national standards of protection of fundamental rights … a data subject's right to privacy and the protection of personal data concerning him or her, on the one hand, and the right to freedom of information, on the other'.

Moreover, even when such 'sufficient links' cannot be established, the principle of sincere cooperation laid out in Article 4(3) and Article 24(3) TEU for common foreign and security policy specifically introduces a number of obligations on Member States. Arguably, of particular interest in this context is the negative obligation enshrined in the latter part of the third paragraph of Article 4(3) TEU, requiring Member States to 'refrain from any measure which could jeopardise the attainment of the Union's objectives'.

Similarly, the latter part of the third paragraph of Article 24(3) provides that Member States shall 'refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations'. In other words, internal and external actions of the Member States in areas falling under retained or reserved national competences cannot put at risk EU objectives and interests. Put differently, with a focus on external action, when they carry out their individual foreign policy actions, Member States must respect the human rights guaranteed by the EU *acquis*. In this respect, the Court of Justice has ruled that the principle of sincere cooperation 'imposes constraints on the Member States in their external action in a number of ways' ([195]), leading some authors to argue that the unity of the international presence of the EU and its Member States as achieved through the

([192]) Craig, P. and de Búrca, G., *EU Law: Text, cases, and materials*, 7th edn, Oxford University Press, Oxford, 2020, p. 44.

([193]) Lenaerts, K. and Van Nuffel, P., *EU Constitutional Law*, Oxford University Press, Oxford, 2021, p. 671.

([194]) Judgment of 24 September 2019, *Google* , C-507/17, EU:C:2019:772, paragraph 72.

([195]) Craig, P. and de Búrca, G., *EU Law: Text, cases, and materials*, 7th edn, Oxford University Press, Oxford, 2020, p. 411.

principle of sincere cooperation 'may be greater than the unity resulting from the exclusive competence of the EU, since it operates also when the Member States are exercising their own competences' ([196]).

The issue of EU influence on Member States' application of international law was addressed by the Court of Justice in the landmark *Kadi* case, where it was clarified that EU law human rights obligations remain relevant when Member States have undertaken commitments or, as in this case, are bound by international (UN) law. Advocate General Maduro made it clear that 'the powers retained by the Member States in the field of security policy had to be exercised in a manner consistent with Community law' and that 'to the extent that their actions come within the scope of Community law, Member States are subject to the same Community rules for the protection of fundamental rights as the Community institutions themselves' ([197]). The Court of Justice further developed these points, confirming, following settled jurisprudence since *Les Verts* ([198]), that Member States could not 'avoid review of the conformity of their acts with the basic constitutional charter, the EC [European Community] Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions' ([199]). The Court also recalled that 'fundamental rights form an integral part of the general principles of law whose observance the Court ensures', so that 'respect for human rights is a condition of the lawfulness of Community acts and that measures incompatible with respect for human rights are not acceptable in the Community' ([200]). The Advocate General also clarified that Article 351 TFEU did not provide a derogation from Article 6(2) TEU, as such an interpretation 'would plainly run counter to firmly established case-law of this Court, according to which the Community guarantees a complete system of judicial protection in which fundamental rights are safeguarded in consonance with the constitutional traditions of the Member States' ([201]). It also added that Article 351 TFEU and the related principle of sincere cooperation require Member States 'to exercise their powers and responsibilities in an international organisation such as the United Nations in a manner that is compatible with the conditions set by the primary rules and the general principles of Community law'. 'Member States themselves, therefore, carry a responsibility to minimise the risk of

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([196]) Craig, P. and de Búrca, G., *EU Law: Text, cases, and materials*, 7th edn, Oxford University Press, Oxford, 2020, p. 412 (referring to Cremona, M., 'Defending the community interest: the duties of cooperation and compliance', in Cremona, M. and de Witte, B. (eds), *EU Foreign Relations Law – Constitutional fundamentals*, Hart Publishing, Oxford, 2008).

([197]) Opinion of Advocate General Poiares Maduro of 16 January 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission*, C-402/05 P, EU:C:2008:11, paragraph 30.

([198]) Judgment of 23 April 1986, *Les Verts* v *Parliament*, C-294/83, EU:C:1986:166, paragraph 23, which states: 'the European Community is a community based on the rule of law inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty'.

([199]) Judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission*, C-402/05 P, EU:C:2008:461, paragraph 281.

([200]) Judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission*, C-402/05 P, EU:C:2008:461, paragraphs 283–284.

([201]) Opinion of Advocate General Poiares Maduro of 16 January 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission*, C-402/05 P, EU:C:2008:11, paragraph 31.

conflicts between the Community legal order and international law' ([202]). This jurisprudence of the Court of Justice was arguably one of the factors that triggered reforms at UN level in relation to the development of that regime, notably with the establishment of the Office of the Ombudsperson of the 1267 Committee, with the purpose of reviewing individual delisting requests and recommending delisting to the sanctions committee where appropriate ([203]).

In terms of enforcement, as the plethora of Court cases mentioned in this section shows, the settled case-law whereby the judicial system of the EU under the treaties is a 'complete system of legal remedies and procedures' proves particularly true and effective in relation to human rights obligations of Member States within the EU legal order. Indeed, the Court has been given ample opportunity to safeguard human rights in the EU legal order through preliminary ruling requests by domestic courts of the Member States. The Commission has also been active in bringing infringement procedures against Member States in breach of their human rights obligations under EU law. Since the entry into force of the Treaty of Lisbon, Article 7 TEU has established a new extrajudicial mechanism to react to serious and persistent violations of the principles laid out in Article 2 TEU, including respect for human rights. The newly introduced 'human rights conditionality mechanism' also allows the Commission to subordinate certain payments and commitments to the Member States to the respect of the rule of law principle. As stated by some authors, respecting the rule of law does indeed enable the protection of human rights ([204]).

4. The European Union as a direct international human rights actor

The modern and dynamic constitutional human rights framework of the EU also applies to its external action. Having included human rights in the EU *acquis* and thereby made them binding on its Member States, the EU actively and consistently engages in promoting human rights in its external action, acting as a catalyst of human rights protection through its Member States. Indeed, as mentioned in Section 2, by virtue of Articles 3(5) and 21 TEU, human rights have been mainstreamed across the different areas of foreign policy and thus in the EU's relations with the rest of the world. Such external projection of human rights takes place through different channels, notably ad hoc clauses in trade agreements, the mainstreaming of human rights in sectoral legislation, diplomacy in international forums and organisations, and the expansive case-law of the Court of Justice. In this way, the EU amplifies the universality and indivisibility of human rights protection in the world, regardless of the policy area concerned.

([202]) Opinion of Advocate General Poiares Maduro of 16 January 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission*, C-402/05 P, EU:C:2008:11, paragraph 32.

([203]) Wouters, J., Hoffmeister, F., De Baere, G. and Ramopoulos, T., *The Law of EU External Relations: Cases, materials, and commentary on the EU as an international legal actor*, 3rd edn, Oxford University Press, Oxford, 2020, p. 182.

([204]) In this regard see for instance Apodaca, C., 'The rule of law and human rights', *Judicature*, Vol. 87, No 6, 2004, pp. 297–298.

4.1. Promotion of European Union human rights standards worldwide through their application beyond its borders

One channel through which the EU exports its human rights protection standards in the international sphere is through their application beyond its borders. Indeed, the case-law of the Court of Justice has often ensured the applicability and enforceability of human rights through EU acts with a direct impact outside EU jurisdiction. Thereby, *de facto, it* 'exports' EU human rights standards beyond the formal territorial and personal scope of EU law.

For instance, in the field of data protection in *Google Spain* the Court of Justice 'extended the 1995 Data Protection Directive's territorial scope' ([205]) beyond EU borders, stating that the right to be forgotten applied regardless of 'the location of the search engine's headquarters or the location where the relevant processing or indexing of the data takes place' ([206]). This was before the adoption of the General Data Protection Regulation (GDPR), which now also applies to non-EU data controllers working on EU residents' data or providers that process EU data ([207]).

In *Shrems II*, the Court again ensured the enforcement of EU data protection standards beyond EU territory, as it declared the Commission decision ([208]) on which the EU–US Privacy Shield was based invalid, insofar as the US legislation did not guarantee a level of data protection 'essentially equivalent' ([209]) to that enshrined in the GDPR and in the Charter, and required data controllers and recipients of personal data transferring the data outside the EU based on standard contract clauses to ensure that data subjects are afforded such level of protection ([210]). The judgment successfully exported human rights data protection standards in the international sphere, not only by ensuring that EU data protection rights are respected when data are transferred outside the EU, but also by exerting pressure on US operators and, ultimately, regulators, to move towards the EU standards as a means of assuring the continuity of data transfers with the EU ([211]).

In the *Polisario* case also mentioned in Section 2, both the General Court and the Court of Justice recognised the EU's 'extraterritorial obligations towards 'distant others', as they 'considered that the EU Council Decision adopting the Agreement [Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco concerning

([205]) Bradford, A., *The Brussels Effect: How the European Union rules the world*, Oxford University Press, Oxford, 2020, p. 134

([206]) Ibid.

([207]) Ibid.

([208]) Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU–U.S. Privacy Shield, OJ L 207, 1.8.2016, p. 1.

([209]) See, for example, judgment of 16 July 2020, *Facebook Ireland and Schrems*, C-311/18, EU:C:2020:559, paragraph 105.

([210]) Judgment of 16 July 2020, *Facebook Ireland and Schrems*, C-311/18, EU:C:2020:559, paragraph 142.

([211]) In this regard, see the rationale in Bradford, A., *The Brussels Effect: How the European Union rules the world*, Oxford University Press, Oxford, 2020.

reciprocal liberalisation measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 and their Annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part] raised concerns with respect to the rights of the Saharawi' ([212]).

In this way, the EU judicature can be regarded as requiring EU institutions to assess the risk that EU policies may indirectly foster or benefit from human rights violations carried out by non-EU citizens in non-EU countries.

4.2. Promotion of European Union human rights standards worldwide through market access conditionality mechanisms

EU trade policy is intertwined with human rights protection. In fact, trade has the potential to improve the protection of human rights by bettering economic conditions but may also have detrimental effects, for instance, on workers' rights or the right to health ([213]). The EU has taken a clear stance on this. Indeed, the Council explicitly stated that '[o]ne of the most important aspect [*sic*] of [the] EU's trade policy is that – alongside protecting European businesses and consumers – it is promoting the EU's principles and values' ([214]), referring to human rights as an example.

In addition, Article 207 TFEU states that the 'common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action', which, pursuant to Article 21 TEU, also include respect for human rights. Furthermore, Article 3(5) TEU commits the EU to contributing, in its relations with the wider world, to 'free and fair trade', while Article 9 TFEU provides that 'in defining and implementing its policies and activities, the Union shall take into account requirements linked to … the guarantee of adequate social protection'.

Such interconnection between trade and human rights was also highlighted by the Court of Justice in the *Singapore* opinion, where the Court recognised the 'direct and immediate effects' ([215]) of sustainable development objectives, including the social protection of workers, on international trade by stating that 'the objective of sustainable development henceforth forms an integral part of the common commercial policy' ([216]).

([212]) Ryngaert, C. and Fransen, R., 'EU extraterritorial obligations with respect to trade with occupied territories: reflections after the case of *Front Polisario* before EU Courts', *Europe and the World: A law review*, Vol. 2, No 1, 2018, p. 5.

([213]) Wouters, J., Nowak, M., Chane, A.-L. and Hachez, N. (eds), *The European Union and Human Rights: Law and policy*, Oxford University Press, Oxford, 2021, p. 366.

([214]) European Council, 'Promoting EU value through trade', n.d. (http://www.consilium.europa.eu/en/policies/trade-policy/promoting-eu-values/), last accessed: 16 August 2022.

([215]) Opinion of 16 May 2017, *Free Trade Agreement with Singapore*, 2/15, EU:C:2017:376, paragraph 157.

([216]) Opinion of 16 May 2017, *Free Trade Agreement with Singapore*, 2/15, EU:C:2017:376, paragraph 147.

The EU has increasingly sought to mainstream human rights protection in line with EU standards of universality and indivisibility in its trade agreements, especially with developing countries, through 'human rights conditionality' clauses.

Through the decades, such clauses have come to integrate not mere political disclaimers, but 'essential element' clauses 'on which the reciprocal obligations of the parties [are] premised, so that human rights violations of a certain scale by a party could amount to a material breach of the treaty and justify [that treaty's] suspension' ([217]), in line with the Vienna Convention on the Law of Treaties. Similarly, 'non-execution' clauses allow the parties to take 'appropriate measures' unilaterally. Human rights clauses are often included in political framework agreements, to which free trade agreements are then linked ([218]). A prominent example of an association agreement to which other trade or trade-related agreements refer, is the Cotonou Agreement ([219]) with the African, Caribbean and Pacific Group of States. The Cotonou Agreement includes respect for 'human rights, democratic principles and the rule of law' ([220]) and 'cooperation in countering the proliferation of weapons of mass destruction' ([221]) among its essential elements. Furthermore, in pursuing an 'active, comprehensive and integrated policy of peace building and conflict prevention and resolution', the agreement also explicitly marks the intention of the parties to 'fight against international crime in accordance with international law' and to work towards the ratification and implementation of the Rome Statute of the International Criminal Court ([222]). A linkage clause to the Cotonou Agreement makes its essential elements clause applicable to other trade or trade-related agreements. For instance, the Economic Partnership Agreement with the CARIFORUM states is explicitly based on the essential elements of the Cotonou Agreement ([223]).

When a framework agreement is not in place with a given country, the human rights essential elements clause is customarily included in the agreement containing the free trade provisions – be that a basic free trade agreement or a more comprehensive one, such as an association agreement – the most prominent example being the aforementioned Cotonou Agreement that will soon be replaced by a modern new agreement between the same parties. As for the aforementioned trade agreements, the ones with Colombia, Peru and Ecuador are indicative

([217]) Wouters, J., Nowak, M., Chane, A.-L. and Hachez, N. (eds), *The European Union and Human Rights: Law and policy*, Oxford University Press, Oxford, 2020, p. 367.

([218]) Zamfir, I., *Human Rights in EU Trade Agreements*, EPRS, Brussels, 2019, p. 4.

([219]) 2000/483/EC: Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 – Protocols – Final Act – Declarations, OJ L 317, 15.12.2000, p. 3. The so-called post-Cotonou Agreement that will replace the Cotonou Agreement was initialled on 15 April 2021.

([220]) Ibid., Article 9(2).

([221]) Ibid., Article 11b.

([222]) Ibid., Article 11.

([223]) Economic Partnership Agreement between the CARIFORUM states, of the one part, and the European Community and its Member States, of the other part, OJ L 289, 30.10.2008, p. 3, Article 2.

examples, where 'respect for democratic principles and fundamental human rights' ([224]) and cooperation in 'countering the proliferation of weapons of mass destruction' ([225]) feature as essential elements.

The primary objective of such human rights clauses is to 'give the EU a legal basis to address human rights issues with its partners in … constructive ways' ([226]). Indeed, the essential elements clause usually provides for political dialogues between the parties. However, if political dialogue fails to address the concerns of one of the parties, the next step is the activation of non-execution clauses. This allows parties to take 'appropriate measures', including the suspension of all or part the agreement as a last resort for the violation of essential elements. For instance, financial assistance directly benefitting the authorities provided for under the Cotonou Agreement was suspended vis-a-vis Burundi for violation of the essential elements of that agreement ([227]).

Human rights conditionality clauses can also be applied as part of the Generalised System of Preferences, which grants non-mutual preferential market access to developing countries ([228]) and conditions the preferential system to the ratification, by the beneficiary countries, of certain human rights international treaties and to the positive outcome of regular monitoring by specific bodies.

On the other hand, the EU has also increasingly mainstreamed human rights protection in sectoral legislation in policy areas with an external dimension, to subordinate foreign actors' access to the single market to the respect of EU human rights standards.

Some authors call this phenomenon 'the Brussels Effect' ([229]), which refers to the EU's practice of implicitly regulating global markets by imposing its standards, first and foremost the universality and indivisibility of human rights protection, as a condition for accessing its market ([230]). This applies in the field of data protection (as discussed in Section 4.1), but also in the fields of environmental

([224]) Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, OJ L 354, 21.12.2012, p. 3, Article 1. Ecuador joined the Agreement in 2016, see Protocol of Accession to the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, to take account of the accession of Ecuador, OJ L 356, 24.12.2016, p. 3.

([225]) Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, OJ L 354, 21.12.2012, p. 3, Article 2(2).

([226]) Zamfir, I., *Human Rights in EU Trade Agreements*, EPRS, Brussels, 2019, p. 8.

([227]) See Council Decision (EU) 2016/394. That decision has now been repealed by Council Decision (EU) 2022/177 and Council Decision (EU) 2022/178 of 8 February 2022.

([228]) Pursuant to Regulation 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008, OJ L 303, 31.10.2012, p. 1.

([229]) Bradford, A., *The Brussels Effect: How the European Union rules the world*, Oxford University Press, Oxford, 2020. See for a discussion of the Brussels Effect also the chapter 'Protecting the environment and tackling climate change' in the third part of this book.

([230]) Ibid.

and consumer protection. For instance, the conflict minerals regulation ([231]), which entered into force on 1 January 2021, is aimed at avoiding the trade of minerals to finance human rights abuses in non-EU countries, by, *inter alia*, requiring EU importers to respect the Organisation for Economic Co-operation and Development's responsible sourcing standards ([232]). As clarified by the Commission, the aim of the regulation is to 'promote the responsible sourcing of smelters and refiners of tin, tantalum, tungsten and gold, whether they are based inside the EU or not' by requiring EU importers to manage and report 'smelters and refiners' practices … associated with risks' ([233]). As is obvious, once again the central aim of these measures is to protect the individuals, be they EU citizens or not, and their universal and indivisible rights to, for example, humane treatment or the safeguarding of their health (Articles 2, 3, 8 and 14 of the ECHR) ([234]).

This approach has become even more visible in the context of the European Green Deal ([235]), as the Commission has significantly enhanced the EU's corporate social responsibility framework, drawing inspiration from the UN *Guiding Principles on Business and Human Rights* ([236]). In this vein, the Commission's proposal for a regulation on sustainable batteries ([237]) would require economic operators placing batteries on the EU market to set up supply chain due diligence policies to address, *inter alia*, 'the risks in the battery supply chain in relation to the protection of human rights, including human health, protection of children and gender equality, in line with international human rights law' ([238]). Yet again, in her 2021 state of the Union speech, the President of the European Commission addressed the issue of forced labour worldwide, making it clear that global trade 'can never be done at the expense of people's dignity and freedom' and the Commission's intention to 'propose a ban on products in our market that have been made by forced labour' ([239]).

([231]) Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, OJ L 130, 19.5.2017, p. 1.

([232]) European Commission, 'Conflict Minerals Regulation: the regulation explained', n.d. (https://policy.trade.ec.europa.eu/development-and-sustainability/conflict-minerals-regulation/regulation-explained_en), last accessed: May 2022.

([233]) Ibid.

([234]) As an aside, it is worth mentioning though that this is also an example of the EU actively supporting multilateralism in that it relies on OECD standards in its legislation aiming to have third countries indirectly comply with them as well.

([235]) European Commission, Communication from the Commission to the European Parliament, the Council, the European, Economic and Social Committee and the Committee of the Regions – The European Green Deal, COM(2019) 640 final. See in more detail on the Green Deal the chapters 'Protecting the environment and tackling climate change' and 'Of farms, fish and forks, in the third part of this book.

([236]) United Nations, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'protect, respect and remedy' framework*, New York and Geneva, 2011.

([237]) European Commission, Proposal for a Regulation of the European Parliament and of the Council concerning batteries and waste batteries, repealing Directive 2006/66/EC and amending Regulation (EU) No 2019/1020, COM(2020) 798 final.

([238]) Ibid., recital 67. This recital in particular cites the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities.

([239]) von der Leyen, U., '2021 state of the Union address by President von der Leyen', European Commission, 2021 (https://ec.europa.eu/commission/presscorner/detail/ov/SPEECH_21_4701), last accessed: June 2022.

Following up on this commitment, the European Commission proposed a directive on corporate sustainability due diligence. Thereby, it aims to create a legally binding framework to 'foster the contribution of businesses operating in the single market to the respect of the human rights and environment in their own operations and through their value chains, by identifying, preventing, mitigating and accounting for their adverse human rights, and environmental impacts, and having adequate governance, management systems and measures in place to this end' ([240]). The proposed directive would apply EU human rights standards to third-country actors in two ways: by applying its rules on foreign companies operating in the EU market, and by extending its human rights coverage to all global supply chains, thus also including sections of them in non-EU countries and involving third-country nationals. This commitment has most recently been reaffirmed in the Commission's communication 'The power of trade partnerships: together for green and just economic growth' ([241]), which sets out the Commission's plan to foster the contribution of EU trade agreements to sustainable development, so that 'economic growth goes together with the protection of human rights, decent work, the climate and the environment, in full adherence with the Union's values and priorities' ([242]).

4.3. The promotion of European Union human rights standards worldwide through diplomatic action in international fora

Although membership of international organisations, including the UN, is often open only to states, the EU has been active in pursuing its human rights agenda in international forums. One example is the persistent successful promotion of the abolition of the death penalty, prompting a number of countries to ratify Protocol No. 6 to the ECHR. Manners argues that the EU achieved this through a set of different means of exerting pressure: notably, raising the issue of the death penalty both bilaterally 'with over 20 countries' ([243]) and multilaterally within the UN framework 'through a presidency memorandum and … the introduction of a "resolution on the death penalty" to the 55th, 56th and 57th sessions of the UN commission on human rights (CHR) in 1999, 2000 and 2001' ([244]).

Another example of the EU's diplomatic action on human rights is the amicus curiae brief submitted by the Commission on behalf of the EU to the Supreme Court of the United States

([240]) European Commission, Proposal for a Directive of the European Parliament and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final.

([241]) European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – The power of trade partnerships: together for green and just economic growth, COM(2022) 409 final.

([242]) Ibid.

([243]) Patten, C., 'Contribution to the debate in the European Parliament on: - death penalty - antipersonnel landmines - Hong Kong - Serbia', speech to the European Parliament, SPEECH/00/404, Strasbourg, 25 October 2000.

([244]) Manners, I., 'Normative power Europe: a contradiction in terms?' *Journal of Common Market Studies*, Vol. 40, No 2, 2002, p. 248.

in the case of *Kiobel* v *Royal Dutch Petroleum* ([245]) in relation to the issue of extraterritoriality of the US Alien Tort Statute. The brief confirmed the EU's role as a global standard setter and 'the broad consensus under international law on the relative importance of State sovereignty and fundamental human rights' ([246]) by supporting a rather restrictive interpretation of the United States' exercise of universal jurisdiction, to ensure that 'EU-based natural and legal persons are not at risk of being subjected to the laws of other States where extraterritorial application of laws does not respect the limits imposed by international law' ([247]). In particular, the Commission argued that the US Alien Tort Statute had to be 'confined to the limited bases for extraterritorial jurisdiction recognised by international law' ([248]), notably to cases that would be subject to universal criminal jurisdiction and conditionally on the exhaustion of national and international remedies ([249]). According to the amicus curiae brief, such limits were necessary to ensure that (even) universal jurisdiction 'comports with the international law principles of comity and equality of sovereignty' ([250]).

5. Conclusion

The EU promotes human rights inside and outside its territory. The influence of the EU as a promoter of the universality and indivisibility of human rights across the globe is significant and increasing. It serves the purpose of reinforcing democracy, peace and stability to the benefit of each and every individual, both EU and non-EU citizens.

The EU project is a project of peace. Peace is the most important value at which democracy and respect for fundamental rights and principles aim. It shall be pursued with the same vigour and consistency in the years and decades to come.

([245]) Decision of the Supreme Court of the United States of 17 April 2013, *Kiobel* v *Royal Dutch Petroleum*, 569 U.S. 108.

([246]) European Parliament, 'Parliamentary question – E-011208/2012(ASW): answer given by Mr Barroso on behalf of the Commission', 2013 (https://www.europarl.europa.eu/doceo/document/E-7-2012-011208-ASW_EN.html), last accessed: June 2022.

([247]) European Commission, *Brief of the European Commission on behalf of the European Union as amicus curiae in support of neither party in Kiobel v Royal Dutch Petroleum,* Supreme Court of the United States, No. 10-1491, 13 June 2012, p. 2

([248]) Ibid, p. 4.

([249]) Ibid.

([250]) Ibid.

PART 2

EU LAW PROVIDES RIGHTS TO EU CITIZENS

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EU CITIZENSHIP: IN THE SERVICE OF EU CITIZENS

Jonathan Tomkin and Elisabetta Montaguti

1. Introduction

EU citizenship and the rights attached to that status have, to a large extent, developed and evolved through the case-law of the Court of Justice. This is particularly true for the right of free movement, the first right to have been created by the Treaty of Rome, and a cornerstone of European integration.

The case-law owes its existence not only to the Court of Justice, but to the individual citizens and families who pursued their claims under EU law before their national courts. Aside from clarifying legal principles, the cases brought before national courts – and then referred to the Court of Justice for a preliminary ruling – offer a glimpse into the life stories of litigants, who have often found themselves in challenging circumstances, battling legal anomalies at the very frontiers of free movement law. Viewed from this perspective, EU citizens (and the lawyers who argue their cases) may be considered to have played a direct and important role in developing their own status. For them, the outcome often makes the difference between a safe and a legally precarious situation.

For its part, the European Commission has been a consistent and longstanding partner in the ongoing judicial dialogue on EU citizenship. In this role, one case at a time, the Commission has engaged with and contributed to the development of EU citizenship since its introduction 30 years ago.

This chapter looks back at the development of EU citizenship with a view to considering some milestones in the Court of Justice's citizenship case-law and the Commission's contribution to this. It will focus on two distinct – although related – strands. The first concerns the rights of family members of EU citizens. The second is the rights of EU citizen children.

2. Family members

Freedom of movement has been at the very heart of the European project since its inception – and therefore well before the introduction of EU citizenship. Of course, as such movement was intended to serve the objective of creating a 'common market', the right was linked to the pursuit of an economic activity. However, even at that early stage, it was recognised that, by contrast with goods and capital, regulating the situation of workers, self-employed persons and service providers would have a direct impact on the lives of individuals and their families. Indeed, the very first EU measures on the free movement of persons – dating back to 1961 ([251]) – ensured that Member State nationals could move to live and work in a Member State of their choosing, accompanied by their family members. However, initially, the definition of family member was limited: it covered only the worker's spouse and children under the age of 21.

Over the years, both the nature of the right of free movement and the right of Member State nationals to be accompanied and joined by their family members have evolved considerably.

First, with the introduction of EU citizenship by the 1992 Treaty on European Union (the Maastricht Treaty), it was recognised at treaty level that movement of Member State nationals across the EU should no longer be considered merely an economic means serving economic ends. Rather, it was a right that could be exercised as an end in itself by virtue of a person's status as an EU citizen. It followed that the right to be accompanied and joined by family members, regardless of nationality, applied to all EU citizens, irrespective of whether or not they moved in connection with the pursuit of an economic activity in another Member State.

Second, the definition of 'family members' who may enjoy free movement rights derived from the rights of EU citizens has also been enhanced. By virtue of Directive 2004/38 ([252]) ('the free movement directive'), that definition now covers both spouses and registered partners (provided that the legislation of the host Member State treats registered partnerships as equivalent to marriage). It also covers the mobile EU citizen's children under the age of 21, and those of their spouse or partner as well as dependent direct relatives in the ascending line (i.e. parents or grandparents of each member of the couple).

In addition, the free movement directive requires Member States to facilitate the entry and residence of other categories of persons such as *de facto* durable partners or other family members who, in the country from which they have come, are dependants or members of the

([251]) Council Regulation No 15 of 16 August 1961 on initial measures to bring about free movement of workers within the Community, OJ No 57, 26.8.1961, p. 1073/61; and Council Directive of 16 August 1961 on administrative procedures and practices governing the entry into and employment and residence in a Member State of workers and their families from other Member States of the Community, OJ No 80, 13.12.1961, p. 1513/61.

([252]) Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.4.2004, p. 77.

household of the EU citizen, or who have serious health conditions that strictly necessitate personal care from the EU citizen.

Although the EU legislator has progressively strengthened the free movement rights of family members, these rights have been considerably reinforced in the case-law. The Court of Justice has built on this evolved legal framework and solidified the family dimension of free movement rules through various avenues. It has consistently underlined that Member State nationals' entitlement to the company of their family members, regardless of nationality, ensures the respect for family life, as enshrined in Article 8 of the European Convention on Human Rights and Article 7 of the Charter of Fundamental Rights of the European Union (the Charter) ([253]). In addition, the Court of Justice has consistently recognised that measures restricting family members of Member State nationals from accompanying or joining nationals in a host Member State would be likely to discourage the exercise of free movement rights ([254]). The derived right of family members to accompany or join a EU citizen applies uniformly, regardless of the nationality of family members and, therefore, irrespective of whether or not they are also EU citizens.

In this respect, two cases represent particular milestones in EU citizens' journey to strengthen the right to be accompanied by family members. The first, the *Metock and Others* case ([255]), concerned the circumstances in which family members could claim to be beneficiaries of derived free movement rights – and whether these rights could be limited to family relationships that existed in another Member State before an EU citizen moved. The second, the *Coman and Others* case ([256]), concerned the definition of 'family member' – and whether the concept of 'spouse' extends to partners in same-sex marriages.

The case of *Metock and Others* was referred to the Court of Justice by the High Court of Ireland, and arose in the context of residence applications submitted by four third-country nationals, each of whom was the spouse of a mobile EU citizen. Critically, all four marriages had taken place only after the EU citizens had moved to Ireland. One applicant had been in a long-term relationship with the EU citizen before moving to Ireland. The remaining three couples had met and married in Ireland. None of the couples had previously lived together as spouses in another EU Member State, and the third-country nationals had all sought asylum in Ireland but had had their applications refused. In one case, the marriage occurred at a time when the third-country national was already subject to a deportation order requiring him to leave Ireland.

([253]) Judgments of 17 September 2002, *Baumbast and R*, C-413/99, EU:C:2002:493, paragraph 72; of 11 July 2002, *Carpenter*, C-60/00, EU:C:2002:434, paragraphs 41–43; and of 5 June 2018, *Coman and Others*, C-673/16, EU:C:2018:385, paragraphs 48–50.

([254]) Judgments of 7 July 1992, *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for the Home Department*, C-370/90, EU:C:1992:296, paragraph 20; and of 25 July 2002, *MRAX*, C-459/99, EU:C:2002:461, paragraph 53.

([255]) Judgment of 25 July 2008, *Metock and Others*, C-127/08, EU:C:2008:449.

([256]) Judgment of 5 June 2018, *Coman and Others*, C-673/16, EU:C:2018:385.

The proceedings arose because the four applicants' claims of residence rights as family members had been rejected. Relying on previous case-law ([257]), the Irish authorities had maintained that it could make the derived right of residence of family members conditional on prior lawful residence in another EU Member State. In addition, the authorities considered that a right of residence could not be conferred on an applicant who was already subject to a deportation order.

The applicants contested the refusal before the High Court of Ireland, which then sought guidance from the Court of Justice on the situations in which third-country-national family members could enjoy rights under the free movement directive. First of all, the national court asked if a Member State could limit the recognition of a derived right of residence to those family members who had been lawfully resident in another Member State. The national court sought guidance on whether a family member could be considered a beneficiary of free movement rights if the family unit only came into being after the EU citizen took up residence in the host Member State. Could such family members be considered as 'accompanying or joining' an EU citizen in the host Member State, and thus be protected by the directive? To what extent was the immigration status of the third-country nationals in question relevant to determining their rights of residence following their marriage to an EU citizen?

Before the Court of Justice, the Irish government, supported by a number of intervening Member States, had argued in favour of a more restrictive interpretation. First, it was argued that the fact that the free movement directive referred to family members accompanying or joining an EU citizen indicated that it sought to confer rights on subsisting family units who were travelling together (accompanying), or third-country national family members travelling to reunite with an EU citizen who had already moved (joining). On a literal interpretation, the concept of an accompanying or joining family member did not self-evidently include persons who were living in a host Member State before the mobile EU citizen moved there and who became a family member only after the EU citizen had taken up residence.

Nor was it self-evident from a purposive or teleological perspective that a wider interpretation of family member was necessary to safeguard free movement rights. In a number of cases, the Court of Justice has justified a broad interpretation of family residence and other derived rights because it recognised that an EU citizen would be discouraged from exercising free movement rights and moving to live in another EU Member State if they had to leave behind their spouse or registered partner. However, such considerations would not apply to EU citizens who, when considering whether or not to move, had no spouse or registered partner (or no spouse or registered partner with a right to live in the EU citizen's previous Member State of residence). A restrictive interpretation would not 'break up' family life that existed prior to their move, nor would it place the person in a worse situation than existed prior to them exercising their free movement rights.

([257]) Judgment of 23 September 2003, *Akrich*, C-109/01, EU:C:2003:491.

Ireland also contended that free movement rules could not interfere with Member States' competence to regulate immigration from third countries. It was argued that recognising the right of residence of third-country nationals who travelled directly from a third country would result in a great increase in the number of persons able to benefit from the right of residence in the Member States. At the same time, the concern was expressed that an extensive interpretation of the directive that covered family relationships created after the EU citizen's movement could encourage sham marriages between EU citizens and third-country nationals seeking a right of residence in an EU Member State.

It was also argued that an expansive interpretation could lead to mobile EU citizens being in a more advantageous situation than nationals of the host Member State, as Member States might not guarantee a parallel right of derived residence to third-country-national spouses under their own domestic immigration law.

For its part, the Commission had pleaded for a broad interpretation of the rights of family members under the directive. It submitted that the free movement directive contained no provision that would have imposed a requirement for 'prior lawful residence' as a condition for allowing a third-country national to reside with their EU spouse in a host Member State. The Commission therefore considered that such a requirement was in contradiction to the directive, the objective of which was to strengthen the freedom of movement of persons. The Commission further submitted that a broad interpretation of 'accompanying and joining' was consistent with fundamental rights. Indeed, in essence, the protection of family rights should always take place once there is a legitimate family unit – the timing or the circumstances of the formation of the unit, namely whether the marriage was contracted before or after the exercise of free movement rights, or whether the spouses previously had the opportunity to live in the EU, could be considered secondary. The Commission further recalled that the directive contained specific provisions to combat abuse, and noted that there was no doubt raised about the authenticity of the marriages in question.

The Court of Justice, in a ground-breaking judgment, favoured a broad interpretation of the concept of family member for free movement purposes.

The Court of Justice ruled that EU citizens' family members who are third-country nationals are entitled to accompany, join and reside with the EU citizen in the host Member State, regardless of whether or not they had previously been lawfully resident in another Member State and irrespective of the date or circumstances of their entry into the host Member State.

The Court also emphasised that third-country nationals are entitled to reside in the host Member State as family members of an EU citizen regardless of whether they were already family members at the time the EU citizen moved to the host Member State or became family members only after the EU citizen moved to the host Member State. The Court emphasised that a restrictive approach to interpreting EU citizens' entitlement to the company of their family

members would deter the exercise of free movement rights and thus constitute an obstacle to the exercise of fundamental freedoms guaranteed by EU law.

In reaching this conclusion, the Court of Justice drew attention to the difference between the rights of EU citizens and matters of immigration. It pointed out that the case concerned third-country nationals who were family members of EU citizens – whose legal status is distinct from that of immigrants – so their situation was regulated by free movement rules and should not be conflated with a Member State's general immigration powers. Thus the family rights attached to the fundamental status of EU citizenship meant that third-country-national family members were indirect beneficiaries of free movement rights.

A further milestone in the case-law of the Court of Justice regarding family members is the case of *Coman and Others* ([258]). In that case, the question arose as to whether the concept of spouse within the meaning of Directive 2004/38 covered same-sex spouses, even if the national law of the Member State of residence did not provide for same-sex marriages in its own legal order.

Mr Coman was a Romanian national who had entered into a same-sex marriage with a United States citizen while exercising his free movement rights (living in Brussels) and then sought to return to Romania. The provisions of the free movement directive only regulate a mobile EU citizen's movement to a Member State of which they are not a national. However, the Court of Justice had previously clarified that, by virtue of the right of free movement, as conferred by Article 21 of the Treaty on the Functioning of the European Union (TFEU), the conditions under which a mobile EU citizen returns to their home Member State following the exercise of free movement rights must be at least as favourable as those provided for under the directive. Accordingly, the Court had ruled that, in this analogous situation, the directive should be interpreted and applied by analogy.

The national authorities refused to recognise the right of residence of the applicant's spouse because they believed that he could not be considered a family member within the meaning of the free movement directive. Given that same-sex marriages were neither provided for nor recognised in Romania, the Member State argued that it was not obliged to recognise the parties to same-sex marriages as spouses within the meaning of the directive. Romania had argued that, in accordance with the principle of subsidiarity, the concept of spouse should be one of national law.

Essentially, therefore, the question which arose before the national court was whether the definition of spouse is to be understood as an autonomous – and uniform – concept under EU law, or whether that notion may vary depending on the law of the Member State hosting mobile EU citizens.

([258]) Judgment of 5 June 2018, *Coman and Others*, C-673/16, EU:C:2018:385.

Indeed, it is notable that the directive provides that the right for 'registered partners' to be treated as family members applies only if these partnerships are recognised in the national law of the host Member State. At the time the directive was adopted, registered partnerships were just developing as a form of status that was comparable to marriage, and were also available to same-sex couples. Arguably, if the EU legislator considered that the recognition of registered partnerships should be possible only if that concept was recognised in the host Member State, the same approach should also apply to marriages.

In its observations, the Commission noted that it was apparent, from the preparatory works of the free movement directive, that the intention at the time had been to limit the concept of spouse to marriages between different sexes. Indeed, in its second (amended) proposal for the free movement directive, the Commission had opted not to take up a suggestion by the European Parliament to expand the definition of spouse to include a specific reference to same-sex marriages. The Commission had explained its position on the grounds that, at the time, only two Member States had legislation for same-sex marriage and, in these circumstances, it was reluctant to impose such choice on other Member States, bearing in mind their competence in regulating family law.

However, in the *Coman and Others* case, the Commission took the view that this position ought to be reconsidered, having regard to both societal and jurisprudential developments since the free movement directive was proposed and negotiated. It further observed that the term 'spouse' is linguistically gender neutral and does not preclude a more extensive interpretation that would be in line with the rights enshrined in the Charter.

In a closely reasoned argument, the Court of Justice ruled that the concept of the spouse of an EU citizen in relation to free movement is not determined by the law of the host Member State, but is an autonomous EU law notion that applies uniformly to all EU citizens and includes same-sex spouses.

The Court of Justice clarified that Member States of course remain competent to define marriage and are free to determine whether or not to allow same-sex marriage in their own legislation. At the same time, however, the Court pointed out that national competence had to be exercised in compliance with EU law, in particular the free movement of EU citizens. Thus, the Court held, national competence did not extend to refusing to recognise marriages contracted in another Member State for the purposes of the couple enjoying the rights conferred under EU law and in the context of the exercise of free movement rights.

The Court of Justice further explained the rationale for this conclusion by referring to the need for uniform interpretation and application of free movement rights. Allowing Member States the freedom to grant or refuse residence to a third-country national married under the law of another Member State according to whether or not their national law allows marriage between persons of the same sex would mean that the freedom of movement of EU citizens would vary

from one Member State to another. This would restrict the effectiveness of the free movement rules and would thus be at odds with the directive and the Court of Justice's settled case-law. The fact that a host Member State's national rules on marriage can have no bearing on the exercise of free movement rights also means that Member States cannot, in that context, make marriages contracted in another Member State subject to a recognition procedure under national law.

3. European Union citizen children

As observed already, the right of Member State nationals to move and reside across the EU was originally intrinsically linked to the pursuit of an economic activity, as a worker, as a self-employed person or in the provision or receipt of a service. Although free movement rights later expanded to cover economically inactive persons, the exercise of that right remained subject to a requirement for self-sufficiency, namely the possession of sufficient resources and health insurance so that the mobile EU citizen would not become a financial burden to the host Member State.

Given these conditions, it was not apparent that children – who could not normally be expected to be either economically active or self-supporting – could be 'primary' (that is in their own right) beneficiaries of the right to free movement. Rather, their right appeared ancillary and connected to their status as family members of a mobile EU citizen.

Certainly, both the free movement directive and the regulation on the free movement of workers ([259]) include provisions that allow, or have been interpreted as allowing, EU citizen minors in education and their carers to retain a right of residence if, following initial entry as a family member of an EU citizen, the EU citizen has died or left the host Member State. Nevertheless, no specific rules were laid down for the autonomous exercise of free movement rights by EU citizen children.

In a number of cases, however, Member States found themselves confronted with claims from mobile EU citizen children who were neither accompanying nor joining a mobile EU citizen, but sought to rely on their status as mobile EU citizens in their own right. In practice, this kind of situation arose when an EU citizen child was cared for by parents or carers who did not possess the nationality of a Member State. This could occur, for example, if third-country nationals resident in a Member State gave birth to children who obtained the nationality of another Member State on account of their birth there (while the parents retained their initial nationality). In these cases, the EU citizen children did not have the status of a family member accompanying or joining an EU citizen within the meaning of the free movement directive.

([259]) Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, OJ L 141, 27.5.2011, p. 1.

The right of residence of such children appeared uncertain owing to how family members are defined in EU legislation. The free movement directive provides for mobile EU citizens being accompanied by family members, including children under 21 or otherwise dependent on the EU citizens. By contrast, the directive does not include parents on whom the EU citizen child is dependent among the family members with a derived right of residence. Therefore, if an EU citizen child was not in a position to fulfil the conditions for enjoying a right of residence in their own right, there is no clear legislative basis for allowing such a child to reside through their third-country-national parents or carers.

Nevertheless, in a number of jurisprudential milestones, the Court of Justice has gradually strengthened the autonomy of this right as regards children.

The first opportunity arose in the *Zhu and Chen* case ([260]), which concerned a Chinese mother who gave birth to a girl, Catherine, in Northern Ireland. As a result of Irish law in force at the time, Catherine obtained Irish nationality by virtue of her birth on the island of Ireland. The question arose as to whether baby Catherine could be considered to fulfil the requirement for legal residence of having sufficient resources, although the resources were not held personally, but placed at her disposal through her third-country-national mother. Furthermore, the question arose as to whether Catherine's third-country-national parent could claim a derived right of residence in the host Member State.

In its judgment, the Court of Justice ruled that the requirement for mobile EU citizens to possess sufficient resources can be met through means provided by third parties, such as a parent or carer. The Court of Justice reasoned that the objective of the requirement was to ensure that a mobile EU citizen did not become a financial burden to the host Member State. In these circumstances, what matters is the availability of resources, not their ownership. It follows that an EU citizen child will be considered to fulfil the sufficient resources requirement, even if those necessary resources are not held in the child's own right, but derive from a carer or sponsor. There was no legitimate reason to limit the right attached to the child's fundamental status as an EU citizen.

The Court of Justice further pointed out that, even if secondary legislation does not confer a derived right of residence on the third-country-national parent or carer of an EU citizen child, this right may, nevertheless, be derived directly from (what is now) Article 21 TFEU.

The Court of Justice has since been offered a further opportunity by Northern Ireland to refine the concept of 'sufficient resources' to be held by EU citizen children. The *Bajratari* case ([261]) required the Court to consider if national authorities assessing whether an EU citizen child possesses sufficient resources can take into account income placed at the child's disposal by a

([260]) Judgment of 19 October 2004, *Zhu and Chen*, C-200/02, EU:C:2004:639.

([261]) Judgment of 2 October 2019, *Bajratari*, C-93/18, EU:C:2019:809.

third-country-national parent that had been generated in breach of national law. In this case, it was apparent that the third-country-national parent had continued to live and work in Northern Ireland after the expiry of their residence card. The referring court asked whether, in determining if the EU citizen child had sufficient resources, account could be taken of the income obtained in the period following the expiry of the parent's right to work and which would therefore be considered unlawful.

In its observations, the intervening Member States argued, in essence, that sufficient resources could take into account only lawful income. By contrast, the applicant sought to rely on well-established case-law that holds that it is the existence of resources – and not their origin – that matters.

For its part, the Commission argued that the income should not have been considered unlawful in the first place. The Commission considered that the difficulty arose as a result of national guidance that had been intended to implement the Court of Justice's judgment in the *Zhu and Chen* case. The guidance recognised the right of a child's parent or carer to reside and work in the United Kingdom, but only if, at the time of exercising free movement rights, the child had sufficient resources in their own right.

This gave rise to a circularity – a 'chicken and egg' scenario – that could be either vicious or virtuous from the child's point of view. If an EU citizen child arrived in the United Kingdom with sufficient resources, then a parent or carer could live and work lawfully in the United Kingdom in that capacity. The income generated from the lawful work could then reinforce the child's possession of sufficient resources. However, it could also work the other way around. If an EU citizen child did not have sufficient resources when they started exercising their free movement rights, then the parent or carer could not claim a derived right to work, as the derived right was premised on the child, as the primary right holder, having previously established a lawful right of residence, which, in turn, was conditional on the child's possession of sufficient resources in their own right.

However, according to the Commission, it followed from the *Zhu and Chen* ruling that, as the EU citizen was residing in the host Member State, the third-country-national parent should have been recognised as having a right to reside and work on the basis of Article 21 TFEU. Therefore, the work undertaken by the child's parent should have been considered lawful. The Commission further stressed that the situation of an EU citizen child would be very precarious if their right to reside could be granted or withdrawn based on the status of the income placed at their disposal.

In its judgment, the Court of Justice reiterated its case-law, according to which the application of free movement directive depends on an individual having sufficient resources, without laying down any requirement whatsoever as to the origin of those resources. Moreover, the objective of this requirement is to ensure that a mobile EU citizen does not become an unreasonable financial burden on the host Member State. In these circumstances, there is no basis to imply

other requirements not provided for in relevant EU rules, such as the nature of the resources placed at the disposal of the EU citizen child. The Court of Justice further observed that, in the case at issue, the work itself was not unlawful (i.e. it was not a question of income characterised as proceeds of crime), and the third-country-national parent had paid tax and social security contributions on the income received.

Of course, there may be occasions when an EU citizen child is unable to comply with the sufficient resources requirement, either in their own right or through their third-country-national carers. The question then arises as to what happens in such cases. In that context, the Court of Justice has held that the failure to comply with the conditions for residence laid down in the free movement directive may permit the removal of the child to the Member State of their nationality, on the understanding that, in such cases, the child is permitted to reside there and therefore to continue to reside in the territory of the EU ([262]). However, removal would be precluded if, based on the particular facts of the case, there was no real prospect of return to the child's state of nationality and the removal would effectively result in their expulsion from the EU, thereby preventing the child from genuinely enjoying the substance of their EU citizenship rights ([263]).

Looking beyond the determination of sufficient resources, the Court of Justice has had the opportunity to consider the rights of EU citizen children in other free movement contexts. In particular, in a series of cases relating to the registration of children's names, the Court of Justice has underlined that national administrative rules must be able to take sufficient account of the situation of EU citizen children in free movement.

In the case of *Garcia Avello* ([264]), the Belgian authorities had refused to register the double surname (that is the names of both parents) of a child of dual Belgian and Spanish nationality, born and living in Belgium, on account of a national rule that permitted only a single surname to be registered. Following a challenge to the refusal, the issue was referred to the Court of Justice for a preliminary ruling. In its judgment, the Court of Justice noted that the child in question was a Spanish national residing in Belgium and therefore fell within the scope of application of EU law. The Court of Justice also considered that the application of the national rule was likely to have a particularly disadvantageous effect on mobile EU citizen children, who may have a double surname registered in another Member State, as it would result in them having different surnames registered in different Member States. By contrast, the Member State's own nationals (whose names had to be registered in only a single Member State) were not disadvantaged in the same way. The Belgian rule was therefore considered discriminatory and contrary to the child's status as an EU citizen. Essentially, the Court of Justice reasoned that the situation

([262]) Judgment of 15 November 2011, *Dereci and Others*, C-256/11, EU:C:2011:734.

([263]) Judgments of 13 September 2016, *Rendón Marín*, C-165/14, EU:C:2016:675; and Judgment of 10 May 2017, *Chavez-Vilchez and Others*, C-133/15, EU:C:2017:354.

([264]) Judgment of 2 October 2003, *Garcia Avello*, C-148/02, EU:C:2003:539.

of children should not be worse on account of the fact that their parent has exercised free movement rights.

A similar issue arose subsequently in the *Grunkin and Paul* case ([265]), concerning one Member State's non-recognition of the double name of a child that had been registered in another Member State. Here too, the Court of Justice ruled that having different surnames in different Member States, and the resulting administrative difficulties, was likely to make the exercise of free movement rights more difficult. Although the Court of Justice did not consider the non-recognition to be a matter of discrimination, the Court found that it impeded free movement rights and therefore was contrary to (what is now) Article 21 TFEU.

The administrative rules regarding the registration of an infant's birth were recently considered again, in the landmark *V.M.A.* case ([266]). This case concerned the EU citizen child of a same-sex female couple, one of Bulgarian nationality and the other British, who, exercising their rights of free movement, lived in Spain, where the child was born. The child's birth certificate was issued by Spain and attested to a parent–child relationship with both mothers. Although the child was considered to have Bulgarian nationality by the referring court, the Bulgarian administrative authorities had refused to issue the child with a Bulgarian birth certificate (which was a precondition for obtaining a Bulgarian identity document, in turn an indispensable tool for the exercise of free movement rights). The authorities' refusal was based on the view that the relevant application form was incomplete. The form in question had only one box for 'mother' and another for 'father', and only one name could appear in each box. Under these conditions, the Bulgarian authorities maintained that the form could not be considered complete unless the 'biological' mother's name was specified. However, the parents of the EU citizen child refused to specify which of them was the biological mother, considering that they were not required to disclose this information under national law. For their part, the Bulgarian authorities contended that Bulgarian law does not recognise same-sex marriages and the reference to two female parents on a birth certificate was contrary to the public policy of Bulgaria, which does not permit marriage between two persons of the same sex.

The Bulgarian mother issued proceedings against the refusal to issue the birth certificate before a national court, which, in turn, sought guidance from the Court of Justice on whether such refusal was compatible with EU law. In particular, the question arose as to whether the failure to issue the child with a certificate breached their rights as an EU citizen and, in particular, their right to freedom of movement.

([265]) Judgment of 14 October 2008, *Grunkin and Paul*, C-353/06, EU:C:2008:559.

([266]) Judgment of 14 December 2021, *Stolichna obshtina, rayon 'Pancharevo'*, C-490/20, EU:C:2021:1008.

In its judgment, the Court of Justice pointed out that, as an EU citizen, the child in question was a beneficiary of free movement rights under EU law.

The Court proceeded to rule, in line with the approach put forward by the Commission in its observations, that Member States are required to issue their citizens with an identity card or a passport stating their nationality and surname as it appears on the birth certificate drawn up by the authorities of a Member State. The Court drew attention to the fact that the obligation to grant this document derives from the free movement directive independently of the issue of a new birth certificate in the Member State of nationality, and decreed that a Member State cannot refuse to grant an identity card or passport on the basis of national rules regulating the delivery of birth certificates.

The Court of Justice further pointed out that, even if the child had not been an EU citizen, they would have derived free movement rights as a family member of an EU citizen. The Court of Justice noted that it was not contested that the Spanish authorities had lawfully established that there was a parent–child relationship, biological or legal, between the EU citizen child and the two parents. It followed that Member States are required, for the purpose of the exercise of rights arising from EU law, to recognise them as parents (and primary carers) of an EU citizen who is a minor, in accordance with Article 21 TFEU and Directive 2004/38. In other words, Member States are required to consider the child as the 'descendant' of, and their non-EU mother as the spouse of, the Bulgarian mother within the meaning of the free movement directive, and to impose no further conditions (such as the issuance of a national birth certificate or a recognition procedure under national law). This, in turn, implies that each parent has the right to move and reside freely with their child within the territory of the Member States.

The Court of Justice also recalled that restrictions on free movement can be imposed only in conformity with fundamental rights. The present case concerned a family, whose life was therefore protected under Article 7 of the Charter. Therefore, it was essential to interpret the situation in a manner that respected the right to family life, and to consider the fact that the right of free movement includes the right to conduct a normal family life in the host Member State. In addition, the Court found that the protection of the child's best interest under Article 24(2) of the Charter prevented a Member State from making the free movement of children excessively difficult on the ground of their parents' sexual orientation.

4. Tracing the edges of free movement

Although the facts of the various citizenship cases considered in the previous section are diverse, it is worth highlighting a feature that they share. The cases typically seek guidance at the frontiers of citizens' free movement rights. Thus, for example, questions on whether a third-country national spouse must be recognised as a family member if the marriage takes place after the EU citizen has moved to a new Member State, or inquiries on the extent to which a parent of an EU citizen child must be recognised as having a right to reside to enable that child's free movement, typically require the Court of Justice to trace the limits of EU citizenship and free movement rights.

Given the extent of the rights of residence and to equal treatment attached to EU citizenship, there is much at stake for the individuals and families who seek to rely on them. EU citizens and families who cannot successfully demonstrate their status as beneficiaries of free movement rights risk finding themselves in a more challenging and precarious legal environment.

In principle, it is not possible for EU citizens to invoke EU rights that were conceived in the context of free movement in order to displace and override less protective national provisions that apply in purely domestic contexts. Indeed, were it possible for EU rules to be generally invoked and applied to override national law whenever it happens to be more advantageous to a party, regardless of whether the situation objectively falls within the scope of the EU treaties, it would suggest the EU legal order's failure to respect its own limits.

The most obvious example of individuals whose situations lie just beyond the borders of free movement rights are families in which the EU citizen is 'static', not having moved between Member States.

That said, if viewed from outside the lens of the EU's constitutional law and competences, it can seem unjust that a mobile EU citizen who has been residing in another Member State can rely on a clear and enforceable (EU law) right to have the company of their third-country national spouse if a national of the same Member State who has never moved and falls outside the scope of the EU free movement rules may not have this right under national law.

This problem has been referred to as 'reverse discrimination' because EU citizens who are non-nationals are seemingly treated more favourably than nationals of the host Member State despite their situations being factually comparable.

There are also other contexts in which individuals may risk being left out in the legal cold because their situation evolves and drops outside the scope of EU rules. A vulnerable category in this respect is third-country-national family members of an EU citizen. It is well established that such third-country nationals derive their rights of residence and to equal treatment from their relationship of proximity with the mobile EU citizen they are accompanying or joining.

Although the case-law has strengthened family rights, they remain derivative, secondary and ancillary in nature. In the event of the death of the EU citizen or a family breakdown ending the relationship with the EU citizen, the rights of third-country nationals who have made a life in a host Member State risk being affected or even withdrawn.

A further case in which the situation of individuals and family members risks evolving outside the scope of EU law occurs when EU citizens who have exercised free movement rights become so integrated in their host Member State that they acquire its nationality. The question has arisen as to whether persons in these cases can continue to benefit from free movement rights, or whether the acquisition of nationality means that they are now in a purely internal situation (i.e. they are a national residing in their own Member State).

Each of these scenarios arising in the borderlands of EU free movement law has posed challenges in practice. In a number of cases, the Court of Justice has successfully nuanced or at least softened the dividing line to varying degrees. Each case will be considered in turn.

4.1. Mitigating reverse discrimination against static European Union minor citizens

First, regarding the situation of reverse discrimination, the Court of Justice has openly acknowledged in its judgment in *Metock and Others* that persons residing in the same Member State may be subject to different rules, depending on whether or not they fall within the scope of free movement rules. This is the inevitable consequence of the co-existence of EU and national rules within the Member States.

At the same time, the Court of Justice has, to some extent, mitigated the effects of these parallel regimes through a broad interpretation of the scope of EU rules, protecting a broader range of EU citizens in cases in which a difference in treatment was felt to be unfair to them. Thus, the Court has consistently held that nationals of a Member State can rely on EU law against their own Member State if they have exercised free movement rights and seek to return to that Member State.

In addition, as regards static EU citizen children, the Court of Justice has accepted that citizenship status can imply that EU citizen children have the right to be accompanied by parents on whom they are dependent in their own Member State, similarly to the entitlements of a minor EU citizen exercising free movement rights in that same Member State. In the leading case of *Ruiz Zambrano* ([267]), the Court of Justice recognised that depriving a static minor EU citizen of the right of residence of their parent and carer would, in effect, deprive the minor of genuinely enjoying the substance of their EU citizenship rights.

([267]) Judgment of 8 March 2011, *Ruiz Zambrano*, C-34/09, EU:C:2011:124.

The right recognised in the *Ruiz Zambrano* judgment can also be read as a form of preventative protection – afforded even before EU minors are able to exercise the rights attached to their citizenship status. Indeed, this approach preserves the possibility for EU citizens to grow up fully enjoying the rights and possibilities that their citizenship entails, including the right to travel, the learning of the language of their Member State of nationality, the development of identity and the sense of belonging as an EU citizen.

4.2. Residence rights of non-European-Union spouses in the context of family breakdowns

Second, regarding the situation of family members, both the EU legislator and the Court of Justice have taken steps to reinforce the rights of family members, in particular those who are third-country nationals and therefore depend on an EU citizen for the right of residence under free movement rules. The free movement directive contains express provisions to ensure that, in certain contexts, families of EU citizens who have died or departed, including in the context of family breakdown, can retain the right of residence in their host Member State.

The Court of Justice has also clarified that as regards the free movement rights of spouses, in particular, the rights subsist for as long as the marriage lasts in law. This approach is intended to protect the spouse by providing a measure of legal certainty as to how long the residence right lasts and also a measure of extended protection (until the very end of the relationship) so that a *de facto* breakdown and separation does not remove a third-country national's free movement rights.

Of course, the protection provided by that interpretation is dependent on the EU citizen remaining in the host state. If, on the other hand, the EU citizen leaves before legal steps for terminating the marriage are taken, then the (formally still married) spouse normally does not retain the right of residence (unless they have acquired permanent residence in the meantime). The unfortunate flip side of treating a *de facto* separated couple as a family unit in law became apparent in the cases of *Singh and Others* ([268]) and *NA* ([269]).

In the *Singh and Others* case, the applicants were third-country nationals who were spouses of EU citizens and found themselves in a precarious situation following the breakdown of their relationships. In each case, the EU citizen had left the host Member State in the period after the relationship had broken down, but before the legal termination of the marriage or registered partnership was sought. Given that the right of residence of third-country nationals is intended to allow the family unit to remain together in a host Member State, the right ceases whenever the EU citizen leaves the state. Until the formal termination of the marriage or partnership, EU law treats the relationship as subsisting; therefore, the law presumes that the family would

([268]) Judgment of 16 July 2015, *Singh and Others*, C-218/14, EU:C:2015:476.

([269]) Judgment of 30 June 2016, *NA*, C-115/15, EU:C:2016:487.

wish to remain together. Consequently, the third-country nationals were considered to have lost their right of residence in the host Member State as soon as the EU citizen spouses they were accompanying left the host Member State. In this context, the question arose as to whether the individuals concerned could nevertheless claim an autonomous right of residence in the host Member State.

In its judgment, the Court of Justice confirmed the position that a spouse or registered partner remains a family member until the formal termination of the marriage or registered partnership. In practice, this means that, if an EU citizen leaves the host Member State following a relationship breakdown, the third-country national must either follow their estranged spouse in free movement or leave the EU (unless they can qualify for a right of residence under local immigration rules). A non-EU spouse would have an autonomous right of residence in the host Member State only if the EU citizen spouse had left following the initiation of divorce proceedings and, even then, only if the marriage subsisted for at least 3 years, at least 1 year of which was spent in the host Member State.

The particularly serious nature of these effects became apparent in the *NA* case, in which the applicant claimed to have been a victim of domestic violence perpetrated by her EU citizen spouse, who had left just before the initiation of divorce proceedings. The imposition of the 'fiction' of continued family life meant that the departure of the mobile EU citizen was likely to trigger the loss of NA's residence rights under the directive – although, on the facts of that case, it was held that she could remain in her capacity as the parent and carer of an EU citizen in education.

The Court of Justice has expressly recognised the potential vulnerability of third-country-national spouses who are victims of domestic violence, as their residence is dependent on a mobile EU citizen and they may be subject to blackmail or threats of divorce. On that basis, it clarified in the judgment of *X* v *Belgian State* ([270]) that the rights of third-country-national spouses in these situations are to be interpreted broadly, so as not to contravene the relevant rules' objective of protecting victims of domestic violence, such that autonomous residence rights may subsist even if the EU citizen leaves prior to the initiation of divorce provided that divorce proceedings are initiated within a reasonable period following this departure.

4.3. Naturalisation

The third scenario in which beneficiaries of EU law risk evolving out of free movement rights is when mobile EU citizens have become so integrated in the host Member State that they have acquired its nationality. In these cases, the question arises as to whether such citizens remain 'free movers' or whether their situation may now be considered purely internal to a single Member State, as they are now persons residing in their country of nationality.

([270]) Judgment of 2 September 2021, *Belgian State (Droit de séjour en cas de violence domestique)*, C-930/19, EU:C:2021:657.

This question arose for consideration in the *Lounes* case ([271]), which concerned a Spanish national, Ms Ormazabal, and her third-country-national husband, Mr Lounes. Ms Ormazabal had moved to live and work in the United Kingdom, and subsequently acquired British citizenship. Some time after acquiring her second nationality, she married Mr Lounes, who, in turn, claimed a residence right in the United Kingdom as a family member of an EU citizen. The application was rejected on the ground that, following his wife's naturalisation, Mr Lounes was not the spouse of a mobile EU citizen (but rather the spouse of a British citizen living in the United Kingdom). Therefore, his situation could now be considered a wholly internal United Kingdom matter rather than a cross-border EU matter, thus not giving rise to a right of residence under the free movement directive. The national court sought guidance from the Court of Justice as to whether a person in the situation of the applicant in the main proceedings could be considered a beneficiary of the free movement directive.

In its judgment, the Court of Justice agreed, in essence, that an EU citizen's acquisition of the nationality of their host Member State entails a change in their status. Following naturalisation in that state, the EU citizen is no longer resident in a Member State other than that of which they are a national, and therefore is no longer a beneficiary of the free movement directive. Nevertheless, the matter did not end there, and the Court of Justice proceeded to examine the situation directly from the perspective of the EU treaties, that is the right of free movement as embodied in Article 21 TFEU.

The Court of Justice noted, in particular, that, prior to naturalisation, Mr Lounes' wife had exercised her free movement rights. Indeed, it was precisely the exercise of these rights that facilitated the integration that led to her naturalisation. Moreover, the Court of Justice had previously recognised that a link with EU law exists in circumstances in which a national of one Member State resides in another Member State (of which they also have the nationality). Indeed, the Court of Justice considered that an alternative (restrictive) approach would undermine the effectiveness of Article 21 TFEU: it would lead to a situation in which a person who, in reality, had exercised their free movement rights was treated in the same way an own national who never left his country of origin. The Court of Justice further stated that the underlying logic of 'gradual integration' that informs Article 21 TFEU would be subverted if the achievement of further integration through naturalisation led to the denial of the rights associated with free movement.

([271]) Judgment of 14 November 2017, *Lounes*, C-165/16, EU:C:2017:862.

5. Conclusion

It is apparent from the cases considered above that the Court of Justice, one case at a time, has considerably strengthened the free movement rights of EU citizens and their family members, in particular the more vulnerable ones, since EU citizenship status was first established 30 years ago.

Although there have been occasional changes and corrections in course, there is now a substantial body of case-law that, when viewed as a whole, is remarkably coherent. The free movement rights of third-country-national family members necessarily remain derived and secondary in nature, but their scope has been enlarged and their autonomy expanded. In addition, the Court of Justice has consistently advanced interpretations of EU law that strengthen the autonomous free movement rights of EU citizen children.

Moreover, in clarifying the scope of the rights in EU law, the Court of Justice has had to touch on areas that have traditionally been considered reserved for the Member States – such as immigration policy, civil status and family law. In dealing with these cases, the Court of Justice has had to reconcile the need to ensure respect for EU law provisions on EU citizenship and the rights attached to that status with the need to respect and preserve the right of Member States to adopt rules and policies that reflect their national priorities and values. In this respect, it is apparent from the cases considered in this chapter that the Court of Justice has striven to ensure that national competences are limited only to the extent necessary to safeguard the effectiveness of the rights conferred directly on EU citizens by the treaties.

REGULATING DATA PROTECTION IN A RAPIDLY CHANGING TECHNOLOGICAL ENVIRONMENT

Antonios Bouchagiar and Herke Kranenborg

1. Introduction

Whether the law manages to keep pace with technological developments is a recurrent topic in almost every field of law. However, that challenge is particularly pertinent in the field of data protection law, given the ever-growing amount of personal data that is exchanged through modern technologies.

In the EU Charter of Fundamental Rights (the Charter), Articles 7 and 8 grant every person the right to privacy and the right to protection of their personal data. Although Article 8 of the Charter contains some indications of what the right to data protection entails, further EU legislation was clearly needed to regulate the matter. The EU has several acts in place, with the general data protection regulation (GDPR) ([272]) being the most comprehensive and well known.

The EU data protection rules are drafted in what is referred to as a technologically neutral manner. This was already the case with the earlier Directive 95/46/EC ([273]), and the same approach is taken in the current GDPR, which replaced Directive 95/46/EC in 2018. The rules are worded in general terms and do not target specific technologies. This allows the rules to stay relevant when new technologies are developed.

But, obviously, more generally formulated norms lead to questions when they are applied in practice. It is no surprise that, after only a few years of the GDPR's application, the Court of Justice is already flooded with preliminary references from national courts asking how provisions of the GDPR must be interpreted in particular practical situations, including situations involving new technologies.

([272]) Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1.

([273]) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, p. 31.

Owing to the general terms used in the GDPR, it is up to the Court of Justice to uphold the relevance of the EU data protection rules in changing societal circumstances and with ongoing technological developments. The Court of Justice's ability to do so was already clear under Directive 95/46/EC. This directive was adopted when the internet and mobile telephony were still in their infancy. The digitalised information society as we know it today, with its social networks, information-sharing platforms and apps with business models based on collecting personal data, was still many years away.

This chapter discusses how the Court of Justice has interpreted EU data protection law in relation to the challenges raised by four developments: search engines (Section 2), cookies (Section 3), social networks (Section 4) and the widespread presence of cameras (Section 5). These cases were mainly dealt with under the provisions of Directive 95/46/EC, but, in all cases, the provisions discussed are more or less equivalent to those of the GDPR (both instruments will be referred to as 'the EU data protection rules' hereafter).

2. Search engines: the *Google* cases

Those who remember the internet of the 1990s will recall that search engines were not as efficient then. The results were not always very pertinent to the search terms. Therefore, internet users often had to know the uniform resource locator (URL) ([274]) of the specific website they wished to visit in order to type it directly into their browser. To draw an analogy, it was as if the only way to call someone was to know their telephone number and manually dial it on the telephone.

However, in the years that followed, internet search engines improved considerably, with Google taking a leading role. The algorithms of search engines have become so advanced that nowadays internet users rarely type a website's URL in their browser. Instead, they just 'google' that website by typing one or more relevant words in their preferred search engine, after which the relevant link appears and one only has to click on it to access the site.

However, the advanced efficiency of search engines also applies to searching specific individuals by their name.

An internet user can obtain a rather complete profile of any individual by simply taking two seconds to type that individual's name in the search box.

The EU data protection law of 1995 (Directive 95/46/EC) had to be interpreted in a manner that effectively safeguarded the right to data protection even in such a context. This turned out to be quite a challenge. So far, the Court of Justice has

([274]) For example, the URL of the European Commission's website is https://ec.europa.eu/

faced four cases concerning the Google search engine and the rights of individuals on whom information is sought. One of these cases was still pending at the time of writing. In the first two rulings in these cases, discussed in the following Sections 2.1 and 2.2, the Court of Justice laid the foundations of the now well-known 'right to be forgotten' and identified important responsibilities of the operators of search engines.

2.1. The first *Google* case: the introduction of the 'right to be forgotten'

The first *Google* case concerned a Spanish national who complained that, when one 'googled' his name, the list of search results included links to an announcement of an old real-estate auction in the context of recovery of social security debts.

The announcement had been published by the daily newspaper *La Vanguardia* by order of the Ministry of Labour to gain maximum publicity for the auction and thus secure as many bidders as possible. However, the complainant argued that, as those proceedings had been fully resolved more than 10 years ago, the reference to that announcement in Google's search results had become entirely irrelevant. On that basis, the complainant asked Google to remove or conceal his personal data so that the data would no longer be included in the search results ([275]).

First, the Court of Justice considered whether a search engine such as Google 'processes' personal data and whether it qualifies as a 'controller' of personal data in order to fall within the scope of the EU data protection rules.

These two key notions have traditionally been given a wide interpretation to ensure the effective and complete protection of personal data in the EU. Therefore, 'processing' includes almost any conceivable kind of operation performed on personal data, such as collection, recording, organisation, storage, alteration, retrieval, consultation, use, transmission and dissemination – it even includes restriction, erasure or destruction of personal data ([276]). The 'controller' is the person who determines the purposes and means of the processing, and therefore they are the primary addressee of the obligations under the GDPR ([277]). In other words, the controller is primarily responsible for complying with the data protection rules. The controller can be a natural or legal person; moreover, they can be a private or public person.

In the *Google* case, the Court of Justice faced two opposing arguments as to whether search engines process personal data and whether they should be considered controllers of these data. On the one hand, Google argued that search engines do not process personal data and that they do not control these data anyway, because they process all the information available

([275]) The factual background of the dispute is described in further detail in paragraphs 14–20 of the judgment of 13 May 2014, *Google Spain and Google*, C-131/12, EU:C:2014:317.

([276]) See Article 4(2) GDPR.

([277]) See Article 4(7) GDPR.

on the internet without choosing between personal data and other information ([278]). On the other hand, the complainant, several Member States and the European Commission argued the opposite based on the wide interpretation of the two notions ([279]).

The Court of Justice ruled in favour of the wide interpretation, emphasising the need to ensure the effective and complete protection of the natural persons concerned ([280]).

In the first place, the Court of Justice found that search engines process personal data in exploring the internet automatically, constantly and systematically in search of the information that is published there, as they collect these data; subsequently retrieve, record and organise them with their indexing programmes; store them on their servers; and eventually disclose them to their users through the list of search results. Whether or not search engines distinguish between personal data and other information on the internet was not relevant to the Court of Justice. Neither was the fact that the personal data were already published on the internet and were not altered by the search engine ([281]).

In the second place, the Court of Justice found that search engines are controllers of personal data ([282]). Of course, search engines are not responsible for all the information that is available on the internet, but they are responsible for the personal data they process in the context of their own activity. The Court of Justice stressed that the processing of personal data by search engines is distinguishable and additional to that carried out by publishers of websites ([283]). The Court of Justice took a realistic view on the important role of search engines in the dissemination of the personal data that may be found on various websites, as the search engines render these data easily accessible to any internet user performing a search based on an individual's name. Therefore, search engines lead to the significant additional exposure of personal data to the public and allow internet users to easily profile specific individuals by googling their names ([284]).

Indeed, in the absence of search engines, internet users would have to access a given website directly by typing its URL in order to access personal data possibly located on that website. Therefore, to find information concerning a specific individual, an internet user would have to spend significant time and effort accessing several websites, some of them relevant while others not so relevant. However, search engines enable the profiling of individuals through a simple search for their name, which takes only a few seconds.

([278]) Judgment of 13 May 2014, *Google Spain and Google,* C-131/12, EU:C:2014:317, paragraph 22.

([279]) Judgment of 13 May 2014, *Google Spain and Google,* C-131/12, EU:C:2014:317, paragraph 23.

([280]) Judgment of 13 May 2014, *Google Spain and Google,* C-131/12, EU:C:2014:317, paragraphs 30, 34 and 38.

([281]) Judgment of 13 May 2014, *Google Spain and Google,* C-131/12, EU:C:2014:317, paragraphs 25–31.

([282]) Judgment of 13 May 2014, *Google Spain and Google,* C-131/12, EU:C:2014:317, paragraphs 32–40.

([283]) Judgment of 13 May 2014, *Google Spain and Google,* C-131/12, EU:C:2014:317, paragraphs 35 and 38.

([284]) Judgment of 13 May 2014, *Google Spain and Google,* C-131/12, EU:C:2014:317, paragraphs 36–37.

The Court of Justice addressed the privacy challenges of that new technology by considering operators of search engines to be responsible for the processing of personal data in the context of their activity, and therefore subjecting them to the obligations of the EU data protection rules. Nevertheless, the Court of Justice noted that operators of search engines were responsible for ensuring that their activity complies with the data protection rules 'within the framework of [their] responsibilities, powers and capabilities' ([285]). That expression seems to place an outer limit on the responsibility of operators of search engines to comply with the EU data protection rules, but the precise delineation of that outer limit is still under discussion in a subsequent case ([286]).

After the Court of Justice concluded that search engines are controllers in the processing of personal data, and therefore that they fall within the scope of the EU data protection rules, the Court went on to examine the precise obligations that a search engine bears when an individual requests 'to be forgotten'.

Google argued that such a request should be addressed to the website publisher because that publisher is responsible for making the information public, is in a better position to appraise the lawfulness of the publication and can easily make the information inaccessible ([287]). However, the complainant, several Member States and the European Commission argued that search engines could be obliged to de-reference personal data from the search results without having to approach the website publisher, and irrespective of whether the data were published lawfully and whether they still appeared on the original web page ([288]).

The Court of Justice recognised that individuals have the right to object to their personal data appearing in the list of search results by invoking the circumstances surrounding their particular situation. In the case in question, the complainant had argued that the proceedings for recovery of social security debts had been resolved a long time ago, and therefore the links in the search results leading to the announcement of the real estate auction on the newspaper's website were no longer relevant.

For example, the operator of the search engine will have a commercial interest in processing the personal data in order to profit from higher advertising revenues, and other internet users have an interest in receiving the information sought, an interest that is protected under the right to freedom of expression as laid down in Article 11 of the Charter.

When individuals invoke their right to be forgotten, a balance must be found between, on the one hand, the individual's privacy interests and, on the other hand, the interests of the search engine and other internet users.

([285]) Judgment of 13 May 2014, *Google Spain and Google,* C-131/12, EU:C:2014:317, paragraph 38.

([286]) See, for example, *Google (Déréférencement d'un contenu prétendument inexact)*, C-460/20, case ongoing.

([287]) Judgment of 13 May 2014, *Google Spain and Google,* C-131/12, EU:C:2014:317, paragraph 63.

([288]) Judgment of 13 May 2014, *Google Spain and Google,* C-131/12, EU:C:2014:317, paragraph 65.

However, the Court of Justice made it clear that, owing to the seriousness of the interference that the activity of search engines has with an individual's privacy, the search engine's economic interest alone is not sufficient to justify the interference. For the same reason, the Court of Justice held that, in principle, the individual's privacy interests prevail over the internet users' interest in receiving the information. The Court of Justice emphasised that 'googling' an individual's name can be highly intrusive, as it enables any internet user to easily profile specific individuals. The list of results allows anyone to obtain a structured overview of the information relating to a specific individual that can be found on the internet, which might concern many aspects of their private life and, without the search engine, could not have been interconnected or could only have been interconnected with great difficulty. Furthermore, the intrusive effects are exacerbated in view of the important role in modern society played by the internet and search engines, which render the information contained in a list of results ubiquitous ([289]).

The outcome of the balancing will nevertheless depend on the circumstances of each case. The possibly sensitive nature of the personal data for the individual's privacy would push the balance towards that individual's privacy interests, whereas the possible role played by an individual in public life would push that balance towards the internet users' interest in receiving the information ([290]).

The Court of Justice also noted that the operator of a search engine may be obliged to de-reference personal data from the search results irrespective of whether the original web page still displays that data and whether the publication on the original web page was lawful ([291]). That interpretation of EU law addresses the challenges of the globalised nature of information on the internet. Information on one website can easily be replicated on several other websites around the world. Moreover, the publisher of a given web page may not be subject to EU law and therefore it may be difficult for an individual to enforce their data protection rights against that publisher in practice. Furthermore, even if subject to EU law, the publisher may be allowed to process the personal data for journalistic purposes (e.g. the website of a newspaper), whereas that consideration would not normally apply to search engines ([292]).

Last, but certainly not least, the Court of Justice dealt with the core question of whether individuals have the 'right to be forgotten' whereby their personal data should be de-referenced from search results simply because a certain period has passed, even if they do not show that the information is prejudicial to them. The Court of Justice answered that question in the affirmative. It noted that even lawful processing of accurate data may, over the course of time, become incompatible with the EU data protection law if those data are no longer necessary

([289]) Judgment of 13 May 2014, *Google Spain and Google,* C-131/12, EU:C:2014:317, paragraphs 80–81 and 87.

([290]) Judgment of 13 May 2014, *Google Spain and Google,* C-131/12, EU:C:2014:317, paragraph 81.

([291]) Judgment of 13 May 2014, *Google Spain and Google,* C-131/12, EU:C:2014:317, paragraphs 83–87.

([292]) The territorial effects of a successful right to be forgotten were discussed in the third Google case before the Court of Justice (judgment of 24 September 2019, *Google (Territorial scope of de-referencing),* C-507/17, EU:C:2019:772). In short, de-referencing should be carried out in all Member States, but not necessarily worldwide.

in view of the purposes for which they were initially collected. This is particularly the case when time has rendered the data inadequate, irrelevant or excessive. Moreover, the individual requesting to be forgotten does not need to show that including the personal data in the list of results causes prejudice against them ([293]).

Of course, the abovementioned balancing of the various interests at issue must take place. In the case in question, the Court of Justice indicated that, given the sensitive nature of the data on the complainant's social security debts and the fact that the initial publication on the newspaper's website had taken place 16 years earlier, the balance tilted in favour of the complainant's privacy interests. The complainant therefore had the 'right to be forgotten' from Google's search results ([294]).

2.2. The second *Google* case: balancing sensitive personal data and the public's right to receive information

In the second *Google* case, the Court of Justice reiterated several of the principles it established in the first *Google* case. However, the balancing of the various interests at issue in the second *Google* case involved particularly delicate considerations on both sides of the scale.

On the one hand, the personal data appearing in the list of results constituted 'sensitive' data covered by Articles 9(1) and 10 GDPR. Those provisions regulate very strictly the processing of sensitive personal data, which are data that may, for example, reveal racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership; genetic, biometric and health data; data concerning a natural person's sex life or sexual orientation; and data relating to criminal convictions and offences. The processing of such data is prohibited in principle, unless one of the situations listed in those provisions applies.

On the other hand, the personal data appeared in press articles that dealt with matters of public interest, such as local politics, corruption charges against political parties, a suicide in the Church of Scientology and a criminal case regarding the sexual assault of children. Moreover, some of the individuals whose data were revealed held public office or other positions implying a degree of public exposure at the time of the events described.

More specifically, the four complainants at issue had asked Google to de-reference links to ([295]):

— a satirical photomontage implying an intimate relationship between the first complainant and a mayor;

([293]) Judgment of 13 May 2014, *Google Spain and Google,* C-131/12, EU:C:2014:317, paragraphs 92–96.

([294]) Judgment of 13 May 2014, *Google Spain and Google,* C-131/12, EU:C:2014:317, paragraphs 97–98.

([295]) For further details, see paragraphs 24–28 of judgment of 24 September 2019, *GC and Others (De-referencing of sensitive data),* C-136/17, EU:C:2019:773.

— a newspaper article concerning the suicide of a member of the Church of Scientology and mentioning the second complainant as a public relations officer of that church;

— press articles concerning a judicial investigation into the funding of a political party in which the third complainant was questioned and ultimately discharged, although the articles were published before that outcome and thus did not mention it; and

— newspaper articles mentioning several intimate details about the fourth complainant that were revealed at a criminal hearing in which the fourth complainant was sentenced to imprisonment for the sexual assault of children.

In view of the above circumstances, the Court of Justice again had to strike a balance between, on the one hand, the individuals' rights to privacy and data protection under Articles 7 and 8 of the Charter and, on the other hand, the internet users' right to receive information under Article 11 of the Charter.

Google sought to be exempted from the GDPR's strict conditions regarding processing sensitive data, arguing that a search engine cannot easily assess the sensitivity of the personal data appearing in the search results, which include links to various web pages for which Google is not responsible. However, the Court of Justice ruled that a search engine such as Google is bound by the specific rules on processing sensitive data ([296]).

Nevertheless, the Court of Justice placed the situation within the framework of the responsibilities, powers and capabilities of search engines, which cannot be compared with the responsibility, power and capabilities of the publisher of a website to which the search results refer. The operators of search engines are not responsible for the sensitive personal data that may appear on a given web page, but they are responsible for referencing that web page and displaying the relevant link in the list of search results following a search based on an individual's name. It is in the context of the latter responsibility that search engines must assess and verify de-referencing requests by individuals ([297]).

Although the individual's consent could be a possible ground for processing sensitive personal data in theory, which is one of the situations in which the prohibition of processing personal data is lifted, in practice, it is obviously unrealistic to expect search engines to obtain the consent of the enormous number of individuals that their search results possibly concern. In any event, a de-referencing request means that the individual in question has withdrawn any consent given. However, consent is not the only situation in which the prohibition is lifted ([298]). Processing

([296]) Judgment of 24 September 2019, *GC and Others (De-referencing of sensitive data)*, C-136/17, EU:C:2019:773, paragraph 45.

([297]) Judgment of 24 September 2019, *GC and Others (De-referencing of sensitive data)*, C-136/17, EU:C:2019:773, paragraphs 45–48.

([298]) Judgment of 24 September 2019, *GC and Others (De-referencing of sensitive data)*, C-136/17, EU:C:2019:773, paragraph 62.

sensitive data may also take place if an individual has manifestly made the data public themselves. Depending on the circumstances, this could be relevant to the Google situation. However, the individual in question can still object later by submitting a de-referencing request to the search engine based on specific grounds relating to their particular situation ([299]).

The Court of Justice considered that, in any event, a balance should be found between, on the one hand, the fundamental rights to privacy and personal data in Articles 7 and 8 of the Charter, and, on the other hand, the fundamental right to freedom of information in Article 11 of the Charter. The Court of Justice applied the same balancing test as in the first *Google* case, but was faced with more nuanced circumstances. Unlike in the first *Google* case, in which the Court of Justice concluded rather clearly in favour of privacy, in the second *Google* case, the Court faced circumstances of significant weight on both sides of the scale. Therefore, the Court of Justice left the conclusion of the balancing test in such delicate cases open, so that national courts are able to strike the right balance in view of the specific circumstances of the case in front of them. Nevertheless, the Court of Justice stressed that the sensitive nature of the personal data on one side of the scale, and the interest of the public to receive newsworthy information on the other side, are important considerations in this balancing exercise ([300]).

Moreover, the Court of Justice very usefully noted that, even if a search engine can reject a request for de-referencing in view of the public's right to receive information, the search engine may still be obliged to adjust the list of results so that it displays the links with the most recent information on the story first ([301]). For example, in principle, a news article explaining that a person was discharged from criminal proceedings should appear before an older article describing their prosecution.

Thus, next to the 'right to be forgotten', the Court of Justice also established at the very least the 'right to be accurately remembered'.

3. Not all cookies are tasty: the *Planet49* case

Cookies are files that a website provider stores on the device of an internet user who visits that website. The user's device is often a computer, but it may be another device such as a smartphone or tablet. The stored cookies allow the website provider to receive data from the user, which can be used to the user's benefit (e.g. by facilitating navigation on the website) or for purposes that are not always to the user's benefit, such as tracking their online behaviour.

([299]) Judgment of 24 September 2019, *GC and Others (De-referencing of sensitive data)*, C-136/17, EU:C:2019:773, paragraphs 63–65.

([300]) Judgment of 24 September 2019, *GC and Others (De-referencing of sensitive data)*, C-136/17, EU:C:2019:773, paragraphs 66–68.

([301]) Judgment of 24 September 2019, *GC and Others (De-referencing of sensitive data)*, C-136/17, EU:C:2019:773, paragraphs 76–78.

Although some internet users do not mind cookies that track their behaviour and may see added value in receiving targeted advertisement based on this tracking, other internet users take issue with website providers tracking their online behaviour. This is why consent is of paramount importance in these situations, and why storage of these cookies has been made subject to consent in specific data protection rules for the telecom sector ([302]).

In the *Planet49* case, the Court of Justice had to express itself on the notion of 'consent' in relation to cookies. *Planet49* organised a promotional lottery on a website in which internet users would enter their names and addresses. The users faced two tick boxes. The first box concerned the user's agreement to receive commercial information from a list of 57 companies. It was not preselected, but it was necessary to select it in order to participate in the lottery. The second box was preselected and it concerned the user's agreement for Planet49 to place cookies on the user's browsing device ([303]). The referring court asked whether internet users had provided valid consent for cookies to be stored on their device in those circumstances.

The Court of Justice stated that consent could not be validly provided through preselected tick boxes, as consent must be provided through the user's active behaviour.

In response, the Court of Justice interpreted EU law in a manner that protects individuals' privacy by making sure that they genuinely consent to the storage of cookies. Active behaviour could consist of ticking a box. However, the passive behaviour of not unticking a preselected box cannot be considered consent, as consent must be given unambiguously ([304]).

Indeed, it is impossible to know with certainty that an internet user has actually consented to the processing of personal data by not unticking a preselected box. It is also impossible to know that such consent is informed. The user may have simply omitted to read the information accompanying the preselected tick box, or not even have noticed that box, before continuing with their activity on the website ([305]).

Moreover, the consent must be specific in the sense that it must relate to the processing of the data in question and cannot be inferred from an indication of the internet user's wishes for other purposes. Therefore, the fact that the user would tick the first box to participate in the promotional lottery could not establish valid consent ([306]).

([302]) The ePrivacy Directive (Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201, 31.7.2002, p. 37 (as amended)), which particularises and complements the old Directive 96/46/EC, and now the GDPR.

([303]) The factual background of the case is described in further detail in paragraphs 25–36 of the judgment of 1 October 2019, *Planet49,* C-673/17, EU:C:2019:801.

([304]) Judgment of 1 October 2019, *Planet49,* C-673/17, EU:C:2019:801, paragraphs 49–65. See also recital 32 GDPR.

([305]) Judgment of 1 October 2019, *Planet49,* C-673/17, EU:C:2019:801, paragraphs 54–55.

([306]) Judgment of 1 October 2019, *Planet49,* C-673/17, EU:C:2019:801, paragraphs 58–59.

Finally, the Court of Justice explained that internet users must receive clear and comprehensive information on the cookies to be stored on their devices, which means that the user should be able to easily determine the consequences of any consent they may give. The information must be easily comprehensible and sufficiently detailed to enable the user to understand the functioning of the cookies employed. In the case in question, in which the cookies aimed to collect information for advertising purposes relating to the products of partners of the organiser of the promotional lottery, the internet users should have been informed of the duration of the cookies' operation and whether or not third parties might have access to those cookies ([307]).

Although it was discussed at the hearing, the Court of Justice ultimately decided not to deal with the sensitive question of whether the condition that consent must be freely given was met in that situation. This question relates to the widespread annoyance, that in order to access a website, the visitor is in fact obliged to accept cookies. It is a complex discussion, as the internet user is, in principle, free to decide whether to visit a website. In other words, if you do not want to accept cookies, you simply do not visit the website. As the question was not raised by the referring national court, the Court of Justice decided to postpone the discussion for the time being ([308]).

4. Facebook fan pages and social plug-ins

Social networks have become a common feature of the internet. With almost 3 billion active monthly users at the time of writing, Facebook is among the most popular social networks. The workings of social networks have effects on other parts of the internet in such a way that it is not always clear whether and how other websites are linked to the social network. For example, such a link may be clear if businesses create 'fan pages' on Facebook in order to promote their goods and services. However, the link may be less clear if businesses embed the 'like' social plug-in offered by Facebook on their own (external) website, which allows their products to gain popularity among Facebook users. The link to Facebook may be even less clear if the external website uses pixels that are not even visible to visitors of that website.

These structures raise the question of who is responsible for the processing of personal data of internet users. EU law has been interpreted with a view to ensuring the effective protection of personal data in these situations, as illustrated by the two rulings of the Court of Justice discussed in Sections 4.1 and 4.2.

([307]) Judgment of 1 October 2019, *Planet49,* C-673/17, EU:C:2019:801, paragraphs 74–75.

([308]) Judgment of 1 October 2019, *Planet49,* C-673/17, EU:C:2019:801, paragraph 64. In his opinion, the Advocate General concluded that, in the case at issue, consent could be seen as freely given (Opinion of Advocate General Szpunar delivered on 21 March 2019 in *Planet49*, C-673/17, EU:C:2019:246, paragraphs 94–99).

4.1. The *Wirtschaftsakademie* case: Facebook fan pages

Wirtschaftsakademie offered educational services through a 'fan page' on Facebook. Fan pages are a tool Facebook provides for businesses that wish to promote their services. Both Facebook users and internet users outside that network can visit the fan page.

Administrators of fan pages can obtain anonymous statistical information on their visitors from Facebook free of charge. Facebook collects these data using cookies, which are active for two years and stored on the hard disk of the computer or other device (e.g. smartphone) of visitors to the fan page ([309]).

In that context, the question arose of how far Wirtschaftsakademie, as administrator of the fan page, was responsible for protecting the personal data of the visitors to that page. In other words, the question was whether Wirtschaftsakademie could be considered the controller of the processing of the personal data, which was in fact performed by Facebook.

In a judgment emphasising the need for effective and complete protection of personal data, the Court of Justice ruled that administrators of fan pages were indeed the controllers of the personal data of their visitors.

The Court of Justice noted that personal data may be 'jointly' controlled by several entities, in the case at issue Facebook and the administrator of the fan page. Of course, the primary controller of the data was Facebook, but that did not exempt Wirtschaftsakademie from any role in controlling its visitors' data. Administrators of fan pages conclude a standard contract with Facebook in which they agree with Facebook's policy on cookies. Although the data processing takes place mainly through the cookies that Facebook places on the visitors' devices in order to improve its advertising system, the administrator of a fan page still plays a role in directing those visitors' data to Facebook. By creating a fan page, the administrator attracts interested visitors, who may or may not be registered Facebook users, and thus enables Facebook to place cookies on their devices in order to collect their personal data. This makes the administrator of a fan page crucially different from a regular user of Facebook who merely has a Facebook account. The regular user would not be responsible for personal data collected by Facebook, as they do not actively enable Facebook to place cookies on other users' devices ([310]).

Moreover, the administrator of a fan page could ask Facebook to process the demographic data of its target audience, such as trends in terms of age, sex, relationship and occupation; information on their lifestyles and interests, their online purchasing habits and their preferred categories of goods and services; and geographical data that tell the administrator where to make special offers and where to organise events. Although the administrator would receive

([309]) The factual background of the case is described in further detail in paragraphs 14–23 of the judgment of 5 June 2018, *Wirtschaftsakademie Schleswig-Holstein,* C-210/16, EU:C:2018:388.

([310]) Judgment of 5 June 2018, *Wirtschaftsakademie Schleswig-Holstein,* C-210/16, EU:C:2018:388, paragraphs 26–35.

that data from Facebook in anonymised form, Facebook still processes a large amount of personal data to provide that anonymous information to the administrator of the fan page. Therefore, in a way, administrators of fan pages ask Facebook to process that personal data in order for them to receive the valuable anonymous information that helps them target their audience. This request, together with their abovementioned role in directing visitors' personal data to Facebook, makes them controllers of the personal data, even if they do not process the personal data themselves ([311]).

Based on the above, the Court of Justice decided that the administrator of a fan page is responsible for Facebook's processing of the personal data of its visitors. If the visitor is not a Facebook user, the administrator is all the more responsible, as the visitor's mere consultation of the fan page starts Facebook's processing of their personal data ([312]). Nevertheless, the Court of Justice also clarified that the administrator's responsibility is not necessarily equal to that of Facebook, which is the primary controller of the visitor's personal data ([313]).

Therefore, EU law ensures the complete protection of individuals visiting a Facebook fan page, while still pragmatically allocating the share of responsibility between Facebook and the administrator of a fan page.

4.2. The *Fashion ID* case: Facebook social plug-ins

Fashion ID was an online clothing retailer that operated its own website (separate from Facebook's infrastructure) with the 'like' social plug-in of the Facebook social network embedded on it. That plug-in transmitted to Facebook the personal information of visitors of Fashion ID's website, regardless of whether the visitor was a Facebook user and whether the visitor had clicked the 'like' button ([314]).

In the *Fashion ID* case, the Court of Justice reiterated several of the principles established in the *Wirtschaftsakademie* case, clarifying them in a setting in which the potential controller was not the administrator of a Facebook fan page but the operator of an independent website that nevertheless contained the 'like' plug-in.

In this setting, the Court of Justice found that Fashion ID was a controller of data, but only regarding the processing of the personal data for which it was actually responsible: the personal data of visitors to its website that were collected and transmitted to Facebook. By contrast,

([311]) Judgment of 5 June 2018, *Wirtschaftsakademie Schleswig-Holstein,* C-210/16, EU:C:2018:388, paragraphs 36–39.

([312]) Judgment of 5 June 2018, *Wirtschaftsakademie Schleswig-Holstein,* C-210/16, EU:C:2018:388, paragraph 41.

([313]) Judgment of 5 June 2018, *Wirtschaftsakademie Schleswig-Holstein,* C-210/16, EU:C:2018:388, paragraphs 30 and 43.

([314]) The factual background of the case is described in further detail in paragraphs 25–41 of the judgment of 29 July 2019, *Fashion ID,* C-40/17, EU:C:2019:629.

Fashion ID was not responsible for any subsequent processing of that data by Facebook, which appeared to be outside Fashion ID's control ([315]).

The processing of the personal data for which Fashion ID was responsible served the commercial interests of both Fashion ID and Facebook, which were joint controllers of the data. Fashion ID agreed to embed the social plug-in to increase the publicity of its goods by making them more visible on Facebook when a visitor to its website clicked the 'like' button. Facebook could use the personal data transmitted through the plug-in for its own commercial purposes, which was actually its consideration for the benefit to Fashion ID ([316]). In this part of the judgment, the Court of Justice interestingly seems to recognise that Fashion ID paid for a promotional service with data (albeit other persons' data); therefore, the service only appeared free.

The Court of Justice also stressed that the collection and transmission of personal data concerned not only Facebook users who visited Fashion ID's website, but also visitors who were not Facebook users, and even visitors who did not click the 'like' button. In fact, the visitor was not necessarily aware that their data were collected and transmitted to Facebook when they merely visited Fashion ID's website. The Court of Justice recalled that Fashion ID's responsibility as a controller was even greater regarding visitors who were not Facebook users ([317]).

In those circumstances, Fashion ID was responsible for obtaining the consent of its visitors prior to the collection and transmission of their data to Facebook, and for informing them of that processing ([318]).

5. The ubiquitous use of cameras

Another challenge of modern technology is the presence of cameras in everyday life. Anyone can easily purchase a home surveillance camera online for a relatively cheap price and, in any event, anyone can record a video at any moment thanks to the camera on their smartphone. Therefore, individuals may be video-recorded without consent, and sometimes without even being aware of it. These videos are shared easily with large groups of persons on platforms such as YouTube and social networks such as TikTok.

The evolution of EU data protection law endeavours to respond effectively to these challenges. In the two cases analysed in Sections 5.1 and 5.2, the Court of Justice interpreted EU law in a manner that strikes a fair balance between the opposing interests at stake. In the *Ryneš* case, the balance had to be struck between the right of an owner of a home surveillance camera to protect the safety of their family and property, and the privacy rights of individuals who expect

([315]) Judgment of 29 July 2019, *Fashion ID*, C-40/17, EU:C:2019:629, paragraphs 73–84.

([316]) Judgment of 29 July 2019, *Fashion ID*, C-40/17, EU:C:2019:629, paragraph 80.

([317]) Judgment of 29 July 2019, *Fashion ID*, C-40/17, EU:C:2019:629, paragraphs 75 and 83.

([318]) Judgment of 29 July 2019, *Fashion ID*, C-40/17, EU:C:2019:629, paragraphs 100–105.

not to be filmed in public spaces. In the *Buivids* case, the Court of Justice examined whether a video of police officers uploaded on YouTube amounted to a journalistic activity and how this activity should be reconciled with the privacy rights of the filmed persons.

5.1. The *Ryneš* case: home surveillance cameras

Mr Ryneš installed a camera system in his home to protect his family and property given that they had been subject to attacks, such as broken windows, by persons he did not know and could not identify. The camera was installed in a fixed position capturing the entrance to his home, the public footpath and the entrance to the house opposite. The recording was only visual (no sound) and was stored as a continuous loop, meaning that once the camera's hard drive reached full capacity it would record over the existing recording, thus erasing the old material. The images could not be studied in real time and, moreover, only Mr Ryneš had access to the recording ([319]).

After the camera was installed, a further attack took place in which the perpetrator broke a window using a shot from a catapult. However, this time, the camera system made it possible to identify two suspects. The recording was handed over to the police and relied on in the course of the subsequent criminal proceedings.

Nevertheless, during the criminal proceedings, one of the suspects requested confirmation that Mr Ryneš' camera system was lawful. This led to a decision by the data protection authority that Mr Ryneš had infringed data protection law.

In subsequent litigation against that decision, the national court asked the Court of Justice whether the case fell within the scope of the EU data protection rules, which explicitly exclude the processing of personal data 'by a natural person in the course of a purely personal or household activity' ([320]).

The Court of Justice explained that a person's image is personal data, and therefore video-recording constitutes automatic processing of their personal data ([321]). Then, the Court went on to examine whether the exception for a 'purely personal or household activity' applied to the case at issue.

Emphasising the need for a high standard of protection of personal data in the EU, the Court of Justice favoured a narrow interpretation of that exception. Activities that stay within the purely private sphere, such as keeping correspondence and address books, fall within the exception of a 'purely personal or household activity'. However, in the case in question, the camera was

([319]) The factual background of the case is described in further detail in paragraphs 13–17 of the judgment of 11 December 2014, *Ryneš*, C-212/13, EU:C:2014:2428.

([320]) See Article 3(2) of Directive 96/46/EC and Article 2(2)(c) GDPR.

([321]) Judgment of 11 December 2014, *Ryneš*, C-212/13, EU:C:2014:2428, paragraphs 21–25.

not pointed solely towards the private setting of Mr Ryneš' home, but also covered a public space, namely the public footpath and the entrance to the house opposite. This video-recording affected the privacy of any person who passed by those public spaces and was consequently recorded by the camera system. Therefore, it did not fall within the exception for a 'purely personal or household activity' ([322]).

Nevertheless, it is important to note that the fact that such video-recording falls within the scope of the GDPR does not necessarily lead to a breach of the GDPR, as this is a different question that will depend on the individual circumstances of each case. Therefore, the Court of Justice clarified that it was necessary to take into account Mr Ryneš' legitimate interests, such as the protection of the property, health and life of his family and himself ([323]).

5.2. The *Buivids* case: filming the police and uploading the video on YouTube

Mr Buivids recorded a video in a police station in Latvia while he was making a statement in the context of administrative proceedings against him, and subsequently uploaded it on YouTube. The video showed the police facilities and a number of police officers performing their duties. It was possible to hear the conversation with the police officers, which was recorded while they were carrying out procedural matters, and to hear the voices of the police officers, Mr Buivids and the person accompanying him.

Subsequently, the data protection authority decided that Mr Buivids had breached data protection law and requested that he remove the video from YouTube. In the ensuing litigation, the question arose as to whether Mr Buivids' freedom of expression or the police officers' right to privacy should prevail ([324]).

The Court of Justice found that both video-recording the police officers and uploading the video to YouTube constituted automatic processing of those officers' personal data, and therefore fell within the scope of the EU data protection rules. Moreover, in view of the publication of the video on YouTube, where an indefinite number of internet users could access it, Mr Buivids' actions could not fall within the exception of a 'purely personal or household activity'. The fact that the video depicted police officers performing their duties did not mean that the processing fell outside the scope of the EU data protection rules, given that those rules do not contain any exception concerning processing the personal data of public officials ([325]).

([322]) Judgment of 11 December 2014, *Ryneš*, C-212/13, EU:C:2014:2428, paragraphs 26–33.

([323]) Judgment of 11 December 2014, *Ryneš*, C-212/13, EU:C:2014:2428, paragraph 34.

([324]) The factual background of the case is described in further detail in paragraphs 15–26 of the judgment of 14 February 2019, *Buivids*, C-345/17, EU:C:2019:122.

([325]) Judgment of 14 February 2019, *Buivids*, C-345/17, EU:C:2019:122, paragraphs 30–46.

Nevertheless, the fact that Mr Buivids' actions fell within the scope of the EU data protection rules did not mean that he had breached them, as this is a different question. In that regard, a balancing had to take place between Mr Buivids' right to freedom of expression and the police officers' rights to privacy and personal data. In that context, the question came up as to whether Mr Buivids could be considered to have processed the police officers' personal data for journalistic purposes. The meaning of this notion is important because the EU data protection rules allow Member States to put in place deviating rules if they are necessary to reconcile the right to data protection with the right to freedom of expression, including processing for journalistic purposes.

The Court of Justice favoured a broad interpretation of the term 'journalistic purposes' that includes not only media undertakings, but also every person engaged in journalism. A journalistic activity's purpose must be the disclosure to the public of information, opinions or ideas, irrespective of the medium used to transmit them. Therefore, the fact that Mr Buivids transmitted the video by uploading it to YouTube did not make this less of a journalistic activity than traditional journalism, such as television news and newspapers. Nor did the fact that he was not a professional journalist exclude him from acting in the pursuit of journalistic purposes when recording the video in the police station and uploading it to YouTube ([326]).

Therefore, the medium used to transmit the information could be classic in nature, such as paper or radio waves, or electronic, such as the internet, without it determining whether the activity was undertaken for journalistic purposes ([327]). However, the Court of Justice noted that this broad interpretation of journalism could not mean that all information published on the internet was part of a journalistic activity ([328]).

In making that analysis, the Court of Justice showed the importance of keeping pace with fast technological developments in view of the evolution and proliferation of methods of communication and the easy dissemination of information through the internet.

Ultimately, the national court had to strike that delicate balance by determining whether the purpose of the recording and publication of this video was to disclose information, opinions or ideas to the public. Nevertheless, the Court of Justice noted that the national court should take into account Mr Buivids' claim that he had published the video on YouTube to draw society's attention to police malpractice, which he alleged occurred while he was making his statement. The national court should also take into account certain criteria developed by the European Court of Human Rights, namely whether the video contributed to a debate of public interest; the degree of notoriety of the person affected; the subject of the news report; the prior conduct of the person concerned; the content, form and consequences of the publication; and the manner

([326]) Judgment of 14 February 2019, *Buivids*, C-345/17, EU:C:2019:122, paragraphs 50–55.

([327]) Judgment of 14 February 2019, *Buivids*, C-345/17, EU:C:2019:122, paragraphs 56–57.

([328]) Judgment of 14 February 2019, *Buivids*, C-345/17, EU:C:2019:122, paragraph 58.

and circumstances in which the information was obtained and its veracity. The possibility of Mr Buivids' taking measures to mitigate the interference with the police officers' right to privacy should also be taken into account ([329]).

6. Concluding remarks

In any area of law, but particularly data protection law, not lagging behind societal and technological developments is a real challenge. The EU data protection rules are drafted in a technologically neutral manner, containing clauses formulated in general terms. This allows the rules to stay relevant when new technologies are developed. Owing to the general terms used in the GDPR, it is up to the Court of Justice to uphold the relevance of the EU data protection rules in changing societal circumstances and with ongoing technological developments.

The cases discussed show that the Court of Justice has so far managed to interpret the data protection rules in a way that ensures they remain a relevant legal framework. When looking at the approach of the Court in the cases discussed, it becomes clear that the Court always takes the objective of ensuring effective and complete protection of the fundamental rights and freedoms of natural persons as a starting point of its analysis, in particular their right to privacy with respect to the processing of personal data.

The Court of Justice will continue to face new challenges, not only because of the increasing number of cases in the field of data protection, but also because of the ever-advancing technological developments. Although in secure hands, it remains to be seen how long the Court can continue to uphold the relevance of the EU data protection rules. For example, already in the cases discussed, it has become clear that the Court is struggling to provide clear guidance on how to allocate the responsibilities of the different actors involved in the current information society. Of course, when the Court of Justice reaches the limits of how the data protection law can be interpreted, it will be the EU legislator's turn to take on that responsibility by designing rules that effectively address new technological challenges.

([329]) Judgment of 14 February 2019, *Buivids*, C-345/17, EU:C:2019:122, paragraph 59–69.

FROM AN ECONOMIC COMMUNITY TO A UNION FOR ITS CITIZENS

Isabel Galindo Martín, Gaëtane Goddin, Bernd-Roland Killmann, Denis Martin, Barbara Rous, Napoleón Ruiz García, Anna Szmytkowska, Freya van Schaik and Hubert van Vliet

1. Introduction – 'from the unthinkable to tangible rights, and beyond'

Back in 1952, a young woman who was a national of one Member State and wanted to work in another would have had to overcome a number of obstacles before her dream could come true. She is likely to have faced several hurdles just to be able to enter and remain in the other Member State to search for a job. If she managed to find work, she would still have had to obtain a work permit. Had her plan been to also keep working in her Member State of origin, she would have been faced with the prospect of paying social security contributions in both states.

If she managed to overcome these hurdles, and get a job in another Member State, she might have found that the working time conditions and her right to annual leave, representation and protection in the event of her role being transferred to another company or the insolvency of her employer were very different from those in her home country. And as a woman, she would not have been guaranteed the right to receive pay equal to that of her male colleagues. Not only that, but she could have found herself suffering discrimination on the grounds of her age, possible disability, sexual orientation or religion without legal protection.

This young woman, if she had heard of Erasmus at all, is likely to have known him only as a Dutch philosopher and renowned scholar. The idea that she could enjoy rights as a consumer was probably no more than wishful thinking, and food laws where she lived might be very different from those prevailing in the country where she spent her holidays. If she acquired a food-borne disease on holiday and needed medical treatment, then it would probably cost her more than the holiday itself.

In 2022, like most students, our protagonist can easily live her dream of going 'on Erasmus', or working in Lisbon despite coming from Helsinki. Her right to export, that is carry with her, to any Member State the social security benefits enjoyed in the Member State of employment is now enshrined in EU law, as is her right not to be discriminated against in her working environment on the basis of her sex, ethnic origin, religion, sexual orientation, age or possible disability. She can even take for granted something as simple as having her family doctor's prescription

dispensed in another Member State while on holiday, something that would not have been possible back in 1952. Now, not only can she buy Finnish food products in Lisbon, but she benefits from a high level of protection of consumer rights across the EU. She can be confident that her risk of a food-borne illness is low, as food, like other goods, wherever it is bought or consumed in the EU, is guaranteed to be safe. Food packaging carries accurate information about the content, enabling her to choose products that meet her personal ethical preferences and dietary requirements, whether she is vegan or someone who eats meat but likes it to be organic.

All these rights have become a reality because the European Economic Community, and subsequently the EU, has increasingly placed the citizen at the heart of the 'process of creating an ever closer union among the peoples of Europe', and through the implementation of the common market, secured a growing level of protection for all citizens in many areas.

The examples that will be analysed below show how EU law and the case-law of EU courts have brought about this process of transformation in all these fields.

But to achieve the objective of putting the citizen at the centre of the European project, some work remains to be done. In particular, the goal calls for initiatives to address new ways of living and of working, to further strengthen patients' rights in the digital age and in post-COVID-19 pandemic Europe, to finally close the gender pay gap while guaranteeing a work–life balance for all, to ensure that consumers are protected and can enforce their rights in an increasingly digitalised world and to ensure that food is not only safe but also healthy and produced and packaged sustainably.

2. From workforce to European Union citizens

2.1. Free movement of workers

Article 69 of the Treaty establishing the European Coal and Steel Community (ECSC Treaty) of 1952 established the free movement of workers, but the right was limited to the coal and steel sector. This provision of the ECSC Treaty was the forerunner of a more general provision in the Treaty establishing the European Economic Community (EEC Treaty) of 1957, and that provision remained, in essence, unchanged until the Treaty on the Functioning of the European Union (TFEU) enshrined, in Article 45, the principle as it stands today.

In the 1950s, workers were just another economic resource, like capital, the other production factor subject to free movement. The aim was to eliminate discriminatory provisions in the legislation of Member States. This, it was hoped, would prevent a migrant worker from another Member State being treated more severely than a national would in the same circumstances, and avoid putting a migrant worker in an unfavourable situation in law or in fact. The efficient

allocation of the workforce was premised on the idea that workers should not be deterred from leaving their own Member State to work in another Member State.

With this logic in mind, it is evident that the principle of free movement was intended to prevent discrimination based on nationality. The concept of discrimination seemed to be limited to unequal treatment that directly or indirectly affected persons of different nationalities. It appeared that a worker having the nationality of the Member State in which they worked would be outside the scope of the free movement of workers, and therefore the protection against discrimination as intended under the treaties. Indeed, Article 45(2) TFEU generally does not prevent a Member State from treating its own nationals less favourably than the nationals of other Member States, given that such difference in treatment does not fall within the scope of EU law. But what about nationals who have exercised their right to free movement? Might they be deterred from returning to their own Member State by the possibility of being disadvantaged compared with those who never left?

This question arose in the *Singh* case. In this case, the United Kingdom had argued that nationals who return to their home Member State after a period spent working abroad could not claim to benefit from rights under the treaty since, unlike nationals of another Member State, their right to enter and remain in their own country was regulated solely by national law. However, the Court of Justice pointed out that the scope of the free movement of persons goes beyond merely making labour available to the Member States, but consists in the abolition of all obstacles to the establishment of a common market. The core principle underlying free movement rights is that nationals of one Member State should be able to move freely within the territory of all Member States in order to pursue their economic activities. The only way to achieve this aim, the Court of Justice held, is to prohibit any measure that would deter nationals from returning to their home Member State under conditions at least equivalent to those granted to nationals of other Member States ([330]).

Clearly, the free movement of workers would not be fully realised if the Member States could refuse to grant the benefit of the provisions of EU law to those of their nationals who had taken advantage of the treaty's guarantee to be free to work in another Member State. It has now been established that returning EU citizens can rely on the rules relating to the free movement of workers to bring a case against their home Member State and claim to be subject to discrimination relative to their fellow nationals ([331]).

The Court of Justice, in pointing out that the free movement of workers is not about the availability of the workforce, but about the right of the person to choose freely their place of work, placed the person at the centre of free movement rights, even before and independently of the creation of citizenship of the EU.

([330]) Judgment of 7 July 1992, *The Queen* v *Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for the Home Department*, C-370/90, EU:C:1992:296.

([331]) See the recent judgment of 12 May 2021, *CAF*, C-27/20, EU:C:2021:383.

2.2. Social security coordination

Before the signing of the EEC Treaty in Rome in 1957, the six founding Member States had already realised that social security rules were needed to render the movement of workers between their territories a realistic option for their nationals.

With that objective in mind, they had negotiated an international convention that was incorporated into what was only the third regulation to be adopted after the entry into force of the original EEC Treaty ([332]). That regulation was adopted on the basis of (what was then) Article 51 EEC Treaty, which required the European legislator to set up a system to enable workers to overcome obstacles to free movement in national social security rules. The treaty never envisaged the creation of a harmonised set of social security rules, but only the coordination of national schemes.

Article 51 EEC Treaty, which is now Article 48 TFEU, listed expressly the two elements that the European legislator was required to include in such a regulation: the aggregation of all periods of employment undertaken in more than one Member States, and the payment of benefits to persons resident in the territories of the Member States (i.e. the export of those benefits).

The principle of aggregation is fundamental to ensuring the effective exercise of the free movement rights of workers. Its purpose is to unify the worker's career in two or more Member States.

The second principle is that of the export of benefits. It is based on the same logic and follows the same objective. The plaintiffs in the *Hoever and Zachow* case were a German couple who lived in the Netherlands. The woman was unemployed, but the man was in full-time employment in Germany. After their son was born, she applied for a family benefit in Germany, but her request was rejected on the grounds that she resided and had her habitual place of residence in the Netherlands. In its judgment, the Court of Justice notably held that EU legislation 'is intended in particular to prevent Member States from making entitlement to and the amount of family benefits dependent on residence of the members of the worker's family in the Member State providing the benefits, so that Community workers are not deterred from exercising their right to freedom of movement. Consequently, it would be contrary to [that] purpose … to deprive a worker's spouse of a benefit to which he or she would have been entitled if the spouse had remained in the State providing that benefit' ([333]).

Furthermore, the Court of Justice twice stressed the vital importance of the principle of aggregation as a necessary corollary to the fundamental right to free movement guaranteed by the treaties.

([332]) Regulation No 3 on social security for migrant workers, OJ 30, 16.12.1958, p. 561/58. That regulation was repealed and replaced by Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, OJ L 149, 5.7.1971, p. 2, which contained more sophisticated and detailed provisions.

([333]) Judgment of 10 October 1996, *Hoever and Zachow v Land Nordrhein-Westfalen*, Joined Cases C-245/94 and C-312/94, EU:C:1996:379.

The *Vougioukas* case concerned a doctor who worked for a public hospital in Greece but had previously worked for some time in Germany. His application for his periods of service as a doctor in German public hospitals to be recognised as pensionable service in Greece was rejected by the competent Greek social security institution on the grounds that, at that time, the European legislator had not yet extended the material scope of the then applicable rules to a special scheme of benefits for 'civil servants'. He therefore could not claim the benefit of the principle of aggregation enshrined in the regulation on social security coordination. Although recognising that the limitation was due to the existence of considerable differences between the national schemes at the time of adoption of the rules then in force, the Court of Justice nevertheless held that the existence of these technical difficulties could not justify indefinitely the lack of any coordination of special schemes for civil servants. It therefore held that, in the absence of a specific provision in the regulation, Mr Vougioukas could base his claim for an aggregation of periods of employment directly on the treaty provisions guaranteeing his fundamental right to free movement ([334]).

The judgment in the *Elsen* case is even more remarkable. In 1981, Mrs Elsen, a German national, moved from Germany to France, where she then lived with her husband and their son, born in 1984. She had ceased engaging in an occupational activity subject to compulsory social security insurance in Germany and remained economically inactive in France. Mrs Elsen asked the German social security institution to take the time she spent raising her son into consideration as periods of insurance for the purpose of qualifying for an old-age pension. Her request was refused on the ground that she had raised her child abroad and the conditions that would have allowed this period of economic inactivity to be treated as a time of child-rearing in Germany had not been fulfilled. However, the Court of Justice held that provisions of EU legislation coordinating social security 'undoubtedly help to ensure freedom of movement not only for workers … but also for citizens of the Union, within the Community' ([335]). The Court took this approach even though, at the time, the European legislator had not yet extended the personal scope of the rules applicable to the coordination of social security systems to EU citizens who exercise their right to free movement as economically inactive citizens. That extension was not achieved until 2004, when Regulation (EC) No 883/2004 ([336]) on the coordination of social security systems was adopted.

The regulations on the coordination of social security legislation are often dubbed the 'natural companions' of the right to free movement. Without them, that right could often remain in practice dead letter. The regulations' periodic amendment to take into account new ways of exercising the right to free movement, coupled with the Court of Justice's case-law, which is very protective of EU citizens, has enabled the continuous enhancement of the right to free movement of all EU citizens.

([334]) Judgment of 22 November 1995, *Vougioukas v Idryma Koinonikon Asfalisseon*, C-443/93, EU:C:1995:394.

([335]) Judgment of 23 November 2000, *Elsen*, C-135/99, EU:C:2000:647.

([336]) Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, 30.4.2004, p.1.

2.3. Labour law

The original EEC Treaty of 1957, in Article 118, envisaged the task of promoting close cooperation in social matters, particularly relating to labour law and working conditions. However, at that time, the task was limited in that it entrusted the Commission with preparing studies, delivering opinions and arranging consultations on problems arising at national level.

Later, when Europe's post-war economic boom came to an abrupt end in the 1970s, unemployment started to rise and the need for adequate protection of workers through labour law hit the political agenda. The original EEC Treaty did not cover standardisation of labour and working conditions as such, only the promotion of the common market. However, in the light of the social unrest that was typical of these years, the Commission tabled the first proposals for directives aimed at standardising labour law in the Member States. The directives, when finally adopted ([337]), exhibited a common pattern: the aim, first and foremost, was to strengthen the functioning of the common market, namely by helping undertakings to restructure, under comparable conditions throughout the EU, to better address economic shocks. Today, by contrast, the directives focus on improved working conditions as an expression of a social policy, as promoted by Article 153 TFEU, which is centred around the life of a person and the dignity of work.

A case in point is Directive 80/987/EEC on the protection of employees in the event of the insolvency of their employer. The directive ensures payment of employees' outstanding claims in the event that their employer becomes insolvent. To this end, it requires Member States to set up an institution to guarantee such payments.

At the time the directive was proposed in 1978 ([338]), the idea of developing such a mechanism to standardise the functioning of a market seemed quite daring. The Commission stressed that the proposal served to avoid 'social disequilibrium' throughout Europe. Undertakings that had failed because of the economic downturn throughout Europe were trying to open insolvency procedures in those Member States where the legal framework was assessed to be most favourable to laying off workers without resistance from trade unions. This was potentially the case in those Member States that already had a guaranteeing institution in place.

([337]) Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies, OJ L 48, 22.2.1975, p. 29 (now Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, OJ L 225, 12.8.1998, p. 16); Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, OJ L 61, 5.3.1977, p. 26 (now Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 82, 22.3.2001, p. 16); and Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, OJ L 283, 28.10.1980, p. 23 (now Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer, OJ L 283, 28.10.2008, p. 36).

([338]) European Commission, Proposal for a Council directive on the approximation of the laws of the Member States concerning the protection of employees in the event of the insolvency of their employer, COM(78) 141 final.

The directive gave rise to the famous *Francovich* case on state liability. The case arose because a Member State had failed to transpose Directive 80/987/EEC into its national law. The failure to implement the directive meant that the institution guaranteeing payments for workers of insolvent undertakings had not been established. The Court of Justice held that, in the absence of such an institution, the Member State, being in breach of its obligations to transpose the directive, was to be held liable for the outstanding payments. State liability for this directive led to a situation in which equal protection for workers throughout the EU reigned ([339]).

Surprisingly, although pursuing the aim of strengthening the common market, the directive lacked provisions covering cross-border situations. It seems as if the directive, in establishing equal conditions for insolvent undertakings in the different Member States, overlooked the fact that undertakings and their employees could find themselves in cross-border situations. It became apparent that, just as managers 'shopped around' to find the best legal framework for their undertaking in the event of insolvency, its workers might have an incentive to try to access the institution guaranteeing their payments in the Member State with the most favourable conditions.

In the *Mosbæk* case, a worker residing and working in one Member Sate for a company that was established in another Member State tried to access the guaranteeing institution of her own Member State despite the fact that she received directions and salary from the undertaking in the other Member State. The Court of Justice was required to resolve cross-border issues, as the directive contained no relevant provisions. Analysing the purpose of the directive, the Court ruled that the competent Member State was that in which the insolvency proceedings were opened or, where applicable, the Member State in which it had been established that the employer's undertaking or business had closed ([340]).

The European legislator reacted to the gap that had become apparent by introducing a new provision on how to deal with the insolvency of undertakings that operated in at least two Member States. The provision determined that the guaranteeing institution was to be identified by reference to the Member State in which the workers habitually carried out their tasks ([341]).

The legal basis for the amendment was the then new social policy provision introduced by the Treaty of Maastricht in 1993, preceding today's Article 153 TFEU. Through this amendment it became clear that workers – rather than undertakings – were to be placed at the heart of the directive. It seems no coincidence that the European legislator also made the place of work the decisive criterion, rather than the place where insolvency procedures were opened.

([339]) Judgment of 19 November 1991, *Francovich and Bonifaci v Italy*, Joined Cases C-6/90 and C-9/90, EU:C:1991:428.

([340]) Judgment of 17 September 1997, *Mosbæk v Lønmodtagernes Garantifond*, C-117/96, EU:C:1997:415.

([341]) See Directive 2002/74/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, OJ L 270, 8.10.2002, p. 10.

The Court of Justice followed up on this change by identifying, in a remarkably prescient ruling, that technological development would lead to new modes of work. In the *Holmqvist* case, the Court emphasised that legislation aiming to protect workers must also provide for solving conflicts of competence between Member States in view of 'recent changes in terms and conditions of employment and the progress of the telecommunications sector' ([342]). The Court of Justice held that, for the purposes of identifying the Member State whose guarantee institution is competent, the criterion of 'activity' relates to the activity of the workers for a given employer.

Although Member States are free to keep or introduce more stringent protective measures for workers, EU law ensures a minimum level of protection for all workers in the EU, whether they wish to move from one Member State to another, as did our protagonist in Section 1, or remain in their original Member State. These minimum rights for all workers across the EU not only create a level playing field in the labour market and beyond, but also evolve together with and adapt to changing forms of work, be it through legislative action or case-law.

3. From cross-border health services to patients' rights

The EU legislation applicable to the coordination of social security systems mentioned earlier already provided a framework for the reimbursement of medical expenses if prior authorisation was obtained, or if someone needed urgent medical care while abroad and presented their European Health Insurance Card. However, what if our protagonist simply wanted to consult an excellent specialist who happened to practise only in another Member State? Or what if the waiting time to see a dermatologist in a neighbouring Member State was much shorter? Could she be reimbursed these costs? Which costs exactly could be reimbursed, and up to what level?

The Court of Justice provided some answers in its case-law related to Article 56 TFEU ([343]). As clear as the case-law may be, the judgments dealt with individual cases and the European legislator considered that EU citizens should benefit from more detailed and systematic rules on cross-border health services. To that end, the Commission presented an initiative in 2004 ([344]) and later, in 2008, a new proposal for a directive dealing specifically with health services ([345]), which was adopted as Directive 2011/24/EU on the application of patients' rights in cross-border healthcare ([346]).

([342]) Judgment of 16 October 2008, *Holmqvist*, C-310/07, EU:C:2008:573.

([343]) See, in particular, judgment of 16 May 2006, *Watts*, C-372/04, EU:C:2006:325, and the case-law cited therein.

([344]) As part of European Commission, Proposal for a directive of the European Parliament and of the Council on services in the internal market, COM(2004) 2 final.

([345]) European Commission, Proposal for a directive of the European Parliament and of the Council on the application of patients' rights in cross-border healthcare, COM(2008) 414 final.

([346]) Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare, OJ L 88, 4.4.2011, p. 45.

First and foremost, the directive makes it clear that a person insured in a Member State has the right to be reimbursed the costs of healthcare received in another Member State. This applies not only in cases of emergency, but whenever one chooses to seek healthcare, without the need to state reasons.

Of course, there are some conditions attached to this right, as the stability of Member States' finances would otherwise be at risk and health policy is within the competence of Member States under Article 168 TFEU. First, the healthcare in question must be reimbursable in the person's home Member State (i.e. it needs to be in the 'basket' of treatments etc. covered by reimbursement). Second, the level of reimbursement is limited in two respects: first, it is limited to the amount that would have been paid if the treatment had been obtained in the home Member State and, second, it cannot exceed the actual cost of treatment. The latter limitation is relevant to scenarios in which healthcare is less expensive in the host Member State. Only exceptionally – for example treatments involving an overnight stay, or risky or particularly expensive medical care – may the Member State subject the reimbursement to a prior request for authorisation.

In cases of doubt as to what Directive 2011/24/EU covers, the Court of Justice has had to help out, as, for instance, in the *WO* case. The facts of this case are chilling. WO had already lost vision in his left eye, when later he was diagnosed with glaucoma in the right eye. The treatments he received in Hungary did not work and his visual field continued to deteriorate. WO contacted a specialist based in Germany and set up an appointment. The doctor advised him to arrange to stay overnight in case surgery turned out to be necessary. In the event, the doctor did indeed consider that an urgent operation was required to save WO's eyesight. WO was operated on successfully the day after his initial appointment. WO's application for reimbursement of costs in Hungary was rejected, as, at that time, Hungarian legislation required prior authorisation. WO contested this refusal before a national court, which, in turn, sought guidance from the Court of Justice. The Court ruled that, although Directive 2011/24/EU does not preclude national legislation from imposing time limits on the reimbursement procedure, including limits on the time for the submission of requests for prior authorisation, the competent institution should be able to take into account the individual circumstances and the urgency of the case in question ([347]).

Another interesting case that centred on Directive 2011/24/EU is the *Veselības ministrija* case, which concerned the relation between available medical treatment and one's religious beliefs. A Latvian child needed heart surgery. Although surgery was available in Latvia, it involved blood transfusion, a practice not in line with the religious beliefs of the child's parents, who were Jehovah's Witnesses. The parents therefore decided to have the child operated on in Poland, where it was possible to undergo a different procedure, one that did not necessitate transfusion. However, the parents' application for authorisation of the surgical procedure

([347]) Judgment of 23 September 2020, *Vas Megyei Kormányhivatal (cross-border healthcare)*, C-777/18, EU:C:2020:745.

was rejected, and as a result the costs they incurred were not reimbursed. The Court of Justice clarified in its ruling that the directive must be understood as not allowing a Member State to refuse authorisation in such cases, even when the medical effectiveness of the treatment available at home is not contested, unless the refusal can be objectively justified by a legitimate aim relating to maintaining treatment capacity or medical competence, and the refusal is an appropriate and necessary means of achieving that aim. Whether or not that was the case was left for the national judge to determine. In its reply, the Court of Justice took account of the fact that the reimbursement level is, in any event, subject to the twofold limit described earlier, and that the refusal would constitute a difference in treatment based on religion, which can constitute discrimination prohibited under Article 21 of the Charter of Fundamental Rights of the European Union (the Charter) ([348]).

Our protagonist can therefore freely consult a specialist abroad, or have medication dispensed at her holiday resort on the basis of her home country doctor's prescription. But it goes further than that. Seventy years ago, nobody would have imagined that one would be able to invoke one's religious beliefs as justification for reimbursement of medical costs incurred in another Member State. What started as cross-border health services has helped to develop patients' rights.

4. From vocational training as a means to a skilled workforce to free movement of students

In 1985, Henry G. Schermers, a renowned professor of (what is now) EU law, wrote, in an annotation to the then recent *Gravier* case ([349]): 'Integration of educational systems does not appear in the [then EEC] Treaties' ([350]). He discerned correctly that the judgment expanded EU citizens' right to study abroad, and that it could be regarded as one of the fundamental constitutional judgments of EU law.

The ruling had been triggered by the assessment of Ms Gravier, a French citizen whose parents lived in France, that Belgium was an excellent location to study to become a comic strip artist.

After she had started studying in Belgium, Ms Gravier objected to the fact that she had to pay a registration fee that was imposed only on foreign students. As she did not pay the fee, she appears to have been on the verge of expulsion.

The Court of Justice found, unsurprisingly, that such unequal treatment based on nationality constituted discrimination, but only 'if it falls within the scope of the Treaty'. In spite of objections from various Member States, but in line with what the Commission had argued,

([348]) Judgment of 29 October 2020, *Veselības ministrija*, C-243/19, EU:C:2020:872.

([349]) Judgment of 13 February 1985, *Gravier v Ville de Liège*, C-293/83, EU:C:1985:69.

([350]) Schermers, H. G. *De Minerval voor Buitenlanders*, 1986, Ars Aequi, Nijmegen, p. 39.

the Court of Justice noted that, although the organisation of education was not something entrusted to the EU, 'access to and participation in courses of instruction and apprenticeship, in particular vocational training, are not unconnected with Community law.' It also pointed out that what is now Article 166 TFEU provided for a common vocational training policy 'capable of contributing to the harmonious development both of the national economies and of the common market.' Ms Gravier was not obliged to pay the fee, as the Court of Justice considered 'vocational training' to include courses in comic strip art provided by an institution of higher art education.

A few years later, in early 1988, the Court of Justice, in the *Blaizot* case, which again concerned Belgium, went a step further. It ruled that, in general, university studies constitute 'vocational training'. Therefore, supplementary enrolment fees for university studies for nationals of other Member States were contrary to the prohibition of discrimination on the grounds of nationality ([351]).

Later that same year, in the *Humbel* case, the Court of Justice held, essentially, that, if a multi-year course teaches vocational skills, then each year of that course qualifies as vocational training, even those years in which no particular vocational skills are taught ([352]).

The Court of Justice further expanded the rights of students in later cases. For instance, in the cases *Commission* v *Belgium* and *Commission* v *Austria*, the Court ruled that Member States must, in principle, not impose discriminatory conditions for access to university studies on nationals of other Member States ([353]). It also clarified that a student from one Member State who has been admitted to a vocational training course in another Member State has a right under EU law to live in that second Member State for the purposes of attending that course and for the duration of the course, whether or not the host Member State has issued a residence permit ([354]).

The Court of Justice also clarified the importance of EU law regarding students' access to financing from Member States.

First, it specified that students who are nationals of other Member States have the right to finance from their host Member State. It noted, in particular, that these students can have the right to a student maintenance grant from their host Member State (although Member States can require 5 years' prior residence) ([355]). Moreover, the Court of Justice provided more detail

([351]) Judgment of 2 February 1988, *Blaizot v Université de Liège and Others*, C-24/86, EU:C:1988:43.

([352]) Judgment of 27 September 1988, *Belgian state* v *Humbel and Edel*, C-263/86, EU:C:1988:451; expanded on in the judgment of 30 May 1989, *Commission* v *Council*, C-242/87, EU:C:1989:217.

([353]) Judgments of 1 July 2004, *Commission* v *Belgium*, C-65/03, EU:C:2004:402; and of 7 July 2005, *Commission* v *Austria*, C-147/03, EU:C:2005:427. Also relevant is the *Bressol* judgment, which further clarified the applicable rules (judgment of 13 April 2010, *Bressol and Others*, C-73/08, EU:C:2010:181).

([354]) Judgment of 26 February 1992, *Raulin* v *Minister van Onderwijs en Wetenschappen*, C-357/89, EU:C:1992:87.

([355]) Judgment of 18 November 2008, *Förster*, C-158/07, EU:C:2008:630. See also judgment of 15 March 2005, *Bidar*, C-209/03, EU:C:2005:169.

on the rights of students to 'export' their student finance when studying for some time in another Member State. The Court based itself on the rules concerning EU citizenship ([356]), and on Article 165 TFEU (which had been added by the Treaty of Lisbon), which states that the EU should contribute to the development of high-quality education by, among other things, encouraging the mobility of students. In particular, the Court of Justice clarified that Member States cannot make the 'exportability' of student finance solely conditional on that student having permanent residence in the granting Member State, but must examine other elements that might show the degree of connection between the applicant for the grant and the Member State ([357]).

In terms of legislative developments regarding the mobility of students and related actions, one of the best-known EU actions is probably the Erasmus programme, a student exchange scheme that was first adopted in 1987 ([358]). The programme allows participants to study part of their course in an university in another Member State, and the time spent studying abroad counts towards their degree from their home university. The scheme was originally intended to foster the mobility of university students, but has greatly expanded since ([359]). For instance, it now covers children and adults, and formal as well as informal education, and includes participants from certain non-EU countries. Almost 10 million participants have benefited from the Erasmus programme over the last 30 years. Its budget for the period 2021–2027 is estimated to be EUR 26.2 billion. It is expected that, over this period, about 10 million individuals will participate in mobility to study abroad with its help, including students, other types of learners, professors, teachers and trainers in all sectors.

Our protagonist, should she time travel from 1952 to 2022, would undoubtedly rejoice in seeing that her options for studying in other Member States have been so greatly expanded by EU law.

([356]) Those rules provide that every person holding the nationality of a Member State is a citizen of the EU, and that every citizen of the EU has the right to move and reside freely within the territory of other Member States (Articles 20 and 21 TFEU).

([357]) See, for example, judgment of 24 October 2013, *Thiele Meneses*, C-220/12, EU:C:2013:683.

([358]) Council Decision 87/327/EEC of 15 June 1987 adopting the European Community Action Scheme for the Mobility of University Students (Erasmus), OJ L 166, 25.6.1987, p. 20. The validity of the scheme was confirmed in the judgment of 30 May 1989, *Commission* v *Council*, C-242/87, EU:C:1989:217.

([359]) Regulation (EU) 2021/817 of the European Parliament and of the Council of 20 May 2021 establishing Erasmus+: the Union programme for education and training, youth and sport and repealing Regulation (EU) No 1288/2013, OJ L 189, 28.5.2021, p. 1.

5. From non-discrimination as an obstacle to fair competition to non-discrimination as a fundamental right

In the aftermath of the Second World War, the elimination of discrimination was recognised as playing a fundamental role in the modernisation of democratic societies, a role that Member States could not ignore when they negotiated the content of the EEC Treaty. However, modernising society is a never-ending task, and the prohibition of discrimination must adapt as the society evolves and new needs arise – that is, it must cover additional grounds of discrimination. The European Economic Community was an economic construction created between Member States in 1957.

To ensure the realisation of the objectives of the treaties, the prohibition of discrimination on the grounds of nationality was imperative not only to guarantee the fundamental right to free movement, but also to ensure fair competition between undertakings in the different Member States. It is therefore logical that the prohibition of discrimination on the grounds of nationality was regarded as the single most important principle of (what was then) Community law, its 'leitmotif' ([360]).

The fact that Member States had only economic goals in mind when prohibiting discrimination is evidenced by the limited scope of the only other prohibition of discrimination – discrimination on the ground of sex – enshrined in the EEC Treaty as well as by the objectives pursued by that other prohibition. In this respect, the treaty was limited to the requirement that male and female workers receive equal pay, and its objective was of an economic nature, for in creating an obstacle to any attempt at 'social dumping' by using lower-paid female labour, it helped establish a system in which 'competition' is not distorted ([361]).

Today, it is settled case-law that the prohibition of discrimination on the ground of sex, the material scope of which has been extended far beyond pay (now covering social security, working conditions, access to goods and services, etc.) has become a fundamental principle of EU law ([362]) that has been reaffirmed and reinforced almost every time the treaty has been amended.

The prohibition of discrimination is now the EU's express aim, and is enshrined in Article 3 TEU and Article 8 TFEU. In addition to the general non-discrimination clause inserted in Article 21 of the Charter, Article 23 of the Charter reaffirms that 'equality between women and men must be ensured in all areas'. Furthermore, with a view to ensuring full equality in practice, Article 157 TFEU states that Member States shall not be prevented from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity, or to prevent or compensate for disadvantages in professional careers.

([360]) Opinion of Advocate-General Jacobs delivered on 30 June 1993 in *Collins and Patricia Im- und Export* v *Imtrat and EMI Electrola*, Joined Cases C-92/92 and C-326/92, EU:C:1993:276.

([361]) Opinion of Advocate-General Dutheillet de Lamothe delivered on 29 April 1971 in *Defrenne* v *Belgian state*, C-80/70, EU:C:1971:43.

([362]) Judgment of 9 February 1999, *Seymour-Smith and Perez*, C-167/97, EU:C:1999:60.

On that basis, the Court of Justice held in the *Badeck* case that a measure that is intended to give priority to women regarding promotion in sectors of public service in which they are under-represented must be regarded as compatible with EU law if (i) it does not automatically and unconditionally prioritise women when women and men are equally qualified, and (ii) the candidatures are the subject of an objective assessment that takes account of the personal situations of all candidates ([363]).

The Treaty of Amsterdam of 1997 empowered the European legislator to adopt measures to combat discrimination on other grounds, namely racial or ethnic origin, religion or belief, disability, age and sexual orientation (Article 19 TFEU). The legislator made use of these new powers to adopt Directive 2000/43/EC ([364]), implementing the principle of equal treatment between persons irrespective of racial or ethnic origin – the material scope of which extends far beyond the employment area and covers, in particular, social advantages, housing, education and access to goods and services – and Directive 2000/78/EC ([365]), establishing a general framework for equal treatment in employment and occupation. The latter directive, which covers the other prohibited grounds of discrimination, applies to the employment and vocational training areas only, as long as the Commission's proposal to extend its material scope is not adopted by the European legislator.

The Court of Justice has notably held that Directive 2000/78/EC precludes legislation under which the surviving partner of a same-sex partnership does not receive a survivor's benefit equivalent to that granted to a surviving spouse even though, under national law, life partnership places persons of the same sex in a situation comparable to that of spouses as far as the survivor's benefit is concerned ([366]). In addition, it ruled that the directive also precludes national legislation that provides that periods of employment completed by an employee before reaching the age of 25 are not taken into account in calculating the notice period for dismissal ([367]).

In other rulings, the Court of Justice held that a difference in treatment on the grounds of religion cannot be justified by an employer's willingness to take account of the wishes of a customer to no longer have the services of that employer provided by a worker wearing an Islamic headscarf ([368]). It held that a worker's obesity constitutes a 'disability' within the meaning of the directive where it entails a limitation resulting from, in particular, long-term physical, mental or psychological impairments that, in interaction with various barriers,

([363]) Judgment of 28 March 2000, *Badeck and Others*, C-158/97, EU:C:2000:163.

([364]) Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, p. 22.

([365]) Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16.

([366]) Judgment of 1 April 2008, *Maruko*, C-267/06, EU:C:2008:179.

([367]) Judgment of 19 January 2010, *Kücükdeveci*, C-555/07, EU:C:2010:21.

([368]) Judgment of 14 March 2017, *Bougnaoui and ADDH*, C-188/15, EU:C:2017:204.

may hinder the person from fully and effectively participating in professional life on an equal basis with other workers ([369]).

The Court of Justice has also recognised that the prohibition of discrimination enshrined in Article 21 of the Charter has horizontal direct effect. That prohibition, the Court ruled, is sufficient in itself to confer on individuals a right that they may rely on in disputes between them in a field covered by EU law ([370]).

Originally intended to avoid distortion of competition between Member States, the prohibition of discrimination is now a fundamental right enshrined in the Charter and in various texts of secondary law, and it extends to various aspects of the individual, including sexual orientation and religious beliefs.

6. From promoting a common market to protecting the well-being of the European Union's citizens

6.1. Consumer protection

Consumer protection rules were not adopted upfront but have been developed in the light of the Member States and European institutions' gradual awareness of the importance of the rights of citizens as recipients of goods and services. This awareness crystallised in the form of treaty provisions recognising the importance of protecting consumers and in the adoption of legislation pursuing that aim.

Consumer protection was absent at the genesis of the EU. In fact, the EEC Treaty of 1957 used the word 'consumer' on only three occasions, namely in Articles 39 and 40 concerning the common agricultural policy and in Article 92 regarding State aid.

It was not until 1972, in the framework of the Paris European Summit, that the Heads of State or Government, in a joint statement ([371]), invited the institutions to draw up a programme of action providing for specific measures to strengthen and coordinate consumer protection. The 1975 preliminary programme for a consumer protection and information policy ([372]) stated, for the first time, that 'the consumer is no longer seen merely as a purchaser and user of goods and services for personal, family or group purposes, but also as a person concerned with the various facets of society which may affect him either directly or indirectly as a consumer.'

([369]) Judgment of 18 December 2014, *FOA*, C-354/13, EU:C:2014:2463.

([370]) Judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257. That statement should apply to all grounds prohibited in Directives 2000/43/EC and 2000/78/EC as it does to the grounds of religion.

([371]) Heads of State or Government, 'Statement from the Paris Summit (19 to 21 October 1972)', *Bulletin of the European Communities*, No 10, October 1972, Office for Official Publications of the European Communities, Luxembourg, 1972, pp. 14–26.

([372]) Preliminary programme of the European Economic Community for a consumer protection and information policy annexed to the Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy, OJ C 92, 25.4.1975, p. 2.

The programme listed a number of consumer rights, ranging from the right to protection of health and safety, to the protection of their economic interests and to obtain redress. A second programme followed in 1981 ([373]).

As a result of those programmes, the EU issued a first round of legislative instruments in defence of consumers' economic interests, namely Directive 84/450/EEC on misleading advertising ([374]) and Directive 87/102/EEC on consumer credit ([375]). Although the focus in these directives was still very much on ensuring the correct functioning of the common market, the need to protect consumers was emphasised through the provision of adequate information and the setting out of certain requirements for contracts. At the same time, the Single European Act of 1986 introduced the objective of ensuring a high level of consumer protection in the Commission's proposals intending to establish the common market. Shortly after, in the Treaty of Maastricht, consumer protection was recognised for the first time not only as part of the activities of the Community, but also as a policy.

During the 1990s, a new set of consumer protection directives was adopted ([376]). Although formally linked to the achievement of the common market ([377]) and fair competition between traders, these directives attached increased importance to consumer rights. For instance, Directive 98/6/EC on price indication set out, for the first time, the obligation of Member States to lay down penalties for infringements, whereas Directive 1999/44/EC on the sale of consumer goods and guarantees introduced a panoply of remedies for consumers in the event of non-conformity with the contract of the products they purchase.

([373]) Second programme of the European Economic Community for a consumer protection and information policy annexed to the Council Resolution of 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy, OJ C 133, 3.6.1981, p. 2.

([374]) Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, OJ L 250, 19.9.1984, p. 17 (now Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, OJ L 376, 27.12.2006, p. 21).

([375]) Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, OJ L 42, 12.2.1987, p. 48 (now Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ L 133, 22.5.2008, p. 66).

([376]) For instance, directives that have played or, in most cases, continue to play an important role for consumers are Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, p. 29; Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers, OJ L 80, 18.3.1998, p. 27; and Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171, 7.7.1999, p. 12.

([377]) That link has been maintained as all consumer protection directives are based on the treaty provisions on the harmonisation of the internal market (Article 114 TFEU or its predecessors).

The new millennium saw a new boost in the adoption of consumer protection rules ([378]). This new set of directives covers a wide range of different areas and topics, but one can clearly distinguish the trend towards a more detailed and comprehensive regulation of consumer rights. In addition, it becomes apparent that the European legislator progressively turns to full harmonisation in consumer protection directives.

In its consumer agenda in 2012 ([379]), the Commission identified some of the key objectives for 2020 as the improved implementation of consumer *acquis*, the enforcement of consumers' rights and the adaptation of the *acquis* to the digital age, which triggered another series of legislation ([380]). In 2020, a new consumer agenda ([381]) presented the Commission's vision for the development of EU consumer policy in 2020–2025, which, again, translated into a new wave of proposals geared towards full harmonisation, such as a directive on consumers' green empowerment ([382]) and a regulation on general product safety ([383]).

Importantly, in parallel with the legislative regulation of consumer protection, the Court of Justice has also played a critical role in the development of the rights enshrined in the different instruments through its case-law. Thus, for instance, in its *Pannon* case ([384]), the Court recognised the obligation for national courts to examine, of their own motion (ex officio), the

([378]) For example, Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety, OJ L 11, 15.1.2002, p. 4; Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, OJ L 271, 9.10.2002, p. 16; Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), OJ L 149, 11.6.2005, p. 22; and Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304, 22.11.2011, p. 64.

([379]) European Commission, A European Consumer Agenda – Boosting confidence and growth, COM(2012) 225 final.

([380]) Examples of that wave of legislation are Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, OJ L 136, 22.5.2019, p. 28; Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, OJ L 136, 22.5.2019, p. 1; Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409, 4.12.2020, p. 1; and Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004, OJ L 345, 27.12.2017, p. 1.

([381]) European Commission, New consumer agenda – Strengthening consumer resilience for sustainable recovery, COM(2020) 696 final.

([382]) European Commission, Proposal for a directive of the European Parliament and of the Council amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information, COM(2022) 143 final.

([383]) European Commission, Proposal for a regulation of the European Parliament and of the Council on general product safety, amending Regulation (EU) No 1025/2012 of the European Parliament and of the Council, and repealing Council Directive 87/357/EEC and Directive 2001/95/EC of the European Parliament and of the Council, COM(2021) 346 final.

([384]) Judgement of 4 June 2009, *Pannon GSM*, C-243/08, EU:C:2009:350, paragraph 32.

unfairness of a contractual term in order to protect consumers. Eventually, the Court extended this obligation to other provisions of EU consumer law ([385]).

At the end of the day, as a result of these legislative and case-law developments, our protagonist enjoys a high level of protection everywhere in the EU, whether she is buying clothes, subscribing to an energy provider, purchasing a plane ticket or obtaining a mortgage to buy a house, to name just a few examples. Indeed, EU law ensures that products are safe, that consumers receive appropriate information enabling them to make fully informed decisions, that businesses act fairly towards consumers and, when that is not the case, that consumers have an effective set of remedies to defend their rights and interests.

6.2. Food law

The EU's common market must offer consumers a wide range of safe and high-quality products, whatever their country of origin. To ensure the free movement of food, legislation standardising national laws on food safety has been adopted since the early days of (what was then) the Community and, by the end of the 1990s, the EU had a broad body of legislation that covered the full cycle of food production.

However, different measures addressed different sectors of the food production industry, and there was no consistency in the legislation and its application. At the same time, the food production chain was becoming increasingly complex and interlinked. A series of food-related crises in the late 1990s to early 2000s – such as the bovine spongiform encephalopathy, foot-and-mouth disease and dioxin crises – showed that, despite the objectives of the common market, the level of consumer protection and food safety was not the same across the EU. Consumers' trust in the food on the market dropped.

In some sectors, such as contaminants, EU-wide requirements were insufficient. There was no clear commitment from all interested parties to give an early warning about a potential risk. Regulatory authorities faced practical difficulties, and it was difficult to adequately respond to crises when problems spilled over from one sector to another. Furthermore, the EU did not have enough capacity to ensure a timely risk assessment and, in general, there was no coordination of scientific information and risk assessment to build a European picture. Changes were needed to re-establish public confidence in the EU's food supply chain. Food safety could no longer be simply instrumental in the functioning of the common market; it had to become the primary objective of EU food law ([386]).

The EU decided that food safety had to be ensured throughout the food chain, from 'farm to fork': across all food sectors, in and between Member States, at the EU's external borders and

([385]) See, for instance, judgement of 21 April 2016, *Radlinger and Radlingerová*, C-377/14, EU:C:2016:283, paragraph 66.

([386]) European Commission, *White Paper on Food Safety*, COM(1999) 719 final.

within the EU. The pillars of food safety had to be better integrated. Improved data collection and analysis had to support state-of-the-art scientific advice so that regulatory measures could be adopted on the basis of the best science; once adopted, measures needed to be better enforced and consumers kept informed.

All this is reflected in Regulation (EC) No 178/2002, laying down the general principles and requirements of food law ([387]), commonly referred to as the general food law. It went beyond sectorial considerations and ensured a coherent approach throughout food legislation by setting not only the basic principles guiding the EU measures but also the general framework for those areas remaining under national law. The general food law clearly defined the roles of all stakeholders in the food chain and, in particular, required economic operators to report food safety emergencies and ensure appropriate information for consumers and trade organisations. It also established control systems covering all steps in the production, marketing and import of food and feed; made the existing rapid alert system applicable to all food and feed; and established a single emergency procedure applicable to all types of food and feed, regardless of their geographical origin. The Court of Justice relies on the importance given to food safety by the general food law when it allows Member States to take measures any time that there are reasons to suspect that food is unsafe, even if the food complies with specific EU provisions ([388]), and to impose penalties on food business operators and distributors when they fail to ensure that foods comply with the requirements laid down in food law ([389]).

The general food law also established a new agency, the European Food Safety Authority (EFSA), with the aim that it would become the independent scientific point of reference for the whole EU. It was anticipated that the EFSA would contribute to the early identification of emerging hazards, with a view to avoiding crises, when possible, and to responding rapidly and effectively when they cannot be prevented. The EFSA provides scientific advice on all matters (risk or nutritional) concerning consumer health and safety arising from the consumption of food; it also collects, analyses and shares the most recent scientific information.

Transparency was from the beginning an important aspect of the work of the EFSA. Its opinions are not only made available to the Commission, the Member States and the European Parliament, but are also published on the internet. The EFSA's procedures and its working programme are also publicly available. Furthermore, changes were made to the legal framework after an evaluation of the general food law in 2018 ([390]) had shown that citizens wanted a more transparent risk assessment process and were concerned that the assessment

([387]) Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, OJ L 31, 1.2.2002, p. 1.

([388]) Judgment of 28 April 2022, *Romega*, C-89/21, EU:C:2022:313.

([389]) Judgment of 13 November 2014, *Reindl*, C-443/13, EU:C:2014:2370.

([390]) European Commission, *The REFIT evaluation of the general food law (Regulation (EC) No 178/2002)*, SWD(2018) 38 final, Commission staff working document, Brussels, 15 January 2018.

of applications for authorisation of substances or products is essentially based on studies, data and information generated and paid for by the applicant. New provisions, applicable since 2021, ensure that information is published throughout the risk assessment and not exclusively after the EFSA adopts its opinion, and that the studies the EFSA uses in its risk assessments are reliable, objective and independent ([391]).

While EU legislation already recognised the consumers' right to expect information on food quality and constituents that is helpful and clearly presented, the legislation was developed further, with a view to enhancing consumers' abilities to make informed choices. In this regard, Directive 2000/13/EC on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs ([392]) was brought in line with consumer needs and preferences by revising the rules in Regulation (EU) No 1169/2011 ([393]). In particular, nutrition labelling and the listing of ingredients became mandatory for all packaged food. The regulation also introduced a requirement to identify the presence of known allergens, for the benefit of those consumers who, for health or other reasons, have to avoid, or want to avoid, certain ingredients. The legislation and the Court of Justice emphasise that the objective of providing a high level of protection for consumers requires that the information relating to food is correct, neutral and objective ([394]).

In addition, the EU recognised that the protection of public health requires not only safe food but also a balanced diet, and that certain evolutions in the market could lead consumers to make unbalanced dietary choices. To respond to the increasing number of foodstuffs with modified nutritional value and marketed with claims concerning their composition, Regulation (EC) No 1924/2006 on nutrition and health claims made on foods ([395]) now regulates the use of claims related to the beneficial effects of a nutrient on certain normal bodily functions and those which compare the composition of a foodstuff to similar foodstuffs. In addition, new legislation was adopted on food supplements ([396]), that is concentrated sources

([391]) Regulation (EU) 2019/1381 of the European Parliament and of the Council of 20 June 2019 on the transparency and sustainability of the EU risk assessment in the food chain and amending Regulations (EC) No 178/2002, (EC) No 1829/2003, (EC) No 1831/2003, (EC) No 2065/2003, (EC) No 1935/2004, (EC) No 1331/2008, (EC) No 1107/2009, (EU) 2015/2283 and Directive 2001/18/EC, OJ L 231, 6.9.2019, p. 1.

([392]) Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs, OJ L 109, 6.5.2000, p. 29.

([393]) Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004, OJ L 304, 22.11.2011, p. 18.

([394]) See judgment of 1 October 2020, *Groupe Lactalis*, C-485/18, EU:C:2020:763, paragraph 44.

([395]) Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods, OJ L 404, 30.12.2006, p. 9.

([396]) Directive 2002/46/EC of the European Parliament and of the Council of 10 June 2002 on the approximation of the laws of the Member States relating to food supplements, OJ L 183, 12.7.2002, p. 51.

of nutrients such as vitamins and minerals, and fortified foods ([397]), meaning foods to which nutrients have been added.

The Commission presented the farm to fork strategy ([398]) in May 2020 as one of the key actions under the European Green Deal ([399]), with the goal of transforming the way food is produced and consumed in Europe. In line with the strategy, future initiatives will aim to reduce the environmental footprint of food systems, strengthen resilience against crises and ensure healthy and affordable food for future generations.

6.3. Health law

The EU's role in the field of health was initially an economic one, centring on the free movement of health professionals and – later – patients. The EU was also assigned some specific harmonisation competences, for example the power to adopt high standards of quality and safety for organs and substances of human origin ([400]) (thanks to which our protagonist can be sure of high standards across the EU in the unfortunate event that she needs a blood transfusion in another Member State). In addition, the EU was given the task of supporting and encouraging cooperation between Member States. In that vein, it has, in more recent years, played an increasingly active role in building a strong European Health Union to protect and improve public health, including through Europe's Beating Cancer Plan ([401]) and an action plan against antimicrobial resistance ([402]).

Recently, during and in the wake of the global COVID-19 pandemic, the EU has taken numerous actions to strengthen its preparedness for and response to serious cross-border threats to health. Since the adoption of Decision No 1082/2013/EU on serious cross-border threats to health ([403]), the EU has improved health security by laying down rules on the epidemiological surveillance, monitoring, early warning and combating of serious cross-border threats to health. That decision has been essential in facilitating the exchange of information on the evolution of the COVID-19 pandemic and supporting the adoption of national measures. Through its EU

([397]) Regulation (EC) No 1925/2006 of the European Parliament and of the Council of 20 December 2006 on the addition of vitamins and minerals and of certain other substances to foods, OJ L 404, 30.12.2006, p. 26.

([398]) European Commission, A farm to fork strategy for a fair, healthy and environmentally-friendly food system, COM(2020) 381 final.

([399]) European Commission, The European Green Deal, COM(2019) 640 final.

([400]) Directive 2002/98/EC of the European Parliament and of the Council of 27 January 2003 setting standards of quality and safety for the collection, testing, processing, storage and distribution of human blood and blood components and amending Directive 2001/83/EC, OJ L 33, 8.2.2003, p. 30; and Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells, OJ L 102, 7.4.2004, p. 48.

([401]) European Commission, Europe's Beating Cancer Plan, COM(2021) 44 final.

([402]) European Commission, A European one health action plan against antimicrobial resistance (AMR), COM(2017) 339 final.

([403]) Decision No 1082/2013/EU of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health and repealing Decision No 2119/98/EC, OJ L 293, 5.11.2013, p. 1

vaccines strategy ([404]), the EU has secured the swift supply of effective COVID-19 vaccines across all Member States, which has saved many lives ([405]). The European Centre for Disease Prevention and Control (ECDC) ([406]) has been at the forefront of the EU's work to address COVID-19 since the outbreak of the pandemic. It played an important role by issuing regular risk assessments, presenting policy options for response, and publishing colour-coded maps showing the level of infections and vaccine uptake across the EU/European Economic Area countries.

The COVID-19 pandemic provided an insight into changes that could be made to strengthen the framework for health crisis preparedness and response at European level. This resulted in the adoption of the so-called Health Union proposals on 11 November 2020 ([407]), which aim to strengthen the legal framework for serious cross-border threats to health (by reinforcing surveillance and improving data reporting, among other things), and reinforce the crisis preparedness and response role of key EU agencies, including that of the ECDC ([408]). The co-legislators have reached a provisional agreement on the draft legislation.

Another step in the creation of a European Health Union was the establishment of the Health Emergency Preparedness and Response Authority on 16 September 2021. This new Commission service works to improve the preparedness and response to serious cross-border threats in the area of medical countermeasures, in particular by strengthening health security coordination within the EU when preparing for or responding to crises; addressing vulnerabilities and strategic dependencies within the EU that are related to the development, production, procurement, stockpiling and distribution of medical countermeasures; and contributing to reinforcing the global health emergency preparedness and response architecture ([409]).

Our protagonist can rest assured that the EU is putting a lot of effort into protecting and improving public health. It will, for instance, continue to support Member States in the fight against cancer and antimicrobial resistance; ensure high standards of quality and safety of organs, blood and other substances of human origin; and contribute to a robust preparedness for and response to public health emergencies. Furthermore, she can be sure that a high level of human health protection will be an essential element of the definition and implementation of all EU policies and

([404]) European Commission, EU Strategy for COVID-19 vaccines, COM(2020) 245 final.

([405]) See European Centre for Disease Prevention and Control, 'WHO/ECDC: nearly half a million lives saved by COVID-19 vaccination in less than a year', press release, 25 November 2021.

([406]) Regulation (EC) No 851/2004 of the European Parliament and of the Council of 21 April 2004 establishing a European centre for disease prevention and control, OJ L 142, 30.4.2004, p. 1.

([407]) European Commission, Building a European Health Union: reinforcing the EU's resilience for cross-border health threats, COM(2020) 724 final.

([408]) European Commission, Proposal for a regulation of the European Parliament and of the Council on serious cross-border threats to health and repealing Decision No 1082/2013/EU, COM(2020) 727 final; and European Commission, Proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 851/2004 establishing a European centre for disease prevention and control, COM(2020) 726 final.

([409]) See Council of the European Union, 'Emergency framework for medical countermeasures: Council reaches political agreement', press release, 20 December 2021 .

activities – in other words, the health aspect must be taken into account and cannot be neglected in any other EU policy area (environment, agriculture, the internal market, etc.).

7. Outlook – and what about the next 70 years?

The examples above show that the EU has managed, over time, to improve the well-being of its citizens in their daily lives in those fields that concern the protagonist in Section 1, in particular work, health and the consumption of goods and services. Yet the tangible rights recognised so far need to be re-evaluated every day in a changing world with new technological and societal challenges, such as the digitalisation of all spheres of life, an ageing society, globalisation – favouring, among other things, the spreading of diseases – and climate change. What is the EU to do to meet these challenges, and are the current treaties still up to date?

The free movement of workers and social law in the EU has shifted from a perspective of treating persons as economic resources to considering them persons with a right to work with dignity.

At the same time, working life is also changing. The digital transformation changed working life for our protagonist, who, you will remember, wanted to go to Lisbon: now, thanks to teleworking, she can live in Lisbon and work in Finland. EU law needs to evolve as working conditions change. An example is how to apply or amend Directive 2003/88/EC on working time ([410]) to home offices and to the right to disconnect. The EU has already reacted to new forms of work, as shown in the recent proposal for a directive on platform work ([411]). The EU, in regulating platform work and enforcing the right to disconnect, is once again showing that it thinks of the worker as an individual and not simply an economic resource, and is placing increasing importance on protecting rights linked to the dignity of the person, such as the right to adequate working conditions and social protection.

On the gender equality front, three important new measures may change our protagonist's future even further: the new leave rights guaranteed by the directive on work–life balance, Directive (EU) 2019/1158 ([412]); efforts to tackle the gender pay gap by increasing transparency ([413]); and shattering the 'glass ceiling' by the proposed directive on women on company boards ([414])

([410]) Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ L 299, 18.11.2003, p. 9.

([411]) European Commission, Proposal for a directive of the European Parliament and of the Council on improving working conditions in platform work, COM(2021) 762 final.

([412]) Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work–life balance for parents and carers and repealing Council Directive 2010/18/EU, OJ L 188, 12.7.2019, p. 79.

([413]) European Commission, Proposal for a directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, COM(2021) 93 final.

([414]) European Commission, Proposal for a directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, COM(2012) 614 final.

(discussions on which were, at the time of writing, being finalised by the European legislator, after years of stalemate).

Our protagonist may also be concerned with living a healthy life. The EU is currently working on yet another change in its food policy to respond to current consumer concerns beyond food safety standards and balanced diets, and, in particular, to respond to the fact that there is an inextricable link between healthy people, healthy societies and a healthy planet, all of which depend on a sustainable food system. Consumer rights are to be elevated further in the future by making it easier to choose healthy and sustainable food, notably by the introduction of mandatory front-of-pack nutrition and sustainability labelling ([415]).

Just as this book was being finalised, the Commission adopted a proposal ([416]) that will bring about a revolution for patients regarding their access to personal health data. It is the proposal for a regulation on the European health data space, which, as one of its pillars, deals with the primary use of health data, that is natural persons' access to and control of their personal electronic health data in the context of healthcare. Under its provisions, our protagonist would be able to access her data throughout the EU, thus avoiding the need for additional medical tests and allowing doctors to immediately consult her medical file. This will, in the longer term, contribute to an improvement in patients' overall health. Of course, these being sensitive data, the proposed regulation takes care to ensure the highest security standards.

Since their adoption, the treaties have been updated to take into account the evolution of European society and to broaden the competences of what is now the EU. It is fair to say that the progress achieved as a result of the developments of the legislation and case-law in the different areas of EU law considered in this chapter and the increased focus on the individual citizen have been remarkable and would have been unthinkable 70 years ago. The treaties currently in force are founded on strong values, which include social fairness, non-discrimination, a high level of health protection and the promotion of citizens' overall well-being in the 21st century. They enable the EU's effective and coordinated response to current events, needs and crises, and will certainly be used for the best in the future. However, in the ongoing transformation of our societies, new work and education patterns such as distance learning, teleworking and platform work emerge, and new methods of producing food and providing health services become available, raising new social protection and safety concerns. These developments sometimes require new ways of thinking and it takes imagination to address these new challenges within the current legal framework, just as previous challenges were in the past. Time will tell whether the tools necessary to address these issues can be found in the current treaties or whether they require new adaptations.

([415]) European Commission, A farm to fork strategy for a fair, healthy and environmentally-friendly food system, COM(2020) 381 final.

([416]) European Commission, Proposal for a regulation of the European Parliament and of the Council on the European health data space, COM(2022) 197 final.

PART

3

EU LAW IMPROVES THE LIVES OF EU CITIZENS

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PROTECTING THE ENVIRONMENT AND TACKLING CLIMATE CHANGE

Giacomo Gattinara, Luke Haasbeek, Magnus Noll-Ehlers, Klára Talabér-Ritz and Céline Valero

1. Introduction

The challenges related to climate change, the depletion of natural resources and environmental degradation require action not only at national level, but also at EU and global levels. The EU is known for its commitment to tackling climate and environmental challenges, and for being the frontrunner in climate mitigation and adaptation efforts. The European Green Deal ([417]) is the blueprint for this transformational change. However, the EU cannot achieve the environmental ambition of the Green Deal by acting alone. The drivers of climate change and environmental pollution are global and not limited to national borders. The EU can use its influence, expertise and financial resources to mobilise its neighbours and partners to join it on a sustainable path.

The EU's regulatory capacity in environmental matters has increased in parallel with a rising environmental awareness among the European public.

Public opinion polls over the last three decades demonstrate widespread support for environmental protection among EU citizens. By the late 1980s, Eurobarometer surveys found that environmental problems were among the primary concerns of citizens in all Member States. Today, public concern for the environment is unquestionable: according to a 2017 Eurobarometer survey, 94 % of EU citizens felt that protecting the environment was important to them personally. In this context, the EU, with its own specificities and instruments, has proved an efficient driver of the environmental cause in Europe. The EU is introducing an ambitious and transformative strategy of green transition to meet the challenges ahead of us in the key areas of our economies and societies. Its secondary legislation now covers a vast number of fields across all sectors in order to meet the Green Deal ambition: to make Europe the first climate-neutral continent in the world.

The scope of environmental law today is particularly wide. This chapter will be limited to the exploration of three areas, to illustrate developments in environmental protection in the EU:

— the shaping, over 40 years, of legislation and case-law to protect citizens against air pollution,

([417]) European Commission, Commission communication – The European Green Deal, COM(2019) 640 final.

— the building of an environmental democracy, which has proved essential to the consistent application of environmental law across the EU and to guarantee citizens' rights,

— the need to go beyond the EU's usual sphere of influence and tackle the global effects of climate change and the threats to the environment.

2. Breathing cleaner air: how more than four decades of European Union legislation on ambient air quality and its interpretation in court have increased the health protection of citizens

Clean air is essential not only to human health, but also to the health of the environment. It provides multiple economic and social benefits. There is well-established evidence of the harmful effects of air pollution. The public's awareness of problems such as acid rain and the long-distance cross-border transportation of pollutants increased in the 1970s. The EU, in addition to regulating emissions at source (e.g. from industrial plants or combustion engines), has set limits on the acceptable concentrations of pollutants in ambient air, with the aim of protecting the general health of citizens. Since the Commission proposed the first directive on air quality standards in 1976 ([418]), there have been legislative updates extending the clean air requirements in scope and substance. At the same time, the rich case-law of the Court of Justice has addressed practical questions arising from the application of air quality rules and keeps on evolving in pending cases. The following sections describe the steps taken to lower the concentrations of pollutants in ambient air and the resulting legal protection of citizens.

2.1. Air quality limit values: introduction at European Union level and transposition into binding national law

The first directive on air quality limit values was approved in 1980 and related to sulphur dioxide and suspended particulates ([419]). It required Member States to take appropriate measures to ensure that, from 1 April 1983, the concentration of those pollutants in the atmosphere was below the limit values set out therein.

When Member States transposed the rules of the directive, the question arose of whether it was sufficient to incorporate the limit values into administrative provision in the form of a circular. The Commission took the view that this was not sufficiently mandatory in nature

([418]) European Commission, Proposal for a Council Directive concerning health protection standards for sulphur dioxide and suspended particulate matter in urban atmospheres, OJ C 63, 19.3.1976, p. 5.

([419]) Council Directive of 15 July 1980 on air quality limit values and guide values for sulphur dioxide and suspended particulates (80/779/EEC), OJ L 229, 30.8.1980, p. 30.

and brought the matter before the Court of Justice. In its judgment in 1991, the Court of Justice accepted that interpretation. It recalled that, when a directive is intended to create rights for individuals, the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts. It stressed that the obligation to prescribe limit values was imposed in order to protect human health in particular. The Court of Justice stated that, whenever exceedance of limit values could endanger human health, the persons concerned have to be in a position to rely on mandatory rules in order to be able to assert their rights. Hence, the Court of Justice found that the directive had to be implemented with unquestionable binding force, and with the specificity, precision and clarity to satisfy the requirement of legal certainty ([420]).

2.2. Right of persons affected by limit value exceedance to enforce specific obligations to improve air quality in court

In the years that followed, limit values for further harmful pollutants were established ([421]). However, the question remained as to what authorities should do when the limit values were exceeded. A second generation of directives set out in more detail how national authorities must address these situations. In particular, it was agreed in 1996 that, when there was a risk of an exceedance, authorities had to draw up action plans indicating the measures to be taken to reduce that risk and to limit the duration of the occurrence ([422]).

In 2008, the Court of Justice decided that individuals were entitled to request adequate action plans in front of national courts.

A resident of an area in which the limit values for fine particulate matter were exceeded had taken legal action against local authorities, asking them to determine the measures to be taken to ensure compliance with the limit values. The Court of Justice found that persons directly affected by an exceedance could require the competent authorities to draw up an action plan. Regarding the content of that plan, the Court of Justice acknowledged that the authorities had discretion as to the measures necessary to reduce the exceedances, taking the various opposing interests into account. However, the limits of that discretion, which relate to the adequacy of the measures, could be verified by national courts ([423]). A confirmatory judgment in 2014 showed that the adequacy of the action plan can also be challenged by a non-governmental organisation (NGO) for the protection of the

([420]) Judgment of 30 May 1991, *Commission* v *Germany*, C-361/88, EU:C:1991:224, paragraphs 12–21.

([421]) See, for example, Council Directive 82/884/EEC of 3 December 1982 on a limit value for lead in the air, OJ L 378, 31.12.1982, p. 15; and Council Directive 85/203/EEC of 7 March 1985 on air quality standards for nitrogen dioxide, OJ L 87, 27.3.1985, p. 1.

([422]) Article 7(3) of Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management, OJ L 296, 21.11.1996, p. 55.

([423]) Judgment of 25 July 2008, *Janecek*, C-237/07, EU:C:2008:447, paragraphs 39 and 46.

environment ([424]). National courts can apply effective coercive measures provided for in national law if authorities refuse to comply with such rulings ([425]).

In addition, persons affected can request that authorities measure the air quality in the most appropriate spots.

The Court of Justice looked into a case in which several inhabitants had asked a national court to verify the location of the sampling points for measuring air quality in their city. The European legislator had set out detailed rules stating that sampling points should be in areas with different levels of air quality. In doing so, the sampling points should be representative of a certain type of area, avoiding small outliers. There should also be sampling points that are representative of the areas with the highest concentrations of a pollutant. According to these rules, the choice of location has to be made on the basis of sound scientific data and evidence ([426]). The Court of Justice considered the location of sampling points to be central to the air quality assessment and improvement system it provides for. It found the rules to be sufficiently clear and unconditional for individuals to invoke them against the authorities. Therefore, when the authorities decide where to place the sampling points, individuals directly affected by the exceedance of limit values can ask a court to verify whether the chosen locations meet the criteria set out by the EU legislator and thus remain within the limits of the authorities' discretion ([427]).

2.3. Removing the possibility of postponing the limit values, even in the most polluted areas

Another major overhaul of the directives further increased the level of protection. The limit values were lowered for particularly problematic pollutants. In addition, it was specified that, when the concentration of a pollutant is above the limit, air quality plans must ensure that the exceedance period is kept as short as possible ([428]). These changes, in combination with the case-law developed, illustrate the importance of legal consequences in case of a breach of the limit values. As a result, there were fresh requests to define more precisely which situations constitute a breach of the limit values.

First, the conditions under which attaining the limit values could be postponed were clarified. The legislative rules had acknowledged that it was possible that compliance with the limit values could not be reached in all areas at the same time because of adverse climatic conditions or transboundary contributions. Hence, they provided for a possible postponement of attainment

([424]) Judgment of 19 November 2014, *ClientEarth*, C-404/13, EU:C:2014:2382, paragraph 56.

([425]) Judgment of 19 December 2019, *Deutsche Umwelthilfe*, C-752/18, EU:C:2019:1114, paragraph 40.

([426]) See Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe, OJ L 152, 11.6.2008, p. 1, Annex III, in particular Sections B and D.

([427]) Judgment of 26 June 2019, *Craeynest and Others*, C-723/17, EU:C:2019:533, paragraphs 44–47.

([428]) Article 23(1) of Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe, OJ L 152, 11.6.2008, p. 1.

deadlines for up to 5 years in specific areas. The Court of Justice decided that this prohibited Member States from postponing limit values for any longer than that. Even during that period, Member States were required to make an application for postponement showing that conformity could not be achieved earlier. At the same time, they had to take appropriate pollution abatement measures. The Commission could object to the postponement if the efforts set out in the air quality plans were insufficient to allow compliance before the new deadline ([429]).

In the meanwhile, those deadlines for permissible postponement have expired, so that the limit values now have to be applied equally throughout the EU without exception.

Second, some authorities argued that, to comply with the limit values, it was sufficient for the average of the measurements taken at all the sampling points in a particular area to remain below that value. This would allow authorities to compensate for highly polluted areas by having some areas with good air quality. However, persons living in a highly polluted area took the view that the limit values must be complied with at every sampling station. When asked by a national court to settle the question, the Court of Justice recalled that the criteria for placing the sampling points require the authorities to collect data that are representative of locations of the same type. The data should enable the relevant authorities not only to know the level of air pollution at each sampling point, but also to infer the air quality at other similar locations. Given that the rules are intended to protect human health and to combat the emission of pollutants, it is necessary to determine the actual air quality at each sampling point, not just the average of all sampling points in an area. Hence, a pollution level higher than the limit value measured at a single sampling point is sufficient to establish an exceedance ([430]).

2.4. Increased enforcement by the Commission to reach the clean air objectives

Although the air quality rules helped to bring the levels of many pollutants below limit values, exceedances of key pollutants with significant health impacts persisted, particularly in urban areas. Against this background, the Commission initiated wide-ranging EU policy efforts to support and facilitate the measures necessary for Member States to meet their targets. In parallel, central enforcement through infringement procedures increased. Since 2018, the Commission has brought 14 new infringement cases to the Court of Justice, focusing on nitrogen dioxide and particulate matter as the two major pollutants. These applications concerned non-compliance with the limit values and the insufficiency of the air quality plans.

All nine judgments that the Court of Justice has so far rendered on those infringement cases fully confirm the position of the Commission. By making a case-by-case assessment of the air quality plans, the judgments further specify the requirements for the measures taken by

([429]) Judgment of 19 November 2014, *ClientEarth*, C-404/13, EU:C:2014:2382, paragraph 33.

([430]) Judgment of 26 June 2019, *Craeynest and Others*, C-723/17, EU:C:2019:533, paragraphs 62–67.

the national authorities. The Court of Justice identified several recurring shortcomings that, in the context of an overall assessment, can serve as an indication of whether the measures are sufficient to keep the exceedance periods as short as possible.

An important first indication lies in the duration of an exceedance. If limit values have been breached in a systematic and persistent manner in a particular region for several years, this indicates that the measures set out in the existing air quality plan are insufficient ([431]). If the relevant authorities wait too long and let the exceedances continue for an extended period before starting to take action, this is another indication of a breach of their obligations. This is also considered to be the case if air quality plans are adopted but the deadlines for meeting air quality objectives are too generous. Air quality plans must strike a balance between minimising the risk of pollution and respecting the opposing interests of various public and private stakeholders; however, they cannot allow an unreasonably long and potentially indefinite deadline for complying with the limit values ([432]).

In any case, an effective reaction to the exceedances requires a sufficient degree of analysis of the causes, the measures envisaged and the expected benefits. Hence, air quality plans must include a timetable for their implementation, and estimate the planned improvement of air quality and the time required to attain their objectives ([433]). The measures taken must be sufficiently detailed and clear. They should show the extent to which they are legally binding ([434]). Finally, any air quality plan must be followed up properly. If measures announced in the air quality plan are not implemented, this is also an indication that the authorities have not kept the exceedance period as short as possible ([435]).

2.5. Upcoming developments

Efforts over more than four decades have significantly improved the protection of EU citizens against harmful concentrations of pollutants. There are now ambient air quality standards for 12 pollutants. The rules set out how to measure pollutants and how to react to an exceedance of limit values. All affected persons have the right to go to court to verify the exact locations where pollution is measured and to establish if the air quality plans adopted in their area are sufficient to keep exceedances as short as possible.

([431]) Judgment of 30 April 2020, *Commission* v *Romania (Exceedance of the limit values for PM10)*, C-638/18, EU:C:2020:334, paragraph 122.

([432]) Judgment of 10 November 2020, *Commission* v *Italy (Exceedance of the limit values for PM10)*, C-644/18, EU:C:2020:895, paragraphs 142 and 154.

([433]) Judgment of 28 April 2022, *Commission* v *France (Exceedance of the limit values for PM10)*, C-286/21, EU:C:2022:319, paragraph 73.

([434]) Judgment of 4 March 2021, *Commission* v *United Kingdom (Exceedance of the limit values for NO2)*, C-664/18, EU:C:2021:171, paragraphs 147–149.

([435]) Judgment of 3 February 2021, *Commission* v *Hungary (Exceedance of the limit values for PM10)*, C-637/18, EU:C:2021:92, paragraph 126.

New scientific findings, changing technologies and increased awareness have led to further legal developments improving air quality in the EU. These advances occur in both jurisprudence and legislation.

In a pending case, a resident of an area that exceeds the limit values is seeking compensation from the authorities.

He claims that air pollution in the area where he lives has damaged his health. The national court hearing the dispute has referred the question of whether, and, if so, under what conditions, individuals can claim compensation from the state for health damage caused by infringement of the EU limit values to the Court of Justice. In her opinion, the Advocate General took the view that an infringement of the air quality legislation may give rise to entitlement to compensation from the state ([436]).

On the legislative side, the Commission is working on a review of the air quality legislation as part of the European Green Deal. The objective is to align limit values more closely with developments in scientific knowledge, including the latest recommendations of the World Health Organization. In addition, the review is looking for ways to make monitoring air quality and adopting air quality plans more reliable. Finally, provisions on penalties and public information are being considered in order to enhance the future implementation of the rules. On the basis of these assessments, the Commission intends to make proposals for legislative changes that will allow the EU to further improve air quality.

3. Bringing environmental protection closer to European Union citizens through litigation: access to environmental information and access to justice in environmental matters under European Union law

3.1. Introduction

The implementation of these rights in specific areas that are extensively regulated in EU environmental law, such as the protection of water resources or of protected species, has often been tested in EU courts. This is even more evident since those rights have been conceived as procedural rights in the Aarhus Convention ([437]).

([436]) Opinion of Advocate General Kokott delivered on 5 May 2022 in *JP* v *Ministre de la Transition écologique and Premier ministre*, C-61/21, EU:C:2022:359, case ongoing.

([437]) The Convention on Access to Information, Public Participation in Decisionmaking and Access to Justice in Environmental Matters was signed on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, OJ 2005 L 124, 17.5.2005, p. 1.

3.2. Accessing environmental information

3.2.1. Setting the boundaries: the far-reaching effects of the notion of 'emissions into the environment'

According to the Aarhus Convention, no public authority that receives a request for information about emissions into the environment can refuse to provide access to that information on the ground of protection of commercial interests (Article (4)(d)). This is set out in the first sentence of Article 6(1) of the Aarhus regulation ([438]), which, in combination with the provisions of Regulation (EC) 1049/2001 ([439]), contributes to the implementation of the Aarhus Convention in the EU.

Despite the adoption of these regulations, a clear definition of the term 'emissions' was not adopted in EU law until some time later. The Court of Justice eventually clarified the definition in the *Commission* v *Stichting Greenpeace Nederland and PAN Europe* case ([440]), which concerned a request for access to environmental information contained in a file relating to the authorisation to place glyphosate on the market. The Court of Justice stated that, although the meaning of 'emissions' varied depending on the area of EU law that applied ([441]), the notion contained in the first sentence of Article 6(1) of the Aarhus regulation has an autonomous meaning. The notion extends to data that will allow the public to know what is actually released into the environment or what could be expected to be released into the environment under normal or realistic conditions of use of a product or substance. This means conditions of use that prevail in the area where that product or substance is intended to be used.

> *Consequently, according to the Court of Justice, that concept must be interpreted as covering information concerning, among other things, the nature, composition, quantity, date and place of actual or foreseeable emissions from a product or substance under such conditions.*

Finally, the Court of Justice considered that the notion of information concerning emissions into the environment also encompasses other types of information, such as information enabling the public to verify the assessment of the actual or foreseeable emissions on which the competent authority based its authorisation of the product or substance ([442]). This stems from the true purpose of the Aarhus regulation.

([438]) Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 264, 25.9.2006, p. 13.

([439]) Regulation (EC) No 1049/2001, of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, p. 43.

([440]) Judgment of 23 November 2016, *Commission* v *Stichting Greenpeace Nederland and PAN Europe*, C-673/13 P, EU:C:2016:889.

([441]) Judgment of 23 November 2016, *Commission* v *Stichting Greenpeace Nederland and PAN Europe*, C-673/13 P, EU:C:2016:889, paragraph 64.

([442]) Judgment of 23 November 2016, *Commission* v *Stichting Greenpeace Nederland and PAN Europe*, C-673/13 P, EU:C:2016:889, paragraphs 79–80.

However, the Aarhus regulation is not the only piece of EU legislation that contributes to the implementation of the Aarhus Convention. As the convention has been ratified by both individual Member States and the EU, the EU adopted the Aarhus directive ([443]) to ensure that Member States respect the Aarhus Convention when transposing EU environmental law into their domestic legislation. Accordingly, that directive states that access to environmental information must be granted if that information relates to environmental emissions (Article 4(2)(2)). In the *Bayer* case ([444]), which concerned a request for access to environmental information about biocides and plant protection products, the Court of Justice interpreted that provision in the same way as it interpreted Article 6(1) of the Aarhus regulation ([445]), although with more detailed references to the aim and purpose of the Aarhus Convention ([446]). In both cases, economic operators argued that granting access to the information requested would constitute a breach of commercial confidentiality. The Court of Justice took the view that a public authority faced with a request for access to environmental information relating to emissions (as defined earlier), whether that request is filed before a national authority or an EU institution or body, will find it impossible to balance the different interests. Accordingly, the public authority will not be able to weigh environmental transparency, on one hand, against, for instance, respect for business confidentiality on the other. Therefore, when emissions are at stake, access to environmental information must be granted even if this is to the detriment of the commercial interests of economic operators.

3.2.2. Defining the notion of public authorities under 'Aarhus law'

Directive 2003/4/EC was at the core of another important case, in which the Court of Justice had to clarify the boundaries of the definition of 'public authority', a key notion in what could be called 'Aarhus law', that is the Aarhus Convention, Aarhus regulation and Aarhus directive. According to the convention, a body 'acting' in a legislative capacity cannot be considered a public authority. This means that such a body is not permitted to deal with a request for access to environmental information.

The Court of Justice explained this rule in the *Flachglas Torgau* judgment ([447]). In this case, the Court of Justice had to decide whether the activity of a minister proposing a law on the adoption of a plan for greenhouse emission licences could be considered as a body performing a legislative function, in accordance with Article 2(2) of the Aarhus directive. Had it been so, the ministry might have immediately refused a request for access to environmental

([443]) Directive 2003/4/EC of the European Parliament and of the Council of 28 February 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ L 41, 14.2.2003, p. 26.

([444]) Judgment of 23 November 2016, *Bayer CropScience and Stichting De Bijenstichting*, C-442/14, EU:C:2016:890.

([445]) Judgment of 23 November 2016, *Bayer CropScience and Stichting De Bijenstichting*, C-442/14, EU:C:2016:890, paragraph 79.

([446]) Judgment of 23 November 2016, *Bayer CropScience and Stichting De Bijenstichting*, C-442/14, EU:C:2016:890, paragraph 54.

([447]) Judgment of 14 February 2012, *Flachglas Torgau*, C-204/09, EU:C:2012:71.

information under that provision of the directive. The Court of Justice considered that the exclusion from the notion of public authority of a body acting in a 'legislative capacity' is justified by the need to allow Member States 'to ensure the smooth running of the legislative process', as provided for by their constitutional rules ([448]).

In other words, although the transparency of administrative activity concerning the environment is important, the safeguarding of democracy is even more so.

The Court of Justice also pointed out that, as every Member State has a different legal tradition, the notion of 'body acting in a legislative capacity' had to be interpreted in a 'functional' way ([449]). This means that interpreting the notion must pay attention to what that body actually does, and not to its name indicated in national law. The words 'acting in a legislative capacity' could then indicate a body acting as the legislator while not being the legislator itself, as in the case of a ministry drafting a legislative proposal. However, the Court of Justice pointed out that the risk of hampering the smooth running of the legislative process no longer exists 'once that process has come to an end' ([450]). Clearly, the right balance must be found between respecting democracy and ensuring transparency in environmental matters.

3.3. Going to court to protect the environment: safeguarding the role of non-governmental organisations protecting the environment

3.3.1. Standing up for the environment and standing in court: the Slovak Bears cases

In the case of *Lesoochranárske zoskupenie* (LZ) (a Slovak NGO active in the protection of the environment), also known as the first *Slovak Bears* case ([451]), LZ challenged the national administration's refusal to let the association take part in an administrative procedure. This procedure concerned the grant of a derogation to the rules of protection of certain protected species, such as the brown bear, that are covered by the habitats directive ([452]). Following LZ's application, the national court asked the Court of Justice whether Article 9(3) of the Aarhus Convention had direct effect, that is whether LZ could have availed itself of that provision before a court of law.

The Court of Justice replied that Article 9(3) of the Aarhus Convention did not have direct effect.

However, according to the Court of Justice, a national court must reconcile the interpretation of its own domestic law with the wording and the aim of that provision of the convention in order to enable LZ to challenge a decision as being possibly contrary to EU environmental law before

([448]) Judgment of 14 February 2012, *Flachglas Torgau*, C-204/09, EU:C:2012:71, paragraph 43.

([449]) Judgment of 14 February 2012, *Flachglas Torgau*, C-204/09, EU:C:2012:71, paragraph 49.

([450]) Judgment of 14 February 2012, *Flachglas Torgau*, C-204/09, EU:C:2012:71, paragraph 55.

([451]) Judgment of 8 March 2011, *Lesoochranárske zoskupenie*, C-240/09, EU:C:2011:125.

([452]) Council Directive 92/43/EC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992, p. 7.

a court ([453]). According to the Court of Justice, an environmental NGO such as LZ could seek effective judicial protection of its 'rights' granted by EU environmental law ([454]). This conclusion is key to understanding how a procedure under Article 267 TFEU can strengthen access to justice in environmental matters. Indeed, the provisions of the habitats directive concern the protection of the environment in general and not that of individual interests. In this regard, an NGO is a representative of the general interest in protecting the environment and has a right to seek effective judicial protection against a breach of the provisions of the habitats directive.

In a second judgment in the *Slovak Bears* cases, the Court of Justice replied to a question from another case brought by LZ ([455]). In this case, the NGO was not allowed to be a party to the procedure authorising a project to extend a deer reserve on a protected site. LZ was not accepted as party to the administrative procedure and challenged this decision in court. According to the applicable provisions, an NGO could challenge an authorisation only after having been formally granted the status of party to the procedure concerning the adoption of that authorisation. The Court of Justice pointed out that environmental NGOs are members of the public concerned under Article 2(5) of the Aarhus Convention and therefore derive their 'right' to public participation from Article 6 of the convention ([456]). More importantly, the Court of Justice ruled that Article 6(3) of the habitats directive also provides the 'right to participate' in an administrative procedure concerning the authorisation of a plan or project that is likely to have a significant effect on the environment when one of the decisions envisaged in that article is to be adopted ([457]).

Against this backdrop, the Court of Justice held that, first, a procedure such as that in which LZ tried to participate is supposed to end with a decision that is subject to Article 9(2) of the Aarhus Convention on access to justice. Second, it ruled that that provision requires wide access to justice for the public concerned, and that Member States must ensure effective access to justice under Article 47 of the EU Charter of Fundamental Rights ([458]). The Court of Justice declared that the domestic courts' interpretation was inconsistent with these provisions, as LZ could not seek effective protection against the decision to refuse it the status of a party to the administrative procedure ([459]). The judgment is undisputedly a landmark decision in ensuring access to justice in environmental matters, given that the principles established therein are applicable to the areas of environmental law in which there are no specific provisions on public participation or on access to justice.

([453]) Judgment of 8 March 2011, *Lesoochranárske zoskupenie*, C-240/09, EU:C:2011:125, paragraph 51.

([454]) Judgment of 8 March 2011, *Lesoochranárske zoskupenie*, C-240/09, EU:C:2011:125, paragraphs 47 and 52.

([455]) Judgment of 8 November 2016, *Lesoochranárske zoskupenie VLK*, C-243/15, EU:C:2016:838.

([456]) Judgment of 8 November 2016, *Lesoochranárske zoskupenie VLK*, C-243/15, EU:C:2016:838, paragraph 48.

([457]) Judgment of 8 November 2016, *Lesoochranárske zoskupenie VLK*, C-243/15, EU:C:2016:838, paragraph 49.

([458]) Judgment of 8 November 2016, *Lesoochranárske zoskupenie VLK*, C-243/15, EU:C:2016:838, paragraphs 58–63.

([459]) Judgment of 8 November 2016, *Lesoochranárske zoskupenie VLK*, C-243/15, EU:C:2016:838, paragraph 63; according to this interpretation, first, a challenge in court against said refusal did not necessarily have to be examined in the procedure concerning the authorisation and, second, the challenge is automatically dismissed as soon as the project is authorised.

3.3.2. How many people can be affected by a breach of European Union environmental law and what they can do: answers from the 'Dutch Pigs' case

Finally, when providing for access to justice in environmental matters, some Member States consider it relevant whether the applicant has taken part in the administrative proceedings that led to the adoption of the measure later challenged in court. This occurs, among other situations, when an individual or an association relies on Article 6 of the Aarhus Convention, which enshrines the right to public participation in environmental procedures. Hence, when Member States provide for these procedures, the main problem of compatibility with the Aarhus Convention stems from the interaction between this administrative procedure and judicial review. In the *Stichting Varkens in Nood* case ([460]), the Court of Justice provided further important clarifications in addressing the different categories of applicants that are indicated in the convention, that is both the 'public' and the 'public concerned', as defined in Article 2(4) and (5) of the convention. These provisions distinguish the public as 'concerned' vis-à-vis the public in general in the sense that the public concerned is essentially a category covering environmental NGOs and applicants who can claim an infringement of their rights following, for instance, a breach of EU environmental law or an impairment of the interest in ensuring respect of their rights. To give a more concrete example, in the case *Wasserleitungsverband Nördliches Burgenland and Others* ([461]), the Court of Justice held that members of the public concerned include individuals claiming an infringement of their rights consisting of pollution, such as users of a well. Similarly, according to the *Folk* case ([462]), a member of the public concerned can also be someone who fishes in river waters.

Returning to the *Stichting Varkens in Nood* case, the judgment of the Court of Justice clarifies two essential points. The first is that the right of public participation applies only to the public concerned and not to the public in general ([463]). The second is the clarification of the consequences of participation (or lack of participation) in a previous administrative procedure in further action before a court. In this case, a Dutch NGO challenged the issuing of a permit to construct a pig farm building in the Netherlands. The national court asked the Court of Justice to clarify the conditions under which previous participation in an administrative procedure 'preparatory to the contested decision' can be a prerequisite for bringing a legal action under Article 9(2) and (3) of the Aarhus Convention. Regarding the public concerned, the Court of Justice stated that this category of applicants must be able to bring legal actions regardless of the role they may have played in the administrative procedure ([464]). The Court of Justice stated that Article 9(2) of the Aarhus Convention prevents admissibility requirements for judicial applications that depend on

([460]) Judgment of 14 January 2021, *Stichting Varkens in Nood and Others*, C-826/18, EU:C:2021:7.

([461]) Judgment of 3 October 2019, *Wasserleitungsverband Nördliches Burgenland and Others*, C-197/18, EU:C:2019:824, paragraphs 33–34.

([462]) Judgment of 1 June 2017, *Folk*, C-529/15, EU:C:2017:419, paragraphs 43–46.

([463]) Judgment of 14 January 2021, *Stichting Varkens in Nood and Others*, C-826/18, EU:C:2021:7, paragraphs 38–39.

([464]) Judgment of 14 January 2021, *Stichting Varkens in Nood and Others*, C-826/18, EU:C:2021:7, paragraphs 55–56.

the role that the NGO may or may not have played in the previous administrative procedure ([465]). However, this changes if the application is brought by a member of the public in general. In that case, Article 9(3) of the Aarhus Convention becomes applicable ([466]), which does not prevent requirements such as previous participation in the administrative procedure ([467]).

4. The territorial extension of European Union law: a tool to tackle the global effects of climate change and environmental challenges

4.1. Introduction

Climate change and environmental degradation are existential threats to Europe and the world. To overcome these challenges, the Commission has launched the European Green Deal ([468]) (the Green Deal), its strategy for Europe's growth and green transition. The Green Deal resets the Commission's commitment to tackling climate and environmental challenges, such as global warming, the changing climate, the risk of extinction for a large number of species, and challenges related to the pollution and destruction of forests and oceans. The EU has led by example in setting ambitious targets to reduce net greenhouse gas emissions by at least 55 % by 2030, compared with 1990, and to be the first climate-neutral continent by 2050. These goals are no longer aspirations or ambitions but obligations laid down in the first European Climate Law ([469]). In order to deliver on this commitment, the Commission will adopt a myriad of measures in various policy areas, such as climate change, energy, environment, mobility and the circular economy.

The climate and environmental challenges identified in the Green Deal are not limited to the EU.

Furthermore, EU action is insufficient on its own and cannot deliver the global emissions reduction the world needs. Therefore, the EU is to 'build on its strengths as a global leader on climate and environmental measures' ([470]) and engage in international 'Green Deal diplomacy' to promote the Green Deal's objectives across the globe ([471]).

([465]) Judgment of 14 January 2021, *Stichting Varkens in Nood and Others*, C-826/18, EU:C:2021:7.

([466]) Judgment of 14 January 2021, *Stichting Varkens in Nood and Others*, C-826/18, EU:C:2021:7, paragraphs 61–62.

([467]) Judgment of 14 January 2021, *Stichting Varkens in Nood and Others*, C-826/18, EU:C:2021:7, paragraph 63.

([468]) European Commission, Commission communication – The European Green Deal, COM(2019) 640 final.

([469]) Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'), OJ L 243, 9.7.2021, p. 1.

([470]) European Commission, Commission communication – The European Green Deal, COM(2019) 640 final, p. 1.

([471]) European Commission, Commission communication – The European Green Deal, COM(2019) 640 final, pp. 1–2 and Section 3, p. 20, and the following.

The Green Deal also identifies, albeit in a very cursory manner, another way in which the EU can address climate and environmental challenges at an international level: '[a]s the world's largest single market, the EU can set standards that apply across global value chains' ([472]).

To respond to the climate and environmental challenges identified in the Green Deal, the Commission has shifted the conception of EU legislation. It is using proposals for EU legislation as a tool to regulate situations or conduct outside the EU that conflict with the Green Deal's objectives, while ensuring the principle of non-discrimination between domestic and imported products is respected. A common denominator in these cases is that the situations or conduct occurring outside the EU have an impact on the level of climate or environmental protection achieved by the EU internal market and the products circulating on that market.

The application of these measures is triggered by a territorial connection to the EU (notably market access), but evaluating compliance with the measures requires an assessment of conduct taking place outside the EU and/or of third-country law. These measures have been qualified by the literature as 'measures giving rise to territorial extension' ([473]) ([474]). Territorial extension should be distinguished from extraterritoriality – the application of a measure that does not depend on a territorial connection to the EU – which is at odds with customary international law unless an alternative, recognised jurisdictional base can be found ([475]), and which is very rarely practised by the EU ([476]).

Therefore, measures of territorial extension in EU legislation intended to achieve the Green Deal objectives will, by their very nature, affect the international realisation of these objectives to a certain extent, going beyond the strict confines of the EU's territory. Furthermore, the literature suggests that the EU legislator could, under certain circumstances, through measures giving rise to territorial extension, actively

Territorial extension allows the EU to regulate conduct or situations occurring outside the EU in so far as this conduct is related to, for instance, placing a product on the EU market.

([472]) European Commission, Commission communication – The European Green Deal, COM(2019) 640 final, p. 22.

([473]) Scott, J., 'The global reach of EU law', in Cremona, M. and Scott, J. (eds), *EU law beyond EU borders: The extraterritorial reach of EU law*, Oxford University Press, Oxford, 2019, p. 22.

([474]) There is an ongoing debate in the literature regarding the conditions under which legislation giving rise to territorial extension should be considered legitimate; this will not be further addressed in this chapter. A renowned author in this field, Joanne Scott, concluded that '[i]t is increasingly widely accepted that it is permissible for the EU to extend the global reach of its laws when foreign conduct causes substantial effects within the EU' (Scott, J., 'The global reach of EU law', in Cremona, M. and Scott, J. (eds), *EU law beyond EU borders: The extraterritorial reach of EU law*, Oxford University Press, Oxford, 2019, p. 63).

([475]) Scott, J. 'The new EU "extraterritoriality", *Common Market Law Review,* Vol. 51, No 5, 2014, p. 1345.

([476]) Scott, J. 'Extraterritoriality and territorial extension in EU law', *The American Journal of Comparative Law,* Vol. 62, No 1, 2014, p. 94; Scott, J. 'The global reach of EU law', in Cremona, M. and Scott, J. (eds), *EU law beyond EU borders: The extraterritorial reach of EU law*, Oxford University Press, Oxford, 2019, p. 24.

promote the occurrence of the 'Brussels Effect' ([477]). The Brussels Effect refers to the EU's unilateral ability to regulate the global marketplace ([478]). Recent literature states that measures giving rise to territorial extension and imposing requirements that apply at company or country levels (i.e. going beyond individual product or transaction levels) are likely to actively trigger the Brussels Effect ([479]). If EU legislation giving rise to territorial extension also fuels the Brussels Effect, it would evidently have a larger impact on the realisation of the Green Deal objectives at international level.

This section will provide examples of measures giving rise to territorial extension included in Commission proposals for EU legislation to achieve the Green Deal's objectives. It will analyse how these measures affect situations or conduct occurring outside the EU, thus contributing to the international realisation of the Green Deal objectives through territorial extension and the Brussels Effect.

4.2. Proposal for a regulation on batteries and waste batteries ([480])

The proposal for a regulation on batteries and waste batteries contains rules applicable to conduct in third countries in relation to the Green Deal's objective of reducing greenhouse gas emissions. Battery development and production are strategic imperatives for the EU in the context of the clean energy transition, especially in relation to road transport. At least 30 million zero-emission electric vehicles are predicted to be on EU roads by 2030. Although electric cars are expected to significantly decrease greenhouse gas emissions, they have an environmentally damaging downside: their batteries. On the one hand, there is a need to scale up global battery production by a factor of 19 to accelerate the transition to a low-carbon economy ([481]). On the other hand, this massive increase in battery production and use has an impact on carbon emissions given that each battery has its own life cycle carbon footprint. Climate change has been identified as the second most important environmental impact category of batteries ([482]).

Therefore, the proposed regulation aims to ensure that the overall life cycle of batteries has a low carbon footprint ([483]). To that end, the proposed regulation introduces a multi-tier approach, leading to the situation in which, by 1 July 2027, electric vehicle batteries and rechargeable

([477]) Scott, J. 'The global reach of EU law', in Cremona, M. and Scott, J. (eds), *EU law beyond EU borders: The extraterritorial reach of EU law*, Oxford University Press, Oxford, 2019, pp. 32–33.

([478]) Bradford, A., *The Brussels Effect: How the European Union rules the world*, Oxford University Press, Oxford, 2020, p. 1.

([479]) Scott, J. 'The global reach of EU law', in Cremona, M. and Scott, J. (eds), *EU law beyond EU borders: The extraterritorial reach of EU law*, Oxford University Press, Oxford, 2019, pp. 32–35.

([480]) European Commission, Proposal for a regulation of the European Parliament and of the Council concerning batteries and waste batteries, repealing Directive 2006/66/EC and amending Regulation (EU) No 2019/1020, COM(2020) 798 final.

([481]) World Economic Forum and Global Batteries Alliance, *A vision for a sustainable battery value chain in 2030: Unlocking the potential to power sustainable development and climate change mitigation*, World Economic Forum, Cologny, 2019.

([482]) Recital 18 and footnote 31 of the proposed regulation on batteries and waste batteries.

([483]) Article 7 of the proposed regulation on batteries and waste batteries.

industrial batteries can be placed on the EU market or put into service only if their technical documentation demonstrates that the declared life cycle carbon footprint value of the battery is below the maximum threshold set by the Commission in a delegated act ([484]).

The life cycle carbon footprint value of a battery includes the carbon emitted during its production.

As the majority of electric vehicle and rechargeable industrial batteries are produced outside the EU, this rule regulates conduct taking place outside the EU. Non-EU facilities producing those batteries for the EU market have to ensure that the carbon emissions generated during their production stay below a certain level. To some extent, these rules could also generate the Brussels Effect ([485]), given that they have an impact on the amount of carbon that a third-country production facility can emit. If batteries for third-country markets are produced in the same facility as batteries for the EU market, the carbon emissions generated in their production are likely also to be reduced.

The proposed regulation also regulates conduct outside the EU through the supply chain due diligence rules that apply to operators placing electric vehicle batteries and rechargeable industrial batteries on the EU market ([486]). These operators must adopt and communicate a company policy for supply chain due diligence that is consistent with the standards set out in the Organisation for Economic Co-operation and Development (OECD) due diligence guidance ([487]) for the supply chains of certain (critical) raw materials for battery production ([488]), including cobalt, natural graphite, lithium and nickel ([489]). This policy must be subject to third-party verification. Only a few countries supply these raw materials and, in some cases, low standards of governance may exacerbate environmental and social risks inherent in the extraction, processing and trading of certain raw materials for battery manufacturing purposes. Therefore, the operator must identify and assess the adverse impacts associated with certain risk categories – which include environmental risks related to air, water, soil and biodiversity – in its supply chain against the standards of its due diligence policy. If risks are identified, a strategy must be adopted to prevent or mitigate the impacts.

Although these rules are imposed on economic operators placing batteries on the EU market, their main aim is to ensure that the supply chains of these operators relating to certain raw materials, which are largely located outside the EU, comply with environmental standards, in particular those laid down in international law. Given that this supply chain due diligence policy

([484]) Article 7 of the proposed regulation on batteries and waste batteries, in particular paragraph 3.

([485]) If the other conditions for its occurrence are fulfilled; see Bradford, A., *The Brussels Effect: How the European Union rules the world.* Oxford University Press, Oxford, 2020.

([486]) Article 39 of the proposed regulation on batteries and waste batteries.

([487]) OECD, *OECD due diligence guidance for responsible supply chains of minerals from conflict-affected and high-risk areas: third edition*, OECD Publishing, Paris, 2016.

([488]) Between 6 % and 60 % of the global production of these raw materials is used for batteries.

([489]) Article 39 in conjunction with Annex X of the proposed regulation on batteries and waste batteries.

applies at company level, it is likely to have an impact on the environmental sustainability of batteries made using those same supply chains of raw materials for third-country markets, thus leading to a larger global impact.

4.3. Proposal for a regulation establishing a Carbon Border Adjustment Mechanism ([490])

Climate change is a global problem that needs a global solution. As the EU raises its climate ambitions, and less stringent environmental and climate policies prevail in non-EU countries, there is a strong risk of 'carbon leakage'. This suggests that companies based in the EU could move carbon-intensive production abroad to take advantage of lax standards, or EU products could be replaced by more carbon-intensive imports. Carbon leakage can shift emissions outside the EU and therefore seriously undermine EU and global efforts to address climate change.

To date, the EU has mitigated carbon leakage through free allocations, that is when certain industries receive a share of their emission allowances for free, but, with rising climate ambition and higher carbon prices, the Commission seeks to phase out these free allocations. In parallel, it seeks to introduce a new Carbon Border Adjustment Mechanism (CBAM) ([491]) requiring EU importers to purchase certificates equivalent to the weekly EU carbon price ([492]).

The CBAM would initially apply to imports in five emissions-intensive sectors deemed at greater risk of carbon leakage: cement, iron and steel, aluminium, fertilisers and electricity ([493]). It would cover imports of these goods from all third countries, except those participating in the EU's Emissions Trading System ([494]) or a linked mechanism ([495]). Importers would be able to claim a reduction in the number of CBAM certificates to be surrendered based on the carbon price paid in the country of origin ([496]).

The CBAM would have a significant impact on the realisation of the Green Deal's objectives by strengthening international climate cooperation and by enhancing the EU's own climate goals.

On the one hand, the gradual introduction of the mechanism could incentivise third-country governments to put in place greener policies and encourage third-country producers to reduce their emissions, particularly if alternative low-carbon technologies are available and affordable, thus

([490]) Please also see the chapter 'The European Union Carbon Border Adjustment Mechanism and its consistency with World Trade Organization law' in the fourth part of this book.

([491]) European Commission, Proposal for a regulation of the European Parliament and of the Council establishing a carbon border adjustment mechanism, COM(2021) 564 final.

([492]) Article 21 of the proposed regulation establishing a CBAM.

([493]) Annex I of the proposed regulation establishing a CBAM.

([494]) Iceland, Liechtenstein and Norway.

([495]) Switzerland.

([496]) Articles 6(2)(c) and 9 of the proposed regulation establishing a CBAM.

promoting the Brussels Effect. On the other hand, the gradual phase-out of free allowances is expected to increase EU producers' incentive to decarbonise.

The undeniable global climate and environmental impacts of the CBAM, fully compliant with the principle of non-discrimination between domestic and foreign producers and World Trade Organization law, are further substantiated by scholars who conclude that similar carbon tariff mechanisms must be seriously considered part of the arsenal of new tools used in the fight against climate change ([497]).

4.4. Proposal for a regulation on deforestation-free products ([498])

Deforestation and forest degradation, which are occurring at an alarming rate ([499]), contribute to the global climate crisis, mainly because they increase greenhouse gas emissions through associated forest fires, permanently remove carbon sink capacities and reduce the climate change resilience and biodiversity of the affected area.

In view of the above, the Commission proposed a regulation that aims to minimise the EU's contribution to deforestation and forest degradation worldwide, and to reduce its contribution to greenhouse gas emissions. To that end, the proposed regulation provides that six commodities identified as the most likely to lead to deforestation (wood, cattle, soy, palm oil, cocoa and coffee), and derived products that contain, have been fed with or have been made using these commodities, cannot be placed on, made available on or exported from the EU market unless they are 'deforestation free', have been produced in accordance with the relevant legislation of the country of production and are covered by a due diligence statement ([500]). The regulation will apply to domestic commodities and products, and to those produced in third countries.

As a result, the regulation will help to combat deforestation not only in the EU but also in third countries.

To increase the effect of the regulation, deforestation-free has been defined ([501]) as meaning that the relevant commodities and derived products were produced on land that has not been subject to deforestation since 31 December 2020. The Commission chose a date before the date the proposal was adopted to avoid operators accelerating deforestation in the EU or outside of it to obtain more agricultural lands in the period between the Council's adoption of the proposal and the Council and Parliament's introduction of the regulation.

([497]) 'The promise and perils of carbon tariffs', *Harvard Law Review*, Vol. 135, No 6, April 2022.

([498]) European Commission, Proposal for a regulation of the European Parliament and of the Council on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010, COM(2021)706 final.

([499]) The Food and Agriculture Organization of the United Nations estimates that around 420 million hectares of forest, which equals about 10 % of the world's remaining forests and an area larger than the EU, was lost between 1990 and 2020.

([500]) Article 3 of the proposed regulation on deforestation-free products.

([501]) Article 2(8) of the proposed regulation on deforestation-free products.

The proposed regulation empowers the Commission to establish, by implementing act, a list of countries (Member States or third countries) or parts thereof that present a high or low risk of producing commodities or products that are not deforestation free. The requirements the regulation imposes on operators will vary depending on the level of risk of the country of provenance of the commodity or product. The categorisation of countries as being at low or high risk of producing commodities or products that are not deforestation free could lead to an even greater contribution to the fight against deforestation in those countries. Being identified as a low-risk country has benefits in terms of EU market access, but requires that the chance that commodities or products produced in that country (or part of it) are not deforestation free be negligible. Therefore, this system could give the proposed regulation an increased impact in the fight against deforestation at international level, including through the promotion of the Brussels Effect.

Finally, the regulation will also apply to commodities and products falling within the scope that are exported from the EU to third countries in order to strengthen its *effet utile* and avoid EU producers selling products that do not comply with the EU's standards.

Given the size of the EU market, it can be expected that the virtuous effect of this regulation will be important. A global shift can even be expected if other important commercial areas follow the EU ([502]).

4.5. Proposal for a regulation on shipments of waste ([503])

One of the circular economy objectives of the Green Deal is that 'the EU should stop exporting its waste outside of the EU and will therefore revisit the rules on waste shipments' ([504]). Exports from the EU of waste destined for disposal and exports from the EU to third countries to which the OECD decision on hazardous waste destined for recovery ([505]) does not apply are already prohibited under the current Waste Shipment Regulation ([506]). To ensure that waste generated in the EU does not damage the environment or public health in these third countries,

([502]) The Fostering Overseas Rule of Law and Environmentally Sound Trade (Forest) Act of 2021, proposed on 10 June 2021, is under review in the United States. The bill pursues the same objective of outlawing commercial products linked to deforestation such as meat, soy, palm oil, cocoa, rubber and wood pulp.

([503]) European Commission, Proposal for a regulation of the European Parliament and of the Council on shipments of waste and amending Regulations (EU) No 1257/2013 and (EU) No 2020/1056, COM/2021/709 final.

([504]) European Commission, Commission communication – The European Green Deal, COM(2019) 640 final, Section 2.1.3, p. 8.

([505]) OECD Council, Decision of the Council concerning the revision of Decision C(92)39/FINAL on the control of transboundary movements of waste destined for recovery operations, C(2001)107/FINAL, 15 March 2004.

([506]) Articles 34(1) and 36(1) of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste, OJ L 190, 12.7.2006, p. 1. The latter prohibition is also covered by an amendment to the Basel Convention, which entered into force at international level in December 2019; see recital 7 of the proposed regulation.

the proposed regulation also prohibits exporting non-hazardous waste destined for recovery to those countries ([507]).

There is one exemption: the export of non-hazardous waste destined for recovery to these third countries is allowed if, for the waste concerned, the country is included in the list of countries established by the Commission in a delegated act ([508]). To be included on that list, and thus be able to receive non-hazardous waste for recovery from the EU, the third country concerned must submit a request ([509]). It has to demonstrate that it has a comprehensive waste management strategy or plan covering its entire territory; show its ability and readiness to ensure the environmentally sound management of waste; and have a legal framework for waste management, in accordance with certain minimum requirements ([510]). Furthermore, the third country has to be a party to and have taken the measures necessary to implement the Basel Convention ([511]) and certain other international conventions ([512]). Finally, it must have an effective enforcement strategy for domestic legislation on waste management and waste shipments ([513]).

Through these provisions, the Commission intends to prevent waste generated in and exported from the EU from contributing to environmental or public health damage in the third countries to which the OECD decision does not apply. If one of these third countries would like to engage in the recovery of non-hazardous waste from the EU, it must comply with strict requirements in relation to the environmentally sound management of the waste in its national legislation and in relation to compliance with international law. Thus, this rule has the potential to importantly contribute to waste management standards applicable in third countries if a sufficient number of countries are interested in being included on this list. It has the potential to generate the Brussels Effect in these countries, as the national legislation and waste management strategies put in place would probably have an impact on the treatment of waste originating from other jurisdictions as well.

([507]) Article 37(1) of the proposed regulation on shipments of waste.

([508]) Article 37(2) in conjunction with Article 38 of the proposed regulation on shipments of waste.

([509]) Article 39(2) and Annex VIII of the proposed regulation on shipments of waste.

([510]) Article 39(3)(a) and (b) of the proposed regulation on shipments of waste.

([511]) Conference of Plenipotentiaries, *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, Conference of Plenipotentiaries, Basel, 22 March 1989.

([512]) Article 39(3)(c) of the proposed regulation on shipments of waste.

([513]) Article 39(3)(d) of the proposed regulation on shipments of waste.

5. Conclusion

As the world's largest single market, the EU is ready to set standards that apply across global value chains and to promote ambitious environment and climate policies across the world.

The measures from the proposed regulations described above will, if adopted by the Council and Parliament, have an important role in tackling certain global environmental and climate change challenges identified in the Green Deal. In addition, given that these measures have the capacity to have a larger scope than the individual products concerned, for instance through affecting, *de jure,* third country legislation or, *de facto,* how a company organises and checks its supply chain, these measures have the potential, through the Brussels Effect, to enhance environmental protection and combat climate change regarding products produced for third-country markets.

OF FARMS, FISH AND FORKS

TOWARDS SAFE, SUSTAINABLE AND HIGH-QUALITY FARMING AND FISHING IN THE EU

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1. Introduction

We all need to eat and drink. Agricultural and fisheries law therefore affects the daily lives of everyone. Moreover, these sectors are crucial for the economy and employ millions of people across the European Union. Regulating the supply of food to nearly 450 million people in the EU – which includes regulating the production of agricultural and fishery products, and their import from non-EU countries – generates a large body of law, which is constantly evolving.

Title III of Part 3 of the Treaty on the Functioning of the European Union (TFEU) governs agriculture and fisheries. Focusing on food security, market stabilisation and support of income for farmers and fishers, the substance of this text has not changed since 1957. Article 39(1) TFEU provides that:

> *The objectives of the common agricultural policy shall be:*
>
> *(a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour;*
>
> *(b) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture;*
>
> *(c) to stabilise markets;*
>
> *(d) to assure the availability of supplies;*
>
> *(e) to ensure that supplies reach consumers at reasonable prices.*

Since then, the need to balance these objectives with others, such as the protection of health and the environment, climate change, conservation of marine resources, consumer protection and animal welfare, has become increasingly acute.

These objectives have been developed gradually over the last 60 years, by treaty amendments on, for example, environmental protection (Article 11 TFEU), consumer interests (Article 12 TFEU) and animal welfare (Article 13 TFEU). Other objectives have been developed by the legislator and through case-law.

Balancing the often opposing needs that result from these objectives is a constant challenge in this area of EU law.

This chapter tells the – often exciting – story of the development of the tools that EU law provides in order to find the right balance between these objectives including during crises. Indeed, agriculture and fisheries are areas of law in which the European Commission often has to react immediately to sudden crises or policy shifts, such as in the case of the adoption of the European Green Deal ([514]), the COVID-19 pandemic and, most recently, Russia's invasion of Ukraine.

This chapter is divided as follows.

Section 2 provides an overview of the key legal developments since the establishment of the common agricultural policy (CAP) in 1962, and then goes on to present the fascinating story of the 'greening' of that policy, and what the CAP can do for rural people and their regions. It then focuses on how the EU protects the interests of consumers when they drink wine and buy organic food.

Section 3 then looks at the common fisheries policy (CFP), which, although covered by the same provisions of the TFEU, has developed as an independent policy. This section first summarises the salient developments of the CFP and its major objectives. It then focuses on the opportunities and challenges the EU faces in the conservation of marine biological resources and how the fisheries objectives are in line with environmental objectives. Finally, it provides a glimpse of the important external aspect of the CFP and how sustainable fishing objectives are shaped by the EU's international obligations.

Section 4 focuses on how the EU has, since the 1960s, protected the health of humans, animals and plants. It first looks at two important cases showing that human health is essential and cannot be sacrificed in the pursuit of economic objectives. It then delves into the realm of animal welfare protection – a matter close to the hearts of the majority of EU citizens. Finally, it provides an example of how the Commission Legal Service helps to protect bees from certain types of pesticides.

([514]) European Commission, Communication from the Commission to the European Parliament, the Council, the European, Economic and Social Committee and the Committee of the Regions – The European Green Deal, COM(2019) 640 final. See in more detail on the Green Deal the previous chapter, 'Protecting the environment and tackling climate change'.

2. Sixty years of the common agricultural policy

2022 marks the 60th anniversary of the CAP. In 1962, the six founding Member States of the European Communities began talks about a common approach to agriculture, which resulted in an agreement to create the first CAP.

After the Second World War, there was a strong focus on the need for food security and support for farmers' incomes. Not surprisingly, the original objectives of the CAP, as set out in Article 39 TFEU, aimed to increase agricultural productivity, stabilise the markets and assure the availability of supplies.

In the initial years of the CAP, a system of price and market support was established, which provided farmers with a guaranteed price for their products, introduced tariffs on imported products and enabled state intervention in the event of a fall in market prices. Farmers received support in proportion to their total levels of production. However, this led, in some cases, to overproduction and other imbalances (in the 1970s commonly referred to as 'milk lakes' and 'butter mountains').

Over the last six decades, through a series of reforms, the CAP, and in particular its financial rules, has constantly evolved in response to changing agricultural markets and consumer demands, and to other factors such as climate change and the need for sustainable development. In times of crisis, these rules have sometimes had to be swiftly adapted to respond to rapidly changing circumstances. For example, when the COVID-19 pandemic broke out in March 2020, the Commission acted quickly in order to approve amendments to the CAP rules so as to extend existing deadlines for checks and controls to be carried out on CAP beneficiaries and Member States.

Similarly, in response to Russia's invasion of Ukraine in February 2022, CAP provisions were quickly modified to enable farmers to receive exceptional aid from CAP funds in order to allow fallow land to once again be used for the cultivation of cereals and thus to ensure global food security.

It was the reform known as Agenda 2000, agreed in Berlin in March 1999, that started to place a greater emphasis on environmental policy objectives and the multifunctional role of the European model of agriculture. It was also at this time that the so-called second pillar of the CAP came into being, which meant that certain measures aiming to promote the development of rural areas started to be financed by the European Agricultural Fund for Rural Development. One of the aims of rural development funding is to provide support for farming in disadvantaged areas, helping to ensure that these areas remain populated. Such funding also contributes to making remote and mountainous areas more liveable by providing support for infrastructure and services. It also ensures focused CAP support for the modernisation of agriculture, the diversification of economic activity in the countryside and specific agri-environmental measures. Section 2.2 below considers the objective of promoting rural development in more detail.

The 2023–2027 CAP, which will come into force in January 2023, is based on what is referred to as the 'new delivery model'. It is focused on the performance of the different Member States in achieving the different objectives of the CAP, and not just on compliance with the rules by individual CAP beneficiaries, as is currently the case. It will support the transition towards more sustainable systems of food and farming, in line with the European Green Deal. For the first time, the CAP will include the aspect of 'social conditionality', meaning that CAP beneficiaries will have to respect elements of European working and employment conditions in order to receive CAP funds. Thus, CAP payments will be linked to compliance with certain European labour law provisions in specific EU directives ([515]). Beneficiaries that do not comply may be subject to administrative penalties.

Section 2.1 below describes the legal challenges to achieving a greener agriculture.

Another important element of the CAP has been the common market organisations (CMOs). In particular, Regulation (EU) No 1308/2013 establishes a common organisation of the markets in agricultural products for all products listed in Annex I TFEU, except for fishery and aquaculture products (which are regulated in a separate CMO, as explained in Section 3 of this chapter). Once a CMO is established, Member States must refrain from taking measures that may undermine it or create exceptions to it. In relation to the applicability of EU competition rules to the EU's farmers, Regulation (EU) No 1308/2013 provides for certain exceptions from the application of those rules, allowing farmers to work together, and with other stakeholders in the food chain, in order to ensure higher sustainability standards. One success story of the CMOs is that of the quality schemes and labels that protect the efforts of farmers and winemakers through protected designations of origin. Another important element of today's agricultural law is the EU organic label. Section 2.3 describes how EU law protects consumer against the misleading use of traditional names of food products and organic labelling.

2.1. Towards an ever greener common agricultural policy: mechanisms of mainstreaming environmental considerations into the European Union's agricultural *acquis*

The text of Article 39 TFEU, which sets out the objectives of the CAP, does not mention the environment at all. It was in 1992, when the international community met at the Rio Earth Summit, that the EU legislator first recognised the need to include protection of the environment in the CAP and to move towards a sustainable agriculture. Agricultural production and the related use of land and water account for roughly 10 % of the EU's greenhouse gas emissions, with only a limited projected reduction of these emissions by 2030. Pesticides, biocides and other chemicals further affect biodiversity, with a particularly harmful effect on pollinators.

([515]) Regulation (EU) 2021/2115 of the 2 December 2021 establishing rules on support for strategic plans to be drawn up by Member States under the CAP (CAP strategic plans) and financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulations (EU) No 1305/2013 and (EU) No 1307/2013, OJ L 435/1, 6.12.2021, p. 1.

Since 1992, the legislator has therefore, at each and every reform of the CAP, declared its intention of moving towards an 'ever greener CAP'.

How could this be achieved? The key instrument in pursuing any objectives of the CAP has been financial incentives provided to farmers through direct payments. In contrast to most areas of agricultural law, where the judiciary plays an important role, the rise to prominence of sustainable agriculture in the CAP cannot be attributed to judicial activism. Rather, the legislator has been the main (or even sole) driver of the persistent pursuit of change towards sustainability in agriculture over the last three decades.

The EU legislator has obviously also enhanced, widened and deepened the EU's environmental *acquis* during this time (examples of significance to agriculture are the nitrates directive ([516]), the habitats directive ([517]), the water framework directive ([518]), the sustainable use of pesticides directive ([519]) and the land use, land use change and forestry regulation ([520])). However, environmental legislation based on Article 192 TFEU did not and could not achieve the success story of sustainable agriculture under the CAP alone. This is evident when looking at the respective legal bases in the TFEU: while the objectives set out for any legislation on the CAP in Article 39 TFEU are compatible with the objectives of environmental policy set out in Article 191 TFEU, the former are different from and, most importantly, of much wider scope and more diverse than the latter.

In addition, agricultural legislation based on Article 43 TFEU can never serve only a single purpose; it must always balance the different objectives or interests to which Article 39 TFEU alludes. It has become obvious that agricultural policy is not (only) about the use of limited resources (in contrast to classic environmental legislation); rather, it must always also take into account objectives such as food safety, security of supply and support of the incomes of

([516]) Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources, OJ L 375, 31.12.1991, p. 1. The nitrates directive aims to reduce and prevent nitrates pollution of water from agricultural sources by requiring the Member States to designate areas vulnerable to this kind of pollution and set out specific measures (such as rules on the storage of manure) applicable to farmers in an action plan.

([517]) Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992, p. 7. This directive provides, in particular, for the establishment of the Natura 2000 network of special nature conservation areas.

([518]) Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ L 327, 22.12.2000, p. 1. This directive integrates a large part of the *acquis* with relevance for the quality of various water bodies in a single piece of legislation, requiring an improvement of water quality in every body of water by certain deadlines and a consideration of all water-quality-relevant aspects in the approval of projects.

([519]) Directive 2009/128/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for Community action to achieve the sustainable use of pesticides, OJ L 309, 24.11.2009, p. 71. This directive aims to reduce the risks and impacts of pesticide use on human health and the environment by, *inter alia*, requiring Member States to establish national action plans with specific measures on pesticide use.

([520]) Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, OJ L 156, 19.6.2018, p. 1. This regulation obligates Member States to achieve a balance of emissions and removals of greenhouse gases from the land and forestry sectors by 2030.

farmers. Along these lines, the Court of Justice has held that agricultural legislation based on Article 43 TFEU may also aim at environmental protection – even if not as a primary purpose, but rather as ancillary to those purposes explicitly set out in Article 39 TFEU ([521]).

Against this background, it is not surprising that one approach frequently applied in environmental legislation – the establishment of a 'budget' for the use of natural resources by applying binding (national) limits on, for example, pollutant ([522]) or greenhouse gas ([523]) emissions – has never been employed in the context of the CAP.

Another prominent approach in the EU's environmental (climate change) legislation that has not been employed by the legislator for 'greening' the CAP is that of the EU Emissions Trading System, which is a market-based mechanism setting incentives for a shift towards the use of more emissions-efficient technologies ([524]). It might indeed be difficult to reconcile such a system – focused on incentivising investments for the sake of enhancing efficiency – with the required contribution of any CAP legislation to 'increasing productivity … and … individual earnings' (Article 43 TFEU).

Financial incentives for 'greening the CAP' were rather introduced through the so-called system of cross-compliance ([525]), which obligates farmers to comply with environmental requirements laid down in environmental legislation and with the 'good agricultural and environmental conditions' in order to have access to CAP payments. The system of cross-compliance (which will continue to exist under the 2023–2027 CAP legislation and will be referred to from 2023 as 'conditionality') integrates the obligation of adherence to the rules laid down in environmental legislation such as, notably, the EU's legislation on water quality, air quality and nature conservation. It therefore does not add any further environmental requirements for farmers, and it does not increase the EU's environmental ambition, but it does support the enforcement of the existing environmental *acquis* through the CAP.

([521]) Judgment of 19 September 2002, *Republik Österreich* v *Martin Huber*, C-336/00, EU:C:2002:509, paragraphs 33–36.

([522]) For example, the national emission reduction commitments directive, Directive (EU) 2016/2284 of the European Parliament and of the Council of 14 December 2018 on the reduction of national emissions of certain atmospheric pollutants, OJ L 344, 17.12.2018, p. 1. This directive establishes a national target for certain pollutant emissions for each Member State and provides for national air pollution control programmes setting specific measures to reach those targets.

([523]) For example, the effort-sharing regulation, Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement, OJ L 156, 19.6.2018, p. 26. This regulation establishes a national target for reductions of greenhouse gas emissions from sectors not covered by the EU emissions trading system (agriculture, transport, buildings, etc.) for each Member State.

([524]) Directive 2003/87/EC of the European Parliament and of the Council of 13 December 20003 establishing a scheme for greenhouse gas emission allowance trading within the Community, OJ L 275, 25.10.2003, p. 32. This directive establishes the EU emissions trading system whereby operators must surrender allowances (auctioned or allocated for free) for greenhouse gas emissions from industrial installations and power plants.

([525]) Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy, OJ L 347, 20.12.2013, p. 549. This regulation regulates the EU financing of expenditure under the CAP.

In addition, the latest revision of the CAP legislation, which covers 2023–2027, provides for at least 25 % of the budget for direct payments to farmers to be allocated to so-called eco-schemes (i.e. voluntary payment schemes that reward climate- and environment-friendly farming practices).

These additional payments must – by definition – require more of farmers than is required by the baseline of existing obligations under environmental legislation covered by the notion of 'cross-compliance' or 'conditionality'.

Environmental protection has thereby moved from being an encouragement to being both a condition for the payment of CAP subsidies to farmers and an incentive to go beyond the baseline requirements of existing environmental legislation: under the 2023–2027 CAP, 40 % of all expenditure will be climate relevant, contributing to the targets of spending 30 % of the EU budget on climate action and 10 % of the EU budget on biodiversity objectives ([526]).

However, the most important mechanism of mainstreaming sustainability into the CAP relates to the Member States' CAP strategic plans. In the recently adopted strategic plans regulation, the legislator provides a governance framework for the CAP based on a 'pledge-and-review' approach.

This latest addition of another regulatory approach for 'greening the CAP' – the establishment of a governance framework that largely defers the definition of specific policies and measures to a political dialogue between the Member States and the Commission, with full transparency and ample consultation of stakeholders – may resemble the *zeitgeist* already common in environmental, climate change and energy policies of the EU ([527]).

However, it also contains great hopes. In times of climate crisis, biodiversity loss and increasing pressure on resources, including water and air, one must hope that this approach, the legislator's latest choice to realise its proclaimed objective of an ever greener CAP, will turn out to be the decisive step towards progress not only in 'greening' agriculture in the EU, but also in finally ensuring a 'greened' CAP that is, and remains, ever 'green'.

([526]) Recital 94 to the CAP strategic plans regulation (footnote 515).

([527]) Notable examples include, in particular, the energy union governance regulation (Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2019 on the Governance of the Energy Union and Climate Action, OJ L 328, 21.12.2018, p. 1; following the model of the Paris Agreement, this regulation establishes a governance framework for national energy and climate policies, with a view to achieving the collective 2030 targets concerning greenhouse gas emission reductions, renewable energy use and energy efficiency), the nitrates directive (footnote 3), the ambient air quality directive (Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe, OJ L 152, 11.6.2008, p. 1; this directive establishes binding targets on pollutant emissions and requires Member States to establish air quality plans in cases of excess), the sustainable use of pesticides directive (footnote 526), the national emission reduction commitments directive (footnote 529), the land use, land use change and forestry regulation (footnote 527) and the climate law regulation (Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing a framework for achieving climate neutrality, OJ L 243, 9.7.2021, p. 1; this regulation establishes a governance framework synchronised with that under the energy union governance regulation, in order to achieve the objective of climate neutrality in the EU by 2050).

2.2. Rural development: ensuring an adequate standard of living for the agricultural community

As a result of the devastated economy after the Second World War, and the rapidly increasing urbanisation in the years that followed, one of the challenges facing Europe has been that of ensuring a level playing field for citizens living in rural and urban areas. Cities often have more employment and education opportunities, and relatively higher wage levels. To address this inequality, Article 39 TFEU specifies, as one of its social objectives, the need to ensure 'a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture'. The treaty foundations of the CAP have remained unchanged since the 1957 Treaty of Rome, thus demonstrating the ongoing importance of this social objective.

In balancing this objective with other objectives, the EU legislature may, on a temporary basis, give priority to one specific objective of the CAP. For example, when there was an oversupply of dairy products on the market and, as a result, farmers' milk production quotas had been reduced, the Court of Justice examined the abovementioned objective of ensuring a fair standard of living for the agricultural community against the objective of stabilising the market. The Court of Justice held that a reduction in quotas was permissible and that the (then) European Community's legislature could not be accused of having exceeded the limits of its discretion when, faced with a market situation characterised by long-term structural surpluses, it gave temporary priority to stabilising the market, for a time neglecting the objective of increasing the individual earnings of the farmers concerned ([528]).

In our fast-changing and technologically evolving world, which now has a more mobile workforce, there is a trend in some Member States for people to move from urban to rural areas. Thanks to the EU's rural development policy, people in rural areas may be offered more modern infrastructure: public roads, faster internet and easier access to services and goods. The 2023–2027 CAP gives Member States a margin of discretion to meet their specific local needs.

Melita Sauka, university lecturer, organic farmer and member of the Latvian Organic Farmers' Association and Latvian Poultry Association, describes how she benefited from the EU's rural development policy:

> *I moved to the countryside 12 years ago, when I purchased the farmland and started organic farming. I've reduced my academic activities to the minimum and am devoting most of my time to organic farming. A big help initially was the state-sponsored farm advisory support. In these last years I've seen an improvement in quality of life for locals: with the help of Union funding new SMEs [small and medium-sized enterprises] have been created, diversifying the employment opportunities, several new roads were*

([528]) Judgment of 19 March 1992, *Hierl* v *Hauptzollamt Regensburg*, C-311/90, EU:C:1992:138, paragraph 14.

asphalted and my neighbour moved from farming to hospitality business. From the direct payments support I purchased a much needed equipment for hatching eggs. Another utility that I see from being a citizen of an EU country, is that the EU rules prevent big lobbyists from advancing only their interests. I am active in two farmer's associations where most of their members are like me – small and medium sized farms – and I can attest from my own experience that, due to the guarantees provided in the EU agricultural law, our concerns have been heard and taken into account at the policy-setting level ([529]).

In carrying out its role as guardian of the treaties, the Commission ensures that the agricultural funds are disbursed in accordance with EU law and, in particular, that the money is actually used to benefit the farmers. Thus, in a legal action involving Portugal related to the repayment of unduly spent EU finances, the Commission had found that the Portuguese authorities had used CAP funds to finance the staff and equipment they needed to carry out checks on support programmes. Before the General Court, the Commission defended the position that EU agricultural funds cannot be used by authorities in Member States to meet their administrative and control obligations or to finance their operational activities. In its judgment, the General Court confirmed that appropriations from the agricultural funds must, in principle, be used to make payments to farmers. Unless specifically provided otherwise, these funds may not be used by national authorities to pay for their normal day-to-day administrative activities ([530]).

2.3. European Union quality schemes and organic labelling: balance between producers' and consumers' interests

When doing your weekly shopping, you might always choose a certain wine, cheese or ham bearing a specific name indicating its origin in France, Italy or elsewhere. Behind this indication of origin are the quality schemes that have been developed since the 1970s and the EU's organic farming label, which was introduced in 2010.

2.3.1. Protected designations of origin and protected geographical indications of agricultural products and foodstuffs

The objective of the EU quality policy is to protect the names of specific products in order to promote their unique characteristics, which are linked to their geographical origin and traditional know-how. Geographical indications comprise the following:

— protected designation of origin (PDO) (food and wine);

— protected geographical indication (PGI) (food and wine);

— geographical indication (spirit drinks and aromatised wines).

([529]) See www.melitasputni.com

([530]) Judgment of 22 November 2018, *Portugal* v *Commission*, T31/17, EU:T:2018:830, paragraphs 68–70.

Regulation (EU) No 1151/2012 ([531]) is a key legal instrument in this policy. It aims to enhance fair competition for farmers and producers of agricultural products and foodstuffs, to ensure that consumers have access to reliable information, and to respect intellectual property rights and the integrity of the internal market.

It sets out a scheme for PDOs and PGIs in order to help producers of products linked to a geographical area by providing customers with clear information on the value-adding characteristics and attributes of the products.

This scheme serves two objectives. Firstly, PDOs and PGIs satisfy consumers' expectations regarding product quality and identifiable geographical origin. Secondly, they enable producers, in conditions of fair competition, to secure higher incomes in return for a genuine effort to improve quality.

These objectives were confirmed by the Court of Justice in Case C-569/18 ([532]), in which three producers of Mozzarella di Bufala Campana PDO challenged the validity of an Italian decree that required any establishment producing both PDO mozzarella and unprotected (non-PDO) mozzarella to create separate production areas for the two different types of cheese. The Court of Justice considered that this measure was justified and constituted a 'necessary and proportionate means of safeguarding the quality of that product or ensuring that the specification for that PDO is monitored'.

Designations of origin fall within the scope of intellectual property rights. In fact, they are normally collective intellectual property rights in the sense that they are intended for the benefit of all producers from a specific geographical area. They provide for legal remedies in case a third party unduly profits from the reputation of a PDO.

Such a case was alleged by the association of champagne producers in another landmark case, C-393/16, *Champagne* v *Aldi* ([533]). The champagne producers brought proceedings in Germany against Aldi Süd, a discount supermarket chain selling, *inter alia*, foodstuffs, to prohibit it from selling a sorbet called 'Champagner Sorbet', the content of which was only 12 % champagne.

The German court asked for a preliminary ruling from the Court of Justice. In its judgment, the Court of Justice held that it is in principle possible to refer to the PDO of an ingredient (champagne) on the label of a composite product (sorbet). However, the Court of Justice set out a number of conditions.

([531]) Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs, OJ L 343/1, 14.12.2012. p. 1.

([532]) Judgment of 17 October 2019, *Caseificio Cirigliana Srl and Others* v *Ministero delle Politiche agricole, alimentari e forestali and Others*, C-569/18, EU:C:2019:873.

([533]) Judgment of 20 December 2017, *Comité Interprofessionnel du Vin de Champagne* v *Aldi Süd Dienstleistungs-GmbH & Co.OHG*, C-393/16, EU:C:2017:991.

In particular, the Court of Justice noted that, while the amount of the ingredient in proportion to the overall composition of the foodstuff is a significant element, this is not, in itself, a sufficient factor in determining whether it is acceptable to refer to the PDO. If the taste of the foodstuff is more attributable to its other ingredients, the use of such a name will take unfair advantage of the reputation of the PDO concerned. This element had to be assessed by the German courts, which decided to put a stop to the sale of the 'Champagner Sorbet' in 2021 because it did not taste sufficiently of champagne.

2.3.2. The European Union organic label

In recent years, sales of organic food and drink products have grown steadily. The placing on the market of such food and drink is governed by the EU's organic legislation, which seeks to strike a balance between the interests of producers and consumers. Such a balance can be seen in the strict rules in the EU's organic legislation relating to the addition by producers of substances to organic food and drink.

The April 2021 judgment of the Court of Justice in the *Natumi* case ([534]) shows how those strict rules ensure the protection and maintenance of consumer confidence in organic food and drink.

Natumi, a producer of soya and rice drinks, added the red coral sea alga *Lithothamnium calcareum* to its drinks, in the form of a powder obtained from the cleaned, ground and dried sediment of the dead sea alga. That sea alga contains mainly calcium carbonate.

Natumi sold a drink called 'Soja DrinkCalcium', which it labelled as 'organic'. Natumi also included the following words on its product labels: 'calcium', 'contains calcium rich sea alga' and 'contains high-quality calcium from the sea alga Lithothamnium'.

The German region of North Rhine-Westphalia brought a case against Natumi before the German courts. North Rhine-Westphalia claimed that the EU's organic legislation prohibits Natumi from using calcium carbonate, as a mineral, for the calcium enrichment of organic products, included through the addition of algae. North Rhine-Westphalia also claimed that the EU's organic legislation forbids Natumi from including references to calcium on such products.

The case made its way up to the German Federal Administrative Court, which then asked the Court of Justice to rule whether the EU's organic legislation prohibits producers from using calcium carbonate, as a mineral, for the calcium enrichment of organic products and from including references to calcium on such products.

In its judgment, the Court of Justice agreed with North Rhine-Westphalia, considering that the use of the powder in question as a non-organic ingredient of agricultural origin in the processing

([534]) Judgment of 29 April 2021, *Natumi* v *Land Nordrhein-Westfalen*, C-815/19, EU:C:2021:336.

of organic foodstuffs, in order to enrich them with calcium, would allow producers to circumvent that prohibition, thereby reducing consumer confidence in organic food and drink.

3. More than 50 years of common fisheries policy

Over 70 % of the Earth is covered by water, with salt water constituting over 97 % of surface water. Fish are a key source of nutrition for many EU citizens, and 22 of the 27 Member States have a coast and a fishing fleet.

The CFP is governed by the same objectives as the CAP, set out in Article 39 TFEU, in particular the need to ensure 'a fair standard of living' for fishers. However, Article 38 TFEU recognises the 'specific characteristics of this sector'. As the fishing sector faces very different challenges, the CFP has developed independently of the EU's agricultural policy.

To start with, the sector largely depends on wild fish, and, apart from aquaculture, is not characterised by cultivating crops or farming animals. The key challenge is to ensure sustainable exploitation of wild fish stocks. Conservation of marine biological resources under the CFP has been explicitly recognised as an exclusive EU competence under Article 3(1)(d) TFEU.

Moreover, fish move freely between the exclusive economic zones of the EU's seas and oceans that it shares with non-EU countries. The significance of sovereignty of the coastal states over these waters, including in sharing fish stocks and granting access to exploit them, led to the 'cod wars' of the late 1950s and early 1960s. More recently, the importance of sovereignty has manifested itself in the negotiations over the United Kingdom's terms of withdrawal from the EU.

By 1970, the first significant body of secondary legislation for fisheries had been introduced. At first, it focused mainly on fishers and the need to ensure their income in the same way as that of farmers. As Denmark and the United Kingdom joined the EU, with their vast waters and fleets, both in the EU and in non-EU waters, it was necessary to deal with specific fisheries challenges, such as the conservation of resources and international relations and obligations following the introduction of the exclusive economic zones.

Forty years on, the key challenge became overfishing and the depletion of fish stocks, while at the same time ensuring a level playing field for EU operators and a good standard of living for these operators and their coastal communities. The EU soon became aware that the need to promote the conservation of marine biological resources is also an economic need. This led to a major reform of the CFP in 2013, when the EU legislator established the new CFP framework, which is based on the concept of sustainable fishing and developing the 'blue economy' ([535]),

([535]) European Commission, *The EU Blue Economy Report 2022*, Publications Office of the European Union, Luxembourg, 2022 (https://data.europa.eu/doi/10.2771/793264).

which comprises all activities that are linked to water, the sea and oceans. Its objective is to obtain the most sustainable yields from the stocks available and shared between the coastal Member States. In line with the EU's international obligations, in particular under the United Nations Convention on the Law of the Sea (UNCLOS), the new CFP framework requires fishers to fish in line with the concept of the 'maximum sustainable yield' (MSY). This concept and how it leads to fierce annual negotiations of quotas for fishers will be further explained in Section 3.1.

Today, the objective to fish sustainably and the need to manage the marine biological resources in an economically and socially acceptable manner present a constant and multifaceted challenge that concerns many actors, and not only within the EU. The EU is a major global player in fisheries. It has one of the world's largest fishing fleets, and accounts for 6 % of worldwide fisheries production from catches. The EU consumes far more fishery products than it catches or farms, importing 60 % of products consumed to satisfy demand. This makes it the world's largest importer of fishery products (34 % of total world trade in value).

Ensuring smooth interplay between environmental objectives and CFP objectives is challenging, as will be explained in Section 3.2. This has an impact not only on internal EU policy management, but also on external negotiations, as illustrated in Section 3.3 below.

Citizens, fishers and non-governmental organisations (NGOs) play an increasingly important role in this area. Certification of fish as sustainably fished has become available and has been gaining importance. NGOs defending the environment have increasingly turned their attention to sustainable fishing.

Another good example highlighting the importance of the fisheries sector for individual EU citizens is the judgment of the General Court in *Jégo-Quéré*. The applicant in that case was a fishing company that challenged a Commission regulation requiring an increase in the mesh size of fishing nets that in turn led to a reduction of catch. The salient question was whether the fishers had standing to attack a general Commission regulation. Departing from settled case-law, the General Court determined that they did ([536]). Upon appeal, the Court of Justice ([537]) overturned the judgment, but made very clear that the treaty ought to be changed so as to allow individuals to request the annulment of certain measures of general application that do not require further implementation. This was then implemented through the Treaty of Lisbon.

([536]) The General Court, in its judgment of 3 May 2002, *Jégo-Quéré et Cie SA* v *Commission*, T-177/01, EU:T:2002:112, held that the applicant had standing to challenge the Commission regulation despite the fact that the applicant did not meet the requirement of individual concern, as developed in the seminal *Plaumann v Commission of the EEC* judgment of 15 July 1963 (C-25/62, EU:C:1963:17). In *Plaumann*, the Court of Justice held that the action for annulment is only open to applicants that are distinguished individually by a measure of general application in the same way as an addressee. In effect reversing the *Plaumann* test, the General Court held that, in view of the requirement of effective legal protection, a natural or legal person is to be regarded as individually concerned by an EU measure of general application that concerns them directly if that measure affects their legal position in a manner that is both definite and immediate.

([537]) Judgment of 1 April 2004, *Commission of the European Communities* v *Jégo-Quéré & Cie SA*, C-263/02 P, EU:C:2004:210. The Court emphasised that the TFEU has established a complete system of legal remedies and procedures designed to ensure the review of the legality of acts of the institutions, including the role of national courts in that system.

3.1. The challenge of fishing sustainably

Fishers, and in particular coastal societies, need sufficient fishing opportunities to be sustainable, both environmentally and economically. At the end of the 20th century, faced with depleting fish stocks, the EU, together with the international community, introduced numerous legal instruments and very ambitious goals under UNCLOS ([538]). Respect for these international rules has been translated into the CFP's legal framework.

The key development in addressing this challenge was the EU obligation to strive to establish fishing opportunities in line with the MSY in principle by 2020. This obligation essentially requires that, each year, the commercial (and, if necessary, also recreational) catch for a given fish stock cannot exceed the highest possible annual level that can be sustained over time, by maintaining the stock's good environmental status, and at the level producing maximum growth of the stock in the light of the best available scientific advice. Although the EU Member States, including the 22 coastal Member States, have an increasingly similar understanding of the concept of MSY, this is not necessarily the case for all the EU's stakeholders or international partners. This is why the Council and the Commission meet every October and December to establish common understanding on how much fishers can fish in the light of the best available science for over 200 fish stocks in the Baltic, northern, western and southern waters, and the Mediterranean Sea and the Black Sea. This is preceded by year-long consultations with non-EU countries to agree access to their waters to fish the shared stocks and to agree sustainable quotas for the high seas.

Funding plays a key role in the full implementation of the CFP's sustainable objectives. The European Maritime, Fisheries and Aquaculture Fund (EMFAF) ([539]) for 2021–2027 ([540]) (preceded by the European Maritime and Fisheries Fund ([541]) for 2014–2020) is the main financing instrument to support this. The EMFAF assigns funding from the EU budget to supporting the CFP, the EU's maritime policy and the EU's international commitments in the field of ocean governance such as UN sustainable development goal 14. Furthermore, the EMFAF helps fulfil the objectives of the European Green Deal, the roadmap for the EU's climate and environmental policies. Such funding is a key enabler for sustainable fisheries and the conservation of marine biological resources, for food security through the supply of seafood products, for the growth of a sustainable blue economy and for healthy, safe, secure, clean and sustainably managed seas and oceans.

([538]) Article 61 of UNCLOS.

([539]) Regulation (EU) 2021/1139 of the European Parliament and of the Council of 7 July 2021 establishing the European Maritime, Fisheries and Aquaculture Fund and amending Regulation (EU) 2017/1004, OJ L 247, 13.7.2021, p. 1.

([540]) The total budget for 2021–2027 is EUR 6.108 billion.

([541]) Regulation (EU) No 508/2014 of the European Parliament and of the Council of 15 May 2014 on the European Maritime and Fisheries Fund and repealing Council Regulations (EC) No 2328/2003, (EC) No 861/2006, (EC) No 1198/2006 and (EC) No 791/2007 and Regulation (EU) No 1255/2011 of the European Parliament and of the Council, OJ L 149, 20.5.2014, p. 1.

Another important and more recent instrument to support the recovery of fish stocks is the so-called landing obligation, introduced by the EU legislator in 2013. Worldwide, discards (i.e. fish – predominantly young or undersized – thrown back into the sea) represent between 10 % and 20 % of total catches.

Discarding raises environmental concerns due to the wasteful loss of living organisms to the detriment of biodiversity. It possibly also leads to the introduction of disease, or of non-native and invasive species to the ecosystem of the seabed. It also causes reduced oxygen levels in the water at the seabed. The landing obligation aims to put an end to the practice of discarding, which has been considered detrimental to the conservation of the marine biological resources by scientists and has become largely unacceptable in public opinion. Its enforcement is essential, as discarding contributes to increased fish mortality, and makes the correct scientific evaluation of fish stocks difficult.

According to Article 15 Regulation (EU) No 1380/2013, the discard ban was introduced in 2015 and progressively became applicable to all fish catches in the EU by 1 January 2019.

An accurate evaluation of fish stocks is the basis for all conservation measures for respecting the MSY objectives.

The landing obligation does not apply to species for which scientific evidence demonstrates high survival rates or to catches falling under *de minimis* exemptions. As a legal requirement, it is important that the landing obligation is implemented in practice. With the objective of reducing unwanted catches in mind, the Commission also regulates a number of technical measures aiming to increase gear selectivity or reduce – or, as far as possible, eliminate – unwanted catches. The implementation of the landing obligation has consequences not only for the conservation of fish stocks, but also for the economic viability of EU fisheries.

In view of these challenges, the fisheries control regulation ([542]), governing in particular the reporting and storage of catches, the use of remote electronic monitoring systems and the carrying of observers on board to monitor compliance, is currently undergoing major reform ([543])

([542]) Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, amending Regulations (EC) No 847/96, (EC) No 2371/2002, (EC) No 811/2004, (EC) No 768/2005, (EC) No 2115/2005, (EC) No 2166/2005, (EC) No 388/2006, (EC) No 509/2007, (EC) No 676/2007, (EC) No 1098/2007, (EC) No 1300/2008, (EC) No 1342/2008 and repealing Regulations (EEC) No 2847/93, (EC) No 1627/94 and (EC) No 1966/2006, OJ L 343, 22.12.2009, p. 1.

([543]) European Commission, Commission communication – Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1224/2009, and amending Council Regulations (EC) No 768/2005, (EC) No 1967/2006, (EC) No 1005/2008, and Regulation (EU) No 2016/1139 of the European Parliament and of the Council as regards fisheries control, COM(2018) 368.

3.2. Tension between fishing activities and the protection of marine ecosystems

Fish are an important source of food and livelihoods in the EU, but at the same time fishing activities have an important impact on marine ecosystems, habitats and sensitive species. The optimal balance between fisheries and environmental policy is therefore crucial for a sustainable and profitable CFP, and for the implementation of the European Green Deal and the EU biodiversity strategy for 2030 ([544]), which aim to ensure richness and diversity of marine life for current and future generations.

However, achieving this smooth interplay is challenging. Every fish caught and the fishing activities involved in every catch affect the marine environment. At the same time, every restriction of fishing activities means less food produced and less profit for the fisheries sector. Therefore, legal initiatives for the protection of the marine ecosystem and for the management of fisheries raise tensions between environmental policy and fisheries policy: while one of the objectives of the CFP is to ensure long-term environmentally sustainable management of marine resources, this must be reconciled with other objectives such as those concerned with economic, social and employment benefits and the availability of food supplies.

This tension raises sensitive and often very technical aspects that result in a complex legal landscape of technical and other conservation measures in the area of fisheries. The European Commission´s legal initiatives and actions in this area aim, in particular, to avoid, or at least minimise, incidental catches of protected marine mammals and other sensitive species, and to regulate fishing activities and conditions under which fishing can sometimes be allowed in or above sensitive and protected habitats (through requirements for the use of certain fishing gear or prohibition of such gear, fishing restrictions during certain periods, detailed reporting requirements on incidental catches and movement of fishing vessels, etc.). These initiatives often raise interesting legal questions as regards the interpretation of the environmental and fisheries legislation and obligations of Member States. For example, in the *Deutscher Naturschutzring* case ([545]), several German nature and environmental protection associations tried to bring about a fishing ban in German marine protected areas.

However, since such a ban would also affect the fishers of other Member States, the Court of Justice ruled that such measures cannot be adopted unilaterally by a Member State and that the competence for adopting such measures, if at all, lies with the EU.

([544]) European Commission, Communication from the Commission to the European Parliament, the Council, the European, Economic and Social Committee and the Committee of the Regions – EU biodiversity strategy for 2030, COM(2020) 380 final.

([545]) Judgment of 13 June 2018, *Deutscher Naturschutzring – Dachverband der deutschen Natur- und Umweltschutzverbände e.V. v Bundesrepublik Deutschland*, C-683/16, EU:C:2018:433.

One of the most important aspects covered by recent Commission actions concerns the incidental catches of sensitive species resulting from fishing activities. In the winter of 2018–2019, a significant number of dolphins were washed ashore along the French coastline. This resulted in increased public attention being paid to the issue. The Commission has therefore initiated various actions in order to minimise the incidental catches of sensitive species, including by starting several infringement procedures against Member States due to the violation of fisheries and environmental rules.

Among these recent actions were measures aimed at the protection of the Baltic Proper harbour porpoise and the common dolphin in the Bay of Biscay, which were based on a complaint submitted by 27 NGOs asking for the adoption of emergency fisheries measures. These measures restrict fishing activities and can have a serious impact on the livelihood of fishers in certain areas. The measures adopted by the Commission to reduce incidental catches of the Baltic Proper harbour porpoise in the Baltic Sea ([546]) required intensive consultation with the concerned Member States and a careful balance between different needs, including defence concerns of certain Member States.

3.3. The need to negotiate access to waters of non-European Union countries and the high seas for shared stocks and to agree on sustainable fishing opportunities

More than 20 % of all the fish caught by European fishing vessels are caught outside EU waters. The EU's fishing activities are, hence, closely linked to those of non-EU countries, in particular to those of the EU's four geographically closest neighbours with significant fishing industries: the Faroe Islands, Iceland, Norway and the United Kingdom. Therefore, the EU jointly manages many fish stocks with these neighbours. It does so in three main ways: (i) through quota exchanges; (ii) through the intergovernmental North East Atlantic Fisheries Commission; and (iii) through bilateral agreements.

As the largest single market for fishery products in the world, the EU also plays an important role in promoting good governance through a number of international organisations. These organisations include (i) regional fisheries management organisations, which are intergovernmental organisations regulating regional fishing activities in the majority of the world's seas, such as the North East Atlantic Fisheries Commission mentioned above; (ii) the UN Food and Agriculture Organization; and (iii) other international bodies, such as the Organisation for Economic Co-operation and Development.

The EU, represented by the Commission, plays an active role in 18 regional fisheries management organisations. This makes it one of the most active global actors in this field.

([546]) Commission Delegated Regulation (EU) 2022/303 of 15 December 2021 amending Regulation (EU) 2019/1241 as regards measures to reduce incidental catches of the resident population of the Baltic Proper harbour porpoise (Phocoena phocoena) in the Baltic Sea, OJ L 46/67, 25.02.2022, p. 67.

Apart from offering EU operators fishing opportunities in non-EU waters, the key objective of these regional bodies is enhancing sustainable fishing within their membership. To that end, most of them have the power to set catch limits, adopt technical measures and enact control obligations. As an example, the International Commission for the Conservation of Atlantic Tunas may, on the basis of scientific evidence, make recommendations to maintain the populations of tuna that may be caught in the area protected by the Convention for the Conservation of Atlantic Tunas at levels that will permit the MSY. Unless a party to the convention objects, such recommendations contributing to sustainable fishing in the convention area will become binding on it. Apart from being active in multilateral forums, the EU has entered into a dense network of sustainable fisheries partnership agreements with non-EU countries including, for instance, Mauritania, Morocco and Senegal ([547]). These bilateral agreements establish a framework for the governance of fishing activities of EU vessels in the waters under the sovereignty or jurisdiction of certain non-EU countries.

Sustainable fisheries partnership agreements cover the legal, environmental, economic and social governance of fishing activities by EU vessels in the waters of non-EU countries. They encompass, among other things, the conditions under which such activities may take place (in particular, the need to obtain a licence), economic and financial cooperation in the fisheries sector, and cooperation on control and surveillance measures ([548]). While these agreements make it possible for EU vessels to request licences to fish in the fishing zones of certain non-EU countries, they also aim to introduce responsible fishing in those zones in order to ensure the long-term conservation and sustainable exploitation of fisheries resources, in particular by implementing a control system ([549]). A number of their provisions also ensure the sustainability of fisheries. For instance, the non-EU country concerned is to set the objectives to be achieved in terms of sustainable development or the management of and total allowable catches, following the advice of the national body responsible for oceanographic research and the regional fisheries management organisation concerned ([550]).

In addition to regional fisheries management organisations and partnership agreements, the EU also pursues close cooperation in the form of bilateral agreements with a number of non-EU countries, the most prominent being those with Norway ([551]) and the United Kingdom ([552]).

([547]) The web page 'Sustainable fisheries partnership agreements' (https://oceans-and-fisheries.ec.europa.eu/fisheries/international-agreements/sustainable-fisheries-partnership-agreements-sfpas_de) provides a list of sustainable fisheries partnership agreements entered into by the EU.

([548]) See, for instance, Article 2 of the Partnership agreement on sustainable fisheries between the European Union and the Islamic Republic of Mauritania, OJ L 439/3, 8.12.2021, p. 3.

([549]) Judgment of 9 October 2014, *Ahlström and Others*, C-565/13, EU:C:2014:2273, paragraph 31.

([550]) See, for instance, Article 4(2) of the protocol implementing the sustainable fisheries partnership agreement between the European Union and the Islamic Republic of Mauritania, OJ L 439/3, 8.12.2021, p. 14.

([551]) Regarding eight particularly important stocks, but also addressing conservation of the marine resources in the Svalbard waters.

([552]) Trade and cooperation agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, OJ L 149, 30.4.2021, p. 10.

Since Brexit, as a result of which 80 fish stocks were made subject to shared management with the United Kingdom, the international dimension of fisheries policy has become ever more important. Since 1 January 2021, the United Kingdom and the EU have cooperated under the EU–UK Trade and Cooperation Agreement, including in the very important domain of fisheries. Both parties exercise the coastal states' rights for the purposes of exploring, exploiting, conserving and managing the living marine resources in their waters, and continue to cooperate and establish new ways to cooperate while striving to respect the UNCLOS obligations. The same goes for the EU's cooperation with Norway, where the EU is currently negotiating a new generation of fisheries agreements.

4. From farm to fork: how we protect humans, bees, cows and trees

Farmers cannot produce food without healthy animals, bees and plants. Moreover, whatever a farmer sprays on plants or feeds animals with could have an impact on the food chain, as consumers will eat it and it might affect their health.

The EU applies the world's most stringent rules and mechanisms in this area, which aim to protect human, animal and plant health, consumer interests and animal welfare.

Curiously, Article 39 TFEU does not refer to the need to protect human, animal and plant health, consumer interests or animal welfare. In EU law, these important objectives have been developed incrementally through secondary legislation, case-law and later treaty changes.

Even in the early years of the European Communities, Member States saw the need to consider their laws regarding animal diseases, in particular, as also having an impact on human health. The first animal health directives were adopted in 1964 ([553]). Their recitals explain that common rules on animal health are the necessary corollary to the CMOs for pork, veal and beef; these rules ensure free intra-Community trade in bovine animals and swine and the meat products made from them. This free trade should not be hindered by differences in the health requirements in different Member States.

The Court of Justice first recognised the importance of health and consumer protection in the 'mad cow disease' crisis of 1986, which is discussed in Section 4.1.1. Further developments were then often triggered by other crises, such as the avian influenza outbreaks of the 1990s and the African swine fever outbreaks since 2018. In each case, these crises risked destabilising the common agricultural market for meat products.

([553]) Council Directive 64/432/EEC of 26 June 1964 on animal health problems affecting intra-Community trade in bovine animals and swine, OJ 121, 29.7.1964, p. 1977/64; and Council Directive 64/433/EEC of 26 June 1964 on health problems affecting intra-Community trade in fresh meat, OJ 121, 29.7.1964, p. 2012/64.

Today, the EU has well-functioning legal tools that protect animal and plant health. They consist of three framework regulations – the animal health law ([554]), the plant health law ([555]) and the official controls regulation ([556]) – which are complemented by numerous delegated and implementing acts. The basic structure of these tools is always similar: they set up an intra-EU mechanism making sure that Member States can rely on each other's controls of plants, animals and food when such food is traded between them. Moreover, there are notification mechanisms through which Member States are to inform each other and the Commission about outbreaks of diseases. These mechanisms are always combined with common rules in order to ensure that imports from non-EU countries of animals, plants and food comply with the high EU standards.

Indeed, the EU's external border 'shields' the internal market and its consumers from imports that do not comply with its standards.

Several lawyers of the Commission Legal Service work to verify, on a daily basis, a never-ceasing stream of amendments to these secondary rules. Some of them can give rise to litigation, including interim measures proceedings, as will be shown using the example of imports of poultry meat from Brazil in Section 4.1.2. Here, the litigation mainly concerns demonstrating that the Commission has acted on a sound scientific basis. At the same time, the Commission regularly launches infringement proceedings if a Member State resists implementing the measures agreed at EU level (e.g. the *Xylella* case ([557]) concerning a plant disease affecting olive trees in Italy).

However, the 'pure' reliance on science has been increasingly questioned since the advent of new technologies that require legal responses, such as genetically modified organisms. In such situations, when Member States' views differ, there is a constant need for the Commission to develop adequate solutions and to clarify the scope of the rules in the light of further technical developments, such as new genome-editing techniques.

([554]) Regulation (EU) 2016/429 of the European Parliament and of the Council of 9 March 2016 on transmissible animal diseases and amending and repealing certain acts in the area of animal health ('animal health law'), OJ L 84, 31.3.2016, p. 1.

([555]) Regulation (EU) 2016/2031 of the European Parliament of the Council of 26 October 2016 on protective measures against pests of plants, amending Regulations (EU) No 228/2013, (EU) No 652/2014 and (EU) No 1143/2014 of the European Parliament and of the Council and repealing Council Directives 69/464/EEC, 74/647/EEC, 93/85/EEC, 98/57/EC, 2000/29/EC, 2006/91/EC and 2007/33/EC, OJ L 317, 23.11.2016, p. 4.

([556]) Regulation (EU) 2017/625 of the European Parliament and of the Council of 15 March 2017 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products, amending Regulations (EC) No 999/2001, (EC) No 396/2005, (EC) No 1069/2009, (EC) No 1107/2009, (EU) No 1151/2012, (EU) No 652/2014, (EU) 2016/429 and (EU) 2016/2031 of the European Parliament and of the Council, Council Regulations (EC) No 1/2005 and (EC) No 1099/2009 and Council Directives 98/58/EC, 1999/74/EC, 2007/43/EC, 2008/119/EC and 2008/120/EC, and repealing Regulations (EC) No 854/2004 and (EC) No 882/2004 of the European Parliament and of the Council, Council Directives 89/608/EEC, 89/662/EEC, 90/425/EEC, 91/496/EEC, 96/23/EC, 96/93/EC and 97/78/EC and Council Decision 92/438/EEC (official controls regulation), OJ L 95, 7.4.2017, p. 1.

([557]) Judgment of 5 September 2019, *Commission* v *Italy*, C-443/18, EU:C:2019:676.

Another area in which the Commission has had to continuously adapt its standards in the light of new scientific developments in order to provide a high level of protection of human and animal health and the environment is that of pesticides. This issue is discussed in greater detail in Section 4.3, which specifically considers the protection of bees.

Last but not least, the protection of animal welfare has become an ever more important objective. The EU has, as of the mid-1970s, adopted harmonised rules on stunning before slaughter ([558]). In the 1980s, several directives aimed at, for example, protecting laying hens ([559]) followed. In this area, lawyers of the Commission Legal Service are mainly focused on preliminary ruling procedures. Two such proceedings have given rise to interesting cases looking at the external dimension of animal welfare in transport to non-EU countries and the link between animal welfare and freedom of religion (see Section 4.2).

4.1. Protecting human and animal health

The Commission plays a decisive role in protecting public health in general and the health of consumers in particular.

Two important landmark cases, one concerning a serious health crisis that originated within the EU (the bovine spongiform encephalopathy (BSE) crisis) and the other concerning the importance of ensuring that food imported to the EU from non-EU countries is safe for consumers (the case of the Brazilian food-processing company BRF), are discussed below.

4.1.1. Should the need to protect consumers' health influence agricultural policy?

Between 1986 and the mid 1990s, thousands of cattle in the United Kingdom were infected with BSE. BSE is more commonly known as 'mad cow disease' because the symptoms usually include aggression and a lack of coordination in the animals. In 1996, Europe was suddenly shaken when it was first reported that BSE could be transmitted to humans through a new variant of Creutzfeldt–Jakob disease, a progressive, degenerative, neurological disease that affects human brains.

This variant was initially detected in the United Kingdom, where almost all cases at the time were recorded. Consumers across Europe (and even across the world) became increasingly concerned about the situation, and the issue became a matter of huge public debate. Consumer confidence was affected and the consumption of beef decreased exponentially.

([558]) Council Directive 74/577/EEC of 18 November 1974 on stunning of animals before slaughter, OJ L 316, 26.11.1974, p. 10.

([559]) Council Directive 1999/74/EC of 19 July 1999 laying down minimum standards for the protection of laying hens, OJ L 203, 3.8.1999, p. 53.

The most likely explanation for the cases was that the Creutzfeldt–Jakob variant was caused by eating the meat of animals infected with BSE. Thus, a link between BSE and Creutzfeldt–Jakob disease ceased to be a theoretical hypothesis and became a realistic possibility. There remained considerable scientific uncertainty, not least because of long incubation periods when the disease could not be detected in live animals.

The Commission needed to act. Two directives ([560]) enabled the Commission to adopt protective measures in the case of outbreaks of 'any zoonoses, diseases or other cause likely to constitute a serious hazard to animals or to human health'.

On 27 March 1996, the Commission banned, as an emergency measure and on a temporary basis, the exports of all bovine animals and all beef and veal or derived products from the United Kingdom to other Member States and to non-EU countries so as to prevent deflections of trade (Commission Decision 96/239/EC ([561])).

On 24 May 1996, the United Kingdom lodged an application challenging the validity of Decision 96/239/EEC and requested that the Court of Justice annul it, which gave rise to *United Kingdom* v *Commission* ([562]). In its judgment, the Court of Justice recalled the wide range of discretionary measures available to the Commission, particularly with regard to the nature and extent of the measures it adopts.

Drawing on the treaty's approach to environmental policy, in particular that of preventive action, the Court highlighted that, '[w]here there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent'.

This is the 'precautionary principle' which has become the cornerstone of the EU's policies on food safety and human and animal health, as well as the environment.

Furthermore, the Court of Justice emphasised that the protection of consumers and the protection of the health and life of humans and animals cannot be disregarded when trying to achieve the objectives of the CAP.

Finally, in this landmark case, the Court of Justice concluded that the protection of health contributes to the achievement of the objectives of the CAP.

([560]) Council Directive 90/425/EEC of 26 June 1990 concerning veterinary and zootechnical checks applicable in intra-Community trade in certain live animals and products with a view to the completion of the internal market, OJ L 224, 18.8.1990, p. 29; and Council Directive 89/662/EEC of 11 December 1989 concerning veterinary checks in intra-Community trade with a view to the completion of the internal market, OJ L 395, 30.12.1989, p. 13.

([561]) Commission Decision of 27 March 1996 on emergency measures to protect against bovine spongiform encephalopathy, OJ L 078, 28.3.1996, p. 47.

([562]) Judgment of 5 May 1998, *United Kingdom* v *Commission*, C-180/96, EU:C:1998:192.

4.1.2. Shielding the European consumer from unsafe food

A further area of Commission activity that is crucial to public health is ensuring that food imported to the EU from non-EU countries is safe for consumers. For this purpose, EU law sets out a listing system for non-EU countries and their establishments: only where there are sufficient guarantees of their compliance with EU law or equivalent requirements, including hygiene rules, can non-EU countries and establishments be listed as authorised to export animals and food products to the EU ([563]).

The case of the Brazilian food-processing company BRF shows the importance of ensuring that food imported to the EU from non-EU countries is safe for consumers. The background to this case was that a sizable number of consignments of poultry meat originating in certain Brazilian establishments and intended for the EU market were found to be contaminated with *Salmonella* at EU border control posts. Furthermore, having received news about a fraud scandal in Brazil relating to laboratory certification in early 2018, the Commission swiftly proceeded to remove the Brazilian establishments involved in the fraud scandal from the list of establishments authorised to export poultry meat to the EU ([564]).

Two Brazilian companies (BRF SA and SHB Comércio e Indústria de Alimentos SA), which, in 2017, together exported 152 107 tonnes of poultry meat from Brazil to the EU, brought an action for annulment against their delisting ([565]) and requested interim measures, including the suspension of the application of the delisting ([566]).

The General Court dismissed the action. In its judgment, the General Court stressed the broad discretion that the Commission enjoys in assessing whether the guarantees provided by non-EU countries are reliable ([567]).

Combating food fraud along the food supply chain forms part of the farm to fork strategy within the Commission's European Green Deal.

([563]) Currently, the listing system is laid down in Articles 126 and 127 of Regulation (EU) 2017/625 on official controls, OJ L 95, 7.4.2017, p. 1.

([564]) Implementing Regulation (EU) 2018/700 of 8 May 2018 amending the lists of third country establishments from which imports of specified products of animal origin are permitted, regarding certain establishments from Brazil, OJ L 118, 14.5.2018, p. 1.

([565]) Judgment of 8 July 2020, *BRF and SHB Comercio e Industria de Alimentos* v *Commission*, T-429/18, EU:T:2020:322.

([566]) Judgment of 8 July 2020, *BRF and SHB Comercio e Industria de Alimentos* v *Commission*, T-429/18 R, EU:T:2019:98.

([567]) Judgment of 8 July 2020, *BRF and SHB Comercio e Industria de Alimentos* v *Commission*, T-429/18, EU:T:2020:322, paragraph 109.

4.2. The protection of animal welfare under Article 13 of the Treaty on the Functioning of the European Union

Animals are sentient beings. This is not only an emotional proclamation of animal rights' defenders but also a statement in Article 13 TFEU. According to this article, the EU and its Member States shall pay full regard to the welfare requirements of animals. These welfare requirements often compete with important economic interests in the transport sector or, even more fundamentally, with freedom of religion when it comes to slaughter. EU rules on these matters have given rise to two complex and high-profile preliminary ruling cases before the Court of Justice.

4.2.1. Does protection of animals during transport end at the European Union border?

The *Zuchtvieh-Export* ([568]) case raised the question of whether certain feeding intervals and resting periods prescribed by EU law need to be respected during the transport of animals to non-EU countries. The case arose from the following situation: 62 cattle were to be transported from Bavaria, Germany, to Uzbekistan via Russia. The transport company submitted a journey plan to the local authorities. It expected there to be a 146-hour stage of the journey between Brest in Belarus and Karaganda in Kazakhstan. The German authorities refused clearance of the transport on the ground that EU rules require animals to be unloaded, fed and watered at the latest after 29 hours. In the view of the transport company, these requirements were not applicable to the extra-EU leg of the journey (i.e. in Russia).

Regulation (EC) No 1/2005 on the protection of animals during transport and related operations ([569]) does not explicitly address the question submitted to the Court of Justice: whether EU requirements apply to extra-EU legs of animal transport. According to Article 1(1) on its scope, the regulation applies to the transport of animals carried out within the EU. Moreover, Article 21(1) of the regulation envisages specific border controls at all EU exit points. However, Article 14(1) and other provisions of the same regulation set out specific obligations for the whole journey from the point of departure to the point of destination.

The Court of Justice, in its judgment on this case, highlighted that protection of animal welfare is a legitimate objective in the public interest, and is now a principle of EU law enshrined in Article 13 TFEU. One of the aims of Regulation (EC) No 1/2005 is precisely to achieve that objective. The Court then rejected an 'isolated reading' of the provisions that appear to limit the extraterritorial application of the EU animal welfare rules. It highlighted that Article 14(1) of the regulation and numerous other provisions setting out the essential obligations to be complied with for long journeys do not make a distinction between the transport of animals taking place within the EU and the transport of animals to a non-EU destination. On that basis,

([568]) Judgment of 23 April 2015, *Zuchtvieh-Export GmbH* v *Stadt Kempten*, C-424/13, EU:C:2015:259.

([569]) Council Regulation (EC) No 1/2005 of 22 December 2004 on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and Regulation (EC) No 1255/9, OJ L 3, 5.1.2005, p. 1.

the Court sided with the German authorities that had refused to clear the transport. This was a remarkable achievement for EU law in terms of two aspects: the protection of animal rights and the fact that this protection does not stop at the EU's borders.

4.2.2. Can animal welfare trump freedom of religion?

Another important case – *Centraal Israëlitisch Consistorie van België and Others* ([570]) – concerned the interpretation of provisions of EU law that guarantee, on the one hand, the minimisation of pain during the killing of animals (through stunning) and, on the other hand, the desire of some religious groups (in particular, Jews and Muslims) to carry out the slaughter of animals in accordance with their religious beliefs (which do not permit stunning).

A Belgian decree, which entered into force on 1 January 2019, set out a requirement according to which, 'if animals are slaughtered according to special methods required for religious rites, the stunning must be reversible and the animals' death must not be caused by stunning'. Jewish and Muslim organisations brought an action before the Constitutional Court of Belgium, arguing that this Belgian decree prevented all the members of the mentioned groups from practising their religion. Belgian animal welfare groups intervened to defend the reversible stunning requirement.

The Court of Justice faced the question of whether freedom of religion under Article 10 of the EU Charter of Fundamental Rights stands in the way of Member States that wish to adopt more protective animal welfare rules. In its examination of the situation, the Court made a remarkable statement:

> *the Charter is a living instrument which must be interpreted in the light of present-day conditions and ideas prevailing in democratic States today […], with the result that regard must be had to changes in values and ideas, both in terms of society and legislation, in the Member States. Animal welfare, as a value to which contemporary democratic societies have attached increasing importance for a number of years, may, in the light of changes in society, be taken into account to a greater extent in the context of ritual slaughter and thus help to justify the proportionality of legislation such as that at issue in the main proceedings.*

The Court of Justice also gave significant leeway to the national legislator and to the national constitutional court to consider the proportionality of the interference with religious freedom.

([570]) Judgment of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, EU:C:2020:1031.

4.3. Protecting bees from the harmful effects of pesticides

Around four in five wild flower and crop species, including major food crops, depend on pollinators such as bees, wasps and butterflies for their reproduction. Therefore, pollinators are crucial not only for biodiversity, but also for food security. Pollinators – in particular bees – have considerably declined in population size and diversity in Europe and around the world, with some species now threatened with extinction.

Modern, intensive agriculture uses chemical pesticides (also known as 'plant protection products') to protect plants from pests and diseases. However, these pesticides can have harmful effects on humans and the environment, including bees and other pollinators. These products are therefore rigorously tested and controlled. EU legislation on plant protection products ([571]) harmonises the rules on the placing on the market of such products, ensuring a high level of protection of human and animal health and the environment. The EU sets the standards that active substances and plant protection products must meet; these are some of the strictest in the world. The Commission approves, restricts or bans active substances used in plant protection products and regulates their use, and Member States do the same for such products.

The Bayer CropScience *case perfectly illustrates the Commission's work in recent decades to protect humans and the environment, in particular bees, from the harmful effects of pesticides. The Commission Legal Service has played a major role in that work.*

When scientific knowledge emerged showing that one cause of the decline in the population of bees was the wide use in plant protection products of a family of active substances – so-called neonicotinoids – the Commission asked the European Food Safety Authority (EFSA) for scientific advice. After the EFSA concluded that, despite scientific uncertainty owing to the lack of data, the risks for bees were high, the Commission used its powers under the EU legislation on plant protection products, and adopted a regulation severely restricting the three neonicotinoid active substances. This was despite continued disagreements among Member States that prevented the adoption of precise protecting goals for bees.

This approach was based on the 'precautionary principle', the same general principle of EU law that allowed the Commission to ban exports of British beef during the BSE crisis ([572]). This principle underpins the EU legislation on, among others, plant protection products. At the time, no other regulator in the world had taken such a step concerning neonicotinoids.

([571]) Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC, OJ L 309, 24.11.2009, p. 1.

([572]) See Section 4.1.1.

This approach was subsequently confirmed by the Court of Justice, in an important judgment for the entire pesticide sector and other areas of EU law based on the precautionary principle.

Bayer CropScience, a producer of neonicotinoids, challenged this regulation before the General Court and then, upon appeal, before the Court of Justice, contesting the scientific basis of the decision and alleging that the decision breached EU legislation on plant protection products, and the precautionary principle.

In the resulting *Bayer CropScience* judgment ([573]), the Court of Justice confirmed the Commission's approach and provided important clarifications on the precautionary principle. Firstly, the precautionary principle applies in situations in which it is not possible to be certain of the existence or the extent of risks to, among others, the environment, because of scientific uncertainty, but in which real harm is likely to follow if the risk materialises. This justified the measures taken by the Commission to protect bees, without waiting for the industry to submit further research studies, which may or may not have clarified all remaining uncertainties, and for Member States to agree precise protection goals. Secondly, the EFSA's assessment of the risks to bees, based on the best scientific and technical knowledge available at the time, was as exhaustive as possible given the time constraints that the Commission was entitled to impose on the basis of the precautionary principle.

This case shows the conflicting objectives that the Commission must balance when faced with situations in which previously unknown risks emerge. On the one hand, the Commission had to act quickly to protect bees, whose population decline has devastating, cascading effects on ecosystems and food security. On the other, it had to ensure that its decision was justified by a full scientific assessment of the risks of the three active substances, based on the best available evidence evaluated by the EFSA.

This case also shows the workings of the EU's science-based regulatory system for food and animal feed, including plant protection products. In this system, an independent, scientific body (the EFSA) is tasked with the scientific assessment of risks to humans, animals or the environment, and its advice ensures the objectivity of decisions concerning specific products. However, the Court of Justice also confirmed that it is for the institutions responsible for making political choices (e.g. the Council, the Parliament and the Commission) to determine the level of risk acceptable to society, and to do so not only on the basis of strictly scientific considerations, but also on the basis of social or economic factors.

([573]) Judgments of 17 May 2018, *Bayer CropScience and Others* v *Commission*, T-429/13 and T-451/13, EU:T:2018:280; and of 6 May 2021, *Bayer CropScience and Bayer* v *Commission*, C-499/18 P, EU:C:2021:367.

5. Concluding remarks

Over time, agricultural and fisheries policy has helped to ensure that Europeans have abundant high-quality food to eat and that farmers and fishers have a fair standard of living, as set out by Article 39 TFEU. In the last 60 years, the EU's most integrated policy had to evolve in order to better meet an increasing number of other challenges. The lawyers of the Commission Legal Service have contributed, through both case-law and legislation, to the development of an impressive number of tools to meet 'add-on' objectives, such as health and consumer protection, environmental protection and sustainable development, and animal welfare.

However, the fundamental objectives of food security and market stabilisation are still central, and require ongoing rebalancing in the light of the current circumstances. Therefore, events in recent years, such as the COVID-19 pandemic and, most recently, Russia's invasion of Ukraine, have created more challenges for Europe, and indeed the entire world, once again making the security of the global food supply a concern, and necessitating constant readjustment and rebalancing.

The evolution of the legal tools of the common agricultural and fisheries policy over the last six decades has proven that EU law can move with the times and adapt to changing circumstances and challenges, both of today and of the future.

THE REMOVAL OF TAX OBSTACLES TO LIVING, WORKING, INVESTING, RETIRING AND DYING IN ANOTHER MEMBER STATE

Wim Roels

1. Introduction

This chapter aims to give the reader a broad overview of what the European Union has achieved in the field of taxation directly affecting European citizens. It is therefore limited to the field of direct taxation: those taxes that a person or organisation pays directly to the entity that imposed it, such as income tax. The field of indirect tax, in other words taxes on goods and services, is outside the scope of this chapter.

The Treaty on the Functioning of the European Union (TFEU) does contain provisions on indirect taxation ([574]), but the reader will search it in vain for any provision granting explicit competence on direct taxation. In principle, therefore, it remains a matter where Member States are free to legislate ([575]). This does not, however, mean that EU law is irrelevant to direct taxation. EU law directly affects national powers in direct taxation in two ways.

Although there is no explicit legal basis for any EU legislation about direct taxation, the provisions on the internal market contain a general provision for the approximation of national laws directly affecting the establishment or functioning of the internal market. This is Article 115 TFEU, which requires unanimity for the Member States to adopt directives. This provision has become the normal legal basis for EU legislation in the field of direct taxation. However, EU legislation will not feature prominently in this chapter, since most such legislation is only relevant to companies active in more than one Member State, and thus not of direct relevance to EU citizens availing themselves of their freedoms under the treaties.

Even though direct taxation is a national competence and does not as such fall within the purview of the EU, the powers retained by the Member States must nevertheless be exercised

([574]) Notably Articles 110–113.

([575]) The basic principle of the EU is that the limits of its powers are governed by the principle of conferral. By virtue of that principle, the EU must act only within the limits of the powers conferred upon it by the Member States in the treaties to attain the objectives set out in those treaties. Any power not conferred on the Union in the treaties remains with the Member States (Article 5 of the Treaty on European Union).

consistently with EU law ([576]). This follows directly from the general principle of EU law that EU law takes precedence over national law ([577]). It is on the basis of the fundamental freedoms in the TFEU that the Court of Justice has analysed national direct tax legislation and declared it either contrary to or compatible with EU law. It does so by adjudicating in cases that reach the Court through two procedural avenues: either through a request for a preliminary ruling submitted by a national court or tribunal that has a question on the interpretation of EU law, or through it being seized of it by the European Commission following an infringement procedure against a Member State for alleged breach of its obligations under the treaties.

After recalling the notion of discrimination as understood by EU law in Section 2, this chapter contains two major parts. In Section 3, you will find an overview of the freedoms according to the stage of life in which they can be used to challenge the compatibility of national tax law with EU law. In Sections 4–6, a number of specific lines of case-law particularly useful for EU citizens as taxpayers will be explored further. Any attempt at exhaustiveness in this matter is necessarily doomed to failure within the space available. I hope, however, that these pages give you a taste of the diversity of the case-law of the Court of Justice on direct taxation, and the contribution that EU law makes to ensuring the freedoms of citizens in this complex area.

2. The prohibition of discrimination on the basis of nationality

One of the main principles of EU law is that discrimination on grounds of nationality is prohibited. This principle is now laid down in the first paragraph of Article 18 TFEU. It is worth citing it in full: 'Within the scope of application of the treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.'

Article 18 is only applicable 'without prejudice to any special provisions' laid down in the treaties. As far as direct taxation is concerned, the more specific provisions are Article 21 (free movement of persons), Article 45 (free movement of workers), Article 49 (freedom of establishment), Article 56 (freedom to provide services) and Article 63 (free movement of capital). If one of these other provisions is applicable, Article 18 no longer applies autonomously ([578]). All these more specific provisions are in themselves rules of non-discrimination ([579]).

The Court of Justice has defined the notion of discrimination as the application of different rules in comparable situations or the application of the same rule to non-comparable situations ([580]).

([576]) Judgment of 14 February 1995, *Schumacker*, C-279/93, EU:C:1995:31, paragraph 21.

([577]) Judgments of 15 July 1964, *Costa* v *E.N.E.L.*, 6-64, EU:C:1964:66, paragraph 3; and of 17 December 1970, *Internationale Handelsgesellschaft mbH*, 11-70, EU:C:1970:114, paragraph 3.

([578]) Judgment of 18 December 2007, *Laval un Partneri*, C-341/05, EU:C:2007:809, paragraphs 54–55.

([579]) By way of example, cf. judgment of 28 October 1999, *Vestergaard*, C-55/98, EU:C:1999:533, paragraph 17.

([580]) Judgment of 14 September 1999, *Gschwind*, C-391/97, EU:C:1999:409, paragraph 21.

It is therefore crucial to determine in each situation whether situations compared are indeed comparable or not. Situations are not comparable where they can be differentiated according to relevant criteria.

Given that the basic principle is the prohibition of discrimination on the basis of nationality, the situations that need to be compared are, on the one hand, the actual transnational situation and, on the other hand, the hypothetical purely national situation. If you have bought shares in a company that is established in another Member State, then you will compare the actual tax treatment of dividends distributed from the company to you with the hypothetical situation if you had bought shares in a company established in your Member State and received dividends in that purely domestic situation ([581]).

Legislation that is overtly discriminatory based on nationality has now become extremely rare and is in any event rather unusual in the area of direct taxation. However, in the area of taxation a more relevant criterion for distinguishing taxpayers is tax residence. All Member States apply different rules to non-resident taxpayers than to resident taxpayers. If this different treatment of non-resident taxpayers disadvantages them in comparison with resident taxpayers, then the Court of Justice has held that this may constitute indirect discrimination on the basis of nationality, since most non-residents will be non-nationals and those rules are therefore liable to operate mainly to the detriment of nationals of other Member States ([582]).

This section can conclude with the observation that EU law on direct taxation is in essence non-discrimination law.

As you will be aware, no right is ever absolute, and there may be justified exceptions to the right not to be discriminated against on grounds of nationality or residence. Indeed, the Court of Justice has accepted a number of grounds of justification as 'overriding reasons in the public interest' by which a restriction of one of the treaty freedoms is considered to be justified and therefore does not amount to a prohibited discrimination ([583]).

([581]) A word of caution to readers who are well versed in international taxation, more particularly the approach used by the double taxation conventions. When two states are negotiating a convention to avoid double taxation they will look at the overall tax burden for certain categories of income and decide on who taxes which sources of income and to what extent. This is largely irrelevant for EU law. The overall tax burden as divided between two Member States only exceptionally comes into play under EU law. Indeed, the analysis of the Court of Justice concerns only one Member State and whether the applicable law of that Member State does or does not discriminate against cross-border situations. The law of any of the other Member States in the cross-border situation remains largely outside the scope of this analysis.

([582]) Judgment of 14 February 1995, *Schumacker*, C-279/93, EU:C:1995:31, paragraph 28.

([583]) Examples of such grounds of justification accepted by the Court of Justice are the protection of a balanced allocation of taxing rights between Member States, the need to fight tax fraud and the effectiveness of fiscal supervision.

3. Which treaty freedom applies in which situation?

3.1. I'd like to work as an employee in another Member State

The free movement of workers in the EU, which is to be found in Article 45 TFEU, is one of the best-known freedoms in the TFEU. It is certainly the one that affects the most EU citizens directly, since an overwhelming majority of the population are workers, have been workers at some stage in life or are dependent on family members who are workers. Article 45 uses the term 'workers' and makes it implicitly clear that it concerns workers who are employed ([584]); however, the treaty legislators did not define the term. It therefore fell to the Court of Justice to define the term 'worker'. The Court decided that the term could not be defined in reference to national employment law of the Member States, which would lead to differences in the application of the freedom, but should be defined as an autonomous notion of EU law. The essential feature of an employment relationship – as interpreted by the Court of Justice – is that (i) for a certain period of time a person performs services (ii) for and under the direction of another person (iii) in return for which they receive remuneration ([585]). The free movement of workers can be relied upon by EU citizens and the workers' family members, the latter being indirect beneficiaries of the freedom.

The free movement of workers means that any discrimination based on nationality between workers of Member States must be abolished as regards employment, remuneration and other conditions of work and employment. Workers in a Member State ('host Member State') who have their origin in another Member State ('home Member State') are entitled to the same treatment as national workers in the host Member State. The prohibition of discrimination also applies to social and tax advantages ([586]). Although the wording of Article 45 seems to indicate otherwise, workers can also invoke the free movement of workers against their own Member State, for example if they suffer discrimination because of employment in another Member State ([587]).

The main source of litigation about direct tax discrimination involving employees has been the various ways in which Member States take account of the employees' personal and family situations for tax purposes. This usually involves tax-free allowances, additional deductions and exemptions that are generally only granted to resident taxpayers. Hence, problems arise in particular with cross-border commuters. This will be explained in more detail in Section 4.1 below.

([584]) Article 45(2)–(4) TFEU.

([585]) Judgment of 3 July 1986, *Lawrie Blum*, 66/85, EU:C:1986:284.

([586]) Article 7(2) of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, OJ L 141, 27.5.2011, p. 1.

([587]) Judgment of 12 December 2002, *De Groot*, C-385/00, EU:C:2002:750, paragraphs 79–80.

3.2. I'd like to work independently in another Member State

Working in another Member State is also protected from discrimination outside any employer–employee relationship. The right of self-employed workers to exercise their economic or professional activity in another Member State is protected by the freedom of establishment set forth in Article 49 TFEU. Again, the freedom of establishment can be invoked against discriminatory tax rules in the host Member State, but also against tax legislation in the home Member State that would dissuade someone from relocating to another Member State ([588]).

What is important to understand is that the freedom of establishment implies that an EU national participates, on a stable and continuous basis, in the economic life of a Member State other than their state of origin, and profits from it ([589]). It therefore needs to be distinguished from a service provider who only renders a service in another Member State, and from the free movement of capital, which applies to investors in another Member State.

From the case-law it appears that self-employed workers seem to deal with substantially similar issues of discrimination to those of employees. Not surprisingly, rules about deduction of professional costs or about tax advantages are an additional source of tax litigation in this category.

3.3. I'd like to set up a company in another Member State and become a shareholder

The freedom of establishment is not only applicable to workers who develop a self-employed economic activity, but also to people who develop their economic activity through the establishment in another Member State of a company or other legal person. This follows from Articles 49(2) and 54 TFEU, which apply to the establishment of any companies or firms constituted under civil or commercial law and other legal persons governed by public or private law, save for those that are non-profit-making. All such entities are entitled to be treated by the host Member State in the same way as natural or legal persons who are nationals of that Member State. A Member State national who holds a controlling shareholding in a company, that is a shareholding that gives the person definite influence over the company's decisions and allows them to determine the company's activities, is exercising their right of establishment ([590]). Shareholders who do not have such a controlling shareholding are not considered to exercise their right of establishment but are simply making an investment (see Section 3.5 below).

([588]) Judgments of 13 April 2000, *Baars*, C-251/98, EU:C:2000:205; and of 11 March 2004, *Lasteyrie du Saillant*, C-9/02, EU:C:2004:138.

([589]) Judgment of 30 November 1995, *Gebhard*, C-55/94, EU:C:1995:411, paragraph 25, where it concerned the establishment of a law practice in Italy by a German *Rechtsanwalt*.

([590]) Judgment of 13 April 2000, *Baars*, C-251/98, EU:C:2000:205, paragraph 22.

The main source of tax litigation by shareholders of companies in another Member State is – not surprisingly – the tax treatment of dividends. Such distributions are often subject to withholding tax in the Member State of the distributing company and again in the hands of the shareholder. Discrimination can therefore occur in either Member State.

3.4. I'd like to offer my services in another Member State

Under Article 56 TFEU, restrictions on the freedom to provide services within the EU are prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended. Those EU nationals who do not intend to relocate to another Member State in order to participate, on a stable and continuous basis, in the economic life of that other Member State, but intend to simply provide their services in another Member State from their home Member State can rely upon this freedom. A service covered by this provision is one that is habitually provided for remuneration and is not covered by any of the other freedoms ([591]).

A frequent source of tax litigation by cross-border service providers is again the deduction of professional costs, more particularly the link between the revenues obtained and the costs exposed (see Section 4.3 below).

3.5. I'd like to invest in another Member State

Article 63 TFEU prohibits restrictions on the free movement of capital and payments between Member States, and between Member States and non-EU countries. The prohibition of such restrictions between Member States and non-EU countries means *de facto* that Member States may not discriminate against capital movements from non-EU countries into the EU, but non-EU countries, which are not bound by the treaty, do not have a corresponding prohibition of discrimination against capital movements from EU Member States. Capital movements are not defined in the treaty but the Court of Justice has recourse to a nomenclature of capital movements that was attached to Directive 88/361/CEE, which contains a non-exhaustive but nonetheless extensive list of transactions that are in any event to be considered capital movements ([592]).

The main sources of tax litigation in this category are again the tax treatment of dividends, of certain financial products and – further removed from the natural person investing – of investment funds.

([591]) Article 57 TFEU.

([592]) Annex I of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty, OJ L 178, 8.7.1988, p. 5.

3.6. I'd like to retire in another Member State

The previous situations all have a link with an economic activity, and indeed the EU was originally focused on the economy and those economically active, that is workers and self-employed people. Only later did EU law include rights for the economically inactive, such as retired workers or others who are economically inactive. Article 21 TFEU provides that every citizen of the EU has the right to move and reside freely within the territory of the Member States. People who have carried out all their occupational activity in the Member State of which they are nationals and who have exercised the right to reside in another Member State only after their retirement, without any intention of working in that state, cannot rely on the freedom of movement of workers. They can, however, rely on the free movement of persons protected by Article 21 TFEU. That is why Ms Turpeinen ([593]), a Finnish national who had worked throughout her life in Finland, could challenge the Finnish tax regime applied to her after she retired to Spain. Her retirement pension was originally taxed in Finland under the normal progressive taxation system, but when she took up residency in Spain, it became taxable in Finland under a non-progressive withholding tax system that was unfavourable to her.

3.7. I stay in my own Member State but I am affected by a cross-border element

Surprising as it may be, one does not need to exercise any right under the treaty to be potentially affected by somebody else's free movement.

If a spouse or former spouse exercises their free movement to move to another Member State, any lingering financial obligations from the marriage or former marriage may well affect the spouse who remains in the home Member State. This was the case for Mr Schempp ([594]), a German national, living, working and paying tax in Germany. The only cross-border element in his situation was that his former wife, for whom he paid maintenance, had moved to Austria. Mr Schempp tried to deduct the maintenance payments paid to his former wife from his German income tax, which was refused on the ground that he had not submitted the required certificate from the Austrian tax authorities to show that his former spouse had been taxed in Austria on the maintenance payments. In contrast to German law, under Austrian law, maintenance payments received are not taxed and maintenance payments paid are therefore also not deductible. Mr Schempp was therefore unable to submit the certificate required under German law. Even though Mr Schempp had not exercised his right to free movement within the EU, the Court of Justice decided that his situation was not a purely domestic situation, since he was negatively affected by the free movement of his former spouse, and therefore Mr Schempp could rely on Article 18 TFEU, the general provision prohibiting discrimination on the ground of nationality.

([593]) Judgment of 9 November 2006, *Turpeinen*, C-520/04, EU:C:2006:703.

([594]) Judgment of 12 July 2005, *Schempp*, C-403/03, EU:C:2005:446.

3.8. If I die in another Member State, or in my own and have property in another Member State, what happens to my estate?

If one has moved to another Member State for work, after retirement, or for any other reason, then it is possible that one's inheritance will be governed by the law of that Member State. That is simply the result of the application of the international private law rules that govern the law of succession and falls outside the scope of this chapter.

However, inheritance taxes may vary from the purely domestic situation on a number of points. A person may die in their home Member State and have property in another Member State. Or a person may die in another Member State and their heirs may still be resident in the home Member State. Or a person may die in the home Member State and their heirs may be resident in another Member State. Or a part of the inheritance can be subject to double taxation, once in the Member State where the property is located and once in the home Member State. All these situations can lead to higher taxes on an inheritance than the purely domestic situation in which the deceased, the heirs and the inheritance are all confined to the same Member State. The Court of Justice has accepted that an inheritance is a movement of capital, as it is included in the nomenclature in Annex I of Directive 88/361/CEE under the heading XI 'Personal capital movements', point D – 'Inheritances and legacies' ([595]). National inheritance tax legislation that has the effect of reducing the value of the inheritance because of a cross-border element is considered a potential discrimination affecting the free movement of capital ([596]).

4. Taxation as a resident and taxation as a non-resident

4.1. Is a resident comparable to a non-resident for tax advantages taking into account their personal and family circumstances?

Every Member State grants tax advantages to residents whereby account is taken of the taxpayer's personal and family circumstances. Examples are additional exemptions, deductions or allowances based on the number of dependents or their particular circumstances. In a system where income taxes are proportional, this is a way to further take into account the individual taxpayer's ability to pay. Most Member States also limit those advantages to resident taxpayers, thereby not extending these benefits to taxpayers who have their residence in another Member State.

In a landmark case, Mr Schumacker was a Belgian residing in Belgium but working as an employee in Germany, whereby his German income constituted the entire income of his household. Under German law, employees may ask for their salary to be split, so that 50 % of

([595]) Judgment of 23 February 2006, *Heirs of M. E. A. van Hilten-van der Heyden*, C-513/03, EU:C:2006:131, paragraph 40.

([596]) Idem, paragraph 44.

the salary is attributed for tax purposes to the spouse, thereby lowering the overall tax level given the progressive taxation system applied in Germany. However, this advantage is only granted to German residents.

The Court of Justice considers that, in relation to direct taxes, the situation of residents and that of non-residents are not, as a rule, comparable. The situation of a resident is different insofar as the major part of his income is normally concentrated in the state of residence. Moreover, that state generally has available all the information needed to assess the taxpayer's overall ability to pay, taking account of their personal and family circumstances ([597]).

The situation is different, however, in a case such as Mr Schumacker's, in which the non-resident receives no significant income in the state of residence and obtains the major part of their taxable income from an activity performed in the state of employment, with the result that the state of residence is not in a position to grant them the benefits resulting from taking into account their personal and family circumstances. In such a case, the situation of the resident and that of the non-resident become comparable as regards taking into account the taxpayer's personal and family circumstances for taxation purposes ([598]). As a result, the Member State of employment must treat the resident and the non-resident in the same manner, and the tax advantage consisting in the salary split should be granted to the non-resident too.

Because of the *Schumacker* judgment, many Member States changed their legislation on this point, allowing non-residents earning at least 90 % of their income in the Member State of employment to be treated as a resident taxpayer ([599]). Inevitably, the 90 % threshold was submitted to the Court of Justice for scrutiny. In a case in which 42 % of the overall household income was earned in the Member State of residence, the Court of Justice concluded that the income represented by that 42 % was sufficient for the Member State of residence to take into account the personal and family circumstances of the taxpayers and therefore the obligation to do so did not shift to the Member State of employment ([600]).

Another landmark case was initiated by the European Commission following a complaint received from an Estonian pensioner who after reaching retirement age in Estonia moved to Finland and worked and acquired the right to a pension there. She therefore received two retirement pensions, one in Estonia and one in Finland, of almost the same amount. The pension received in Estonia was subject to income tax, whereas in Finland, because of the very low level of her total income, there was no liability for tax. Simply applying the then standing case-law, it would

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([597]) Judgment of 14 February 1995, *Schumacker*, C-279/93, EU:C:1995:31, paragraphs 31–34.

([598]) Idem, paragraphs 36–37.

([599]) Even before the judgment in the *Schumacker* case, the Commission had issued Recommendation 94/79/EC of 21 December 1993 on the taxation of certain items of income received by non-residents in a Member State other than that in which they are resident (OJ L 39, 10.2.1994, p. 22), in which it had suggested that Member States should use a threshold of 75 % of income in the Member State of activity.

([600]) Judgment of 14 September 1999, *Gschwind*, C-391/97, EU:C:1999:409.

seem that 50 % of her income was generated in Finland, where she was resident, and therefore that 50 % should be enough to take account of her personal and family situation. However, although she was resident in Finland and should therefore be taxed on her worldwide income in that Member State, her income fell below the threshold to be taxable in Finland. Finland, as the Member State of residence, was unable to take into account her personal and family circumstances for tax purposes, and Estonia, which could take into account such circumstances, since the Estonian pension was taxable there, did not do so because she was not an Estonian resident. Estonia would, however, do so for resident taxpayers in the same situation. The Court of Justice decided that Estonia should grant tax advantages to non-residents taking account of personal and family circumstances if for any reason the resident Member State was not able to do so ([601]).

It is obvious that the Court has distanced itself from the interpretation that a percentage of the overall income could in any way be an easy rule of thumb when Member States of income have a duty to treat non-residents as residents in matters of tax advantages taking account of personal and family circumstances. This is confirmed in a more recent judgment in which a taxpayer generated only 6 % of his overall income in his Member State of residence. However, the overall income was so much that the Court of Justice correctly held that the Member State of residence could very well take into account the personal and family circumstances of the taxpayer based on that 6 % ([602]).

Then the question has been raised of what to do if there are not just two (Member) States involved but three. This happened in a case in which a Dutch national was resident in Spain, where he did not generate any income. His income was generated in the Netherlands and Switzerland. In Spain, he actually had a negative income because of the mortgage on his Spanish property. He sought to deduct this mortgage from his Dutch income under Dutch tax rules. This deduction was refused because he was not a Dutch resident.

The Court of Justice followed the suggestion of the Commission to accept proportionality between the two states where the taxpayer generated income. In this particular case, the litigation was against the Netherlands and therefore that Member State should grant the tax advantage on deduction of the mortgage in proportion to the part of the income that the taxpayer generated in its territory, which was 40 % of his total income. If the other 60 % of the taxpayer's income had been generated in another Member State, and this Member State's national tax law had also granted the same benefit of deducting the mortgage costs from the personal income tax base, then that Member State should have granted the tax advantage for that proportion. However, in this particular case, the other state was Switzerland, which is not a Member State and therefore has no obligation under EU law ([603]).

([601]) Judgment of 12 May 2012, *Commission* v *Estonia*, C-39/10, EU:C:2012:282.

([602]) Judgment of 6 December 2018, *Montag*, C-480/17, EU:C:2018:987.

([603]) Judgment of 9 February 2017, *X*, C-283/15, EU:C:2017:102.

We can therefore conclude this section by summarising that the decisive criterion is whether it is impossible for a Member State to take into account, for the calculation of tax, the personal and family circumstances of a taxpayer in the absence of sufficient taxable income in that Member State, although such circumstances can otherwise be taken into account when there is sufficient income. If a taxpayer has sufficient income in the Member State of residence, then that Member State must take into account the personal and family circumstances of the taxpayer. Only when the taxpayer does not have sufficient income in the Member State of residence does that obligation shift to the Member State of income. Furthermore, if there is more than one Member State of income, the obligation of those Member States becomes proportionate. In any event, the obligation on the Member State of income is only enforceable if in that Member State the specific tax advantage sought is set out in its tax legislation. In no circumstances can Member States be required to grant tax advantages that do not otherwise exist in their legislation.

4.2. Can a non-resident be taxed in a different manner from a resident?

Mr Gerritse ([604]) was a Dutch drummer who was invited to Berlin for a radio broadcast for which he received a fee. Had he been a German resident, the fee would have fallen below the taxable threshold in Germany and would therefore not have been taxed under the progressive income tax system. Since Mr Gerritse was a non-resident in Germany, the fee was taxed not under the normal progressive tax system but through a deduction at source (withholding tax) at a fixed rate of 25 % on the full amount, in other words without the benefit of a tax-free threshold or any possibility of deducting the costs directly related to the activity generating the income (on deductibility of costs, see Section 4.3 below).

There is a difference of treatment therefore on two points: (i) the income is taxed in different ways, progressively for the resident and through a fixed-rate withholding tax for the non-resident, and (ii) the resident benefits from a tax-free allowance whereas the non-resident does not.

With reference to the *Schumacker* judgment, the Court of Justice reiterated that, in relation to direct taxes, the situations of residents and of non-residents are generally not comparable and the fact that a Member State does not grant to a non-resident certain tax benefits that it grants to a resident is not, as a rule, discriminatory, having regard to the objective differences between the situations of residents and of non-residents, from the point of view both of the source of their income and of their personal ability to pay tax or their personal and family circumstances ([605]).

([604]) Judgment of 12 June 2003, *Gerritse*, C-234/01, EU:C:2003:340.

([605]) Idem, paragraphs 43–44.

The tax-free allowance is meant to take into account the ability to pay and the personal and family situation of the taxpayer and it is therefore for the Member State of residence to take this into account. In this particular case, the Netherlands did provide Mr Gerritse with a similar tax-free allowance ([606]).

As far as the fixed-rate withholding tax is concerned, as opposed to the progressive rate, the Court considered that residents and non-residents are comparable, so applying a higher rate of income tax to a non-resident than to a resident would constitute indirect discrimination prohibited by EU law, in particular by the freedom to provide services ([607]).

This approach has been applied even more explicitly in another case, which concerned corporate income tax ([608]) and in which it was explicitly asked if a non-resident could be subjected to withholding tax whereas residents were taxed in the normal corporate income tax system. The Court of Justice confirmed the findings in *Gerritse* and concluded that, since they are not in the same situation, they can be subject to different taxation methods. However, that does not mean that the result of taxation through different methods and regimes can be disadvantageous to the non-resident. The Court judged that the system of withholding tax in the situation of the taxpayer in question was not shown to be disadvantageous to him.

The case of Mr Talotta ([609]) provides another example of different methods of taxation between residents and non-residents. Mr Talotta was a Luxembourg resident who operated a restaurant in Belgium. Since he did not complete his tax return, the Belgian rules on *ex officio* taxation were applied. A difference in treatment was established according to which non-residents could be taxed based on a sector-specific minimum of taxable profits determined by law (i.e. fixed-rate taxation). On the other hand, Belgian residents were taxed with reference to the normal profits or earnings of at least three similar taxpayers and having regard, as appropriate, to the capital invested, the turnover, the number of workers and any other relevant information. The Court of Justice held in this case that the residents and non-residents were in a comparable situation, since they presented the tax authorities with the same difficulty in the event of non-declaration of income. The different manners in which the taxable income was determined *ex officio* were therefore held to be discriminatory.

The conclusion must therefore be that a Member State can use different methods of taxation for residents and non-residents but (i) the difference in technique must be required to counter the particular difficulty caused by the non-resident and (ii) the tax burden on the non-resident may not be heavier than on the resident.

([606]) Idem, paragraphs 48–51.

([607]) Idem, paragraphs 52–53.

([608]) Judgment of 22 December 2008, *Truck Center*, C-282/07, EU:C:2008:762.

([609]) Judgment of 22 March 2007, *Talotta*, C-383/05, EU:C:2007:181.

4.3. Can I deduct costs borne for generating income in another Member State?

This question is particularly pertinent for readers interested in providing services in another Member State than the one where they are resident. A good example is the case already referred to earlier of Mr Gerritse, the Dutch drummer invited to a Berlin radio station ([610]).

He received a fee for that session and wanted to deduct costs related to that session, such as travel and the hotel. German law, however, did not allow him to do so. Non-residents were taxed on the gross amount of the fee through a withholding tax, whereas residents were taxed on their net income in the normal progressive income tax regime. Residents could therefore deduct the costs directly linked to the activity that generated the taxable income in Germany, whereas non-residents could not. The Court of Justice held that both are placed in a comparable situation in that respect and that the freedom to provide services precludes national legislation that excludes the possibility of non-residents deducting business expenses from their taxable income, if such a possibility is granted to residents ([611]).

These principles were confirmed in a case concerning a Portuguese company that organised a European tour in which equestrian presentations and lessons in dressage were given in various countries, including Germany ([612]). For the German part of the tour, the company tried to deduct the costs directly linked to the German presentations and lessons from its gross income generated in Germany on the tour. The German authorities refused, since the costs did not meet the legal condition that the operating expenses or business costs have a direct economic connection to that income and are greater than half of that income.

As far as the direct economic link is concerned, the Court of Justice confirmed that, where powers of taxation are exercised by a state in the territory in which activity has generated taxable income, it must be possible for the costs directly connected to that activity to be taken into account in the taxation of non-residents, and that this includes all of the costs that are inextricably linked to that activity irrespective of the place and time at which those costs were incurred ([613]). Therefore, costs incurred prior to the tour and in Portugal should be able to be considered to have such a direct economic connection.

As far as the requirement that the costs be greater than half of the income is concerned, the Court held that such a condition is clearly discriminatory compared with residents, to whom that condition does not apply ([614]).

([610]) Judgment of 12 June 2003, *Gerritse*, C-234/01, EU:C:2003:340.

([611]) Idem, paragraphs 27–28.

([612]) Judgment of 15 February 2007, *Centro Equestre da Lezíria Grande Lda*, C-345/04, EU:C:2007:96.

([613]) Idem, paragraph 27.

([614]) Idem, paragraph 37.

Finally, a case in which the facts may sound familiar to readers exercising a liberal profession. Mr Vestergaard ([615]), a Danish tax practitioner, participated in a tax training course in Crete (Greece). He spent a week in Crete, of which 3 full days and 2 half-days were dedicated to the training course. He tried – in vain – to deduct the cost of the trip and his stay from his Danish tax return. Danish law contained a presumption of tourism when professional conferences or courses were organised in a foreign tourist resort, whereas when these were organised in a Danish tourist resort no such presumption applied. The Court of Justice found that this was contrary to the freedom to provide services.

5. Taxation as a result of moving out of your own Member State: 'exit tax'

When a taxpayer leaves the jurisdiction of the home Member State to take up residence in another Member State, the taxpayer ceases to be a resident of the home Member State for tax purposes and becomes a tax resident in the host Member State. At that time, the home Member State may want to settle certain outstanding tax issues with the departing taxpayer. The expression 'exit tax' refers not to a specific tax but to a particular moment in time when a tax is levied and for a particular reason, namely the fact that the tax authorities lose power to tax the person because the taxpayer leaves the tax territory of the Member State in question.

5.1. Conflicting interests of the taxpayer and the Member State

The issue is particularly relevant to unrealised capital gains. If one has a portfolio of shares, these may have increased in value between the moment of their acquisition and the moment that the owner takes up residence in another Member State. The increase in value is an unrealised capital gain, since the increase in value will only be realised when the shares are sold. As long as the shares are not sold, the increase in value is merely theoretical. If the home Member State levies an exit tax on the unrealised capital gains of this portfolio of shares, the taxpayer can have a serious cash-flow problem. Normally, a capital gains tax is levied on a realised capital gain and then the tax can be paid with a part of the proceeds of the sale. However, if the capital gains tax is levied on an unrealised capital gain, there has been no sale, nor are there any proceeds of the sale to pay the tax with. Consequently, the taxpayer needs to find funds from other sources to pay the tax or, in the absence of such other means, sell a part of the portfolio of shares.

The point of view of the home Member State is entirely different. If the taxpayer takes up residence in another Member State, then the home Member State loses its power to tax the

([615]) Judgment of 28 October 1999, *Vestergaard*, C-55/98, EU:C:1999:533.

capital gain that the taxpayer may realise in a future sale, including the unrealised capital gain accrued over the time when the taxpayer was resident in the home Member State.

There is also another conflict of interest once the Court of Justice has accepted that the immediate levy of an exit tax is contrary to the treaty freedoms (see Section 5.3 below). The taxpayer has an interest in deferring the payment of the exit tax until the moment of realisation. However, taxpayers may keep the assets for a very long time. This is of course contrary to the interests of the home Member State, which will need to keep an eye on these assets for the entire period between exit and realisation, whenever the latter event may take place.

5.2. Where is the discrimination?

It may be unfortunate that the taxpayer has to pay tax on unrealised gains, but that does not make it in itself contrary to the treaty freedoms. The problem arises simply because in the purely national situation, when the taxpayer moves within the home Member State, that move does not trigger an exit tax, since the tax power of the home Member State is not affected. Therefore, the intra-EU situation is treated less favourably than the purely domestic situation.

5.3. Evolution of the case-law

The various judgments clearly struggle with the different interests of the taxpayers and of the Member States. Whereas the pendulum in the early case-law swung probably too much in the favour of the taxpayers, the current position is generally a fair middle ground, except for one aspect, which will be explained below.

The case-law on exit tax has not developed in a straight line.

Mr de Lasteyrie du Saillant ([616]), originally a French resident, left France and moved to Belgium. He held shares in a family business established in France. When he took up residence in Belgium, the market value of the shares was higher than when he acquired them. There was therefore an unrealised capital gain, which French law submitted to capital gains tax as if it were a realised capital gain. The only way in which he could avoid paying the tax was by providing a bank guarantee for 5 years. If he did not sell the shares within that 5-year period, the tax would not be due at the expiry of that period. The Court of Justice held that the exit tax as conceived by France constituted a restriction on the freedom of establishment with regard to both the immediate taxation and the need to provide a bank guarantee.

In a further case ([617]), referred to as *N*, the arguments from both the Member States, on the one hand, and the taxpayer and Commission, on the other, were more developed, which led to a judgment confirming that in *Lasteyrie*. The Court of Justice also found an additional restriction

([616]) Judgment of 11 March 2004, *Lasteyrie du Saillant*, C-9/02, EU:C:2004:138.

([617]) Judgment of 7 September 2006, *N*, C-470/04, EU:C:2006:525.

in the fact that the applicable Dutch law did not take into account a possible reduction in value of the shares between the exit and realisation ([618]).

At this point it was clear that a Member State could determine the unrealised capital gain and calculate the tax at the time of exit, but the tax would only be due from the taxpayer once the capital gain had been realised, that is, after selling the shares. The deferral of the payment of the tax could not be conditional upon a (bank) guarantee and, should the value of the shares be lower at realisation than at exit, then the tax should be adjusted accordingly.

After these two cases, the exit tax cases all concerned businesses subject to corporate income tax. A first case diverged from the *N* case by concluding that a possible reduction in value of the shares between exit and realisation does not need to be taken into account ([619]). This was presented as specific to business assets and the availability of what is commonly referred to as a 'step-up' in corporate income tax. The new Member State of residence will take the assets at their balance sheet value at 'entry' and then take account of any negative value going forward.

In another case, the Court of Justice accepted that the German exit tax legislation, which gives the taxpayer the choice between immediate recovery and recovery spread over 5 years, was an appropriate way of dealing with the deferral of payment of the exit tax when realisation may be too far in the future for the home Member State ([620]).

There remains the issue of the possible reduction in value of the assets between exit and either realisation or payment of the exit tax in instalments. In this regard, the problem is precisely in the area of exit taxes that apply to natural persons as opposed to those that apply to companies or businesses. In corporate income tax, when a company transfers its seat to another Member State, the host Member State will take the value of the assets at their book value at entry as a base and then take into account for tax purposes any subsequent increase or decrease in value. Therefore, when a company suffers a reduction of value between the exit and the payment of the exit tax, and as a result pays too much exit tax, it will be able to compensate for that loss through the reduction of value in the new Member State. In personal income tax, such a mechanism is generally absent. A natural person suffering a reduction of value on a portfolio of shares between exit and payment of exit tax will not be able to compensate for this at a later point in time in the new Member State. A stock exchange crash between exit and payment of the exit tax could therefore be catastrophic for the finances of a natural person who is a taxpayer.

With this scenario in mind, the Commission brought a case against Portugal to try to get confirmation from the Court of Justice that the *Lasteyrie* and *N* case-law was still valid for

([618]) Idem, paragraph 54.

([619]) Judgment of 29 November 2011, *National Grid Indus*, C-371/10, EU:C:2011:785.

([620]) Judgment of 23 January 2014, *DMC*, C-164/12, EU:C:2014:20, paragraph 62–64.

natural persons whereas *National Grid Indus* and *DMC* were the case-law applicable to companies. However, the Court explicitly held that the same regime applies to both and that Member States do not need to take account of any possible reduction in value after exit ([621]).

6. Charitable gifts and inheritance taxes

6.1. Charitable gifts

Many people do not want to wait until death to pass some of their wealth to causes close to their hearts but do so throughout their lives. At the same time, Member States encourage giving to certain charities they have recognised as being in the general interest, and do so through granting tax advantages. Generally speaking, Member States only recognise charities that are established in their own territory and therefore implicitly discourage charitable gifts to charities established in other countries, including Member States.

With the increased internationalisation of people's lives, it is also becoming more common for people to want to give to causes in other Member States than the one they (currently) live in.

Mr Persche ([622]), a German resident, donated bed linen, towels, zimmer frames and toys to a charity in Portugal. Under German law, taxpayers may deduct from the total amount of their income, as exceptional deductible expenses up to certain limits, expenditure that promotes benevolent, church, religious or scientific charitable purposes, and purposes recognised as particularly worthy of support. However, this is only valid for charities that meet the criteria set out by German law, including being established in Germany.

Mr Persche deducted his gift from his taxable income in Germany, since the Portuguese charity complied with all Portuguese requirements to benefit in Portugal from all exemptions and tax benefits conferred by Portuguese law on charitable bodies. Mr Persche therefore submitted that the original donation certificate was sufficient under Portuguese law to entitle him to a deduction for tax purposes and should therefore also be taken into account in Germany. The German authorities, in accordance with German law, refused this deduction. The Court of Justice held that the free movement of capital precludes legislation of a Member State by virtue of which, as regards gifts made to bodies recognised as having charitable status, the benefit of a deduction for tax purposes is allowed only in respect of gifts made to bodies established in that Member State, without any opportunity for the taxpayer to show that a gift made to a body established in another Member State satisfies the requirements imposed by that legislation for the grant of such a benefit ([623]).

([621]) Judgment of 21 December 2016, *Commission* v *Portugal*, C-503/14, EU:C:2016:979, paragraphs 51–55.

([622]) Judgment of 27 January 2009, *Persche*, C-318/07, EU:C:2009:33.

([623]) Idem, paragraph 72.

6.2. Inheritance taxes

Inheritance tax is a thorny problem in EU law, because there are more and more people who move from one country to another, buy a second home in another Member State, marry a spouse from another Member State, etc. All this leads to more and more estates with some extraterritorial aspect. The problem is further complicated by the fact that tax legislation in various Member States differs considerably, not only in taxation rates, but also in whether the estate is taxed or the heirs are, whether or not account is taken of the blood relationship between the deceased and the heirs, and even whether any inheritance tax is levied at all.

Often, Member States treat inheritances with an element of extraterritoriality differently from inheritances that are entirely confined to their own territory, and this may give rise to questions under EU law.

6.2.1. Double taxation of assets held abroad

The most common issue is double taxation. If the estate of the deceased has assets in more than one Member State, then two Member States may be entitled to levy inheritance tax on the same assets. It is indeed often the case that Member States levy a tax on the whole worldwide estate of the deceased if they were a resident at the moment of death. If the deceased was a non-resident at the moment of death, then a Member State where the non-resident deceased had assets will often tax the assets that were within its territory at that time. In addition, unlike the case of income tax, Member States have only very rarely entered into conventions to avoid double taxation on inheritances. The landmark case that came to the Court of Justice is that of Ms Block ([624]), a resident in Germany and the sole heir of a German resident. The estate consisted of capital assets invested with financial institutions in Germany and in Spain. She paid inheritance tax in Spain on the assets invested in Spain and, in addition, she was due to pay inheritance tax in Germany on the whole inheritance, including the assets already taxed in Spain. No double tax convention exists between Germany and Spain in relation to inheritance taxes.

The German tax administration nonetheless allowed Ms Block to count the inheritance tax paid in Spain as a debt of the estate and therefore deduct it from the basis of the assessment of inheritance tax payable in Germany. This, however, was not sufficient for Ms Block, who requested that the inheritance tax paid in Spain be credited against the inheritance tax to be paid in Germany, which would be considerably more advantageous to her. One of the arguments made was that such double taxation would be contrary to EU law, in particular the free movement of capital, since, if all the deceased's assets had been invested in Germany, only German inheritance tax would have been due.

The Court of Justice, however, took the view that, in its current stage of development, EU law does not lay down any general criteria for the attribution of areas of competence between

([624]) Judgment of 12 February 2009, *Margarete Block*, C-67/08, EU:C:2009:92.

Member States in relation to the elimination of double taxation within the EU ([625]). Therefore, Member States enjoy a certain autonomy as long as they comply with EU law, and they are not obliged to adapt their own tax systems to the tax systems of other Member States in order to eliminate such double taxation arising from the exercise in parallel by those Member States of their fiscal sovereignty ([626]). It is therefore clear that the Court considers that the elimination of double taxation is a matter for the legislators, either national legislatures through bilateral conventions or the EU legislature in adopting harmonisation on this point. Note, therefore, that assets held abroad may be subject to a heavier inheritance tax burden due to double taxation.

6.2.2. Discriminatory taxation of assets located in another Member State

This can be illustrated by a case that will interest owners of family-owned businesses in particular. Mr Vogten ([627]), a Dutch national residing in Belgium, owned a family business in the Netherlands, near the Belgian border. Since he resided in Belgium, his estate was subject to Belgian inheritance tax. However, Flemish regional legislation grants a substantial advantage to the transmission of family-owned businesses in that the business is treated separately from the rest of the deceased's estate and subject to a much lower rate of tax. This is, however, subject to the condition that a minimum level of employment is maintained over a certain period of time, a condition that must be fulfilled in the Flemish region. Given that the family business was located not in the Flemish region but in the Netherlands, the tax authorities refused Mr Vogten's heirs the tax advantage.

The Court of Justice considered that this legislation introduces a condition that can be fulfilled more easily by a company already established in the Flemish region and therefore constitutes an indirect discrimination between taxpayers based on the place of employment of a certain number of workers in a certain period ([628]). A similar outcome was obtained in a case in which German inheritance tax introduced a difference based on whether the real property inherited was located in Germany or in another Member State ([629]).

Discrimination based on the assets can also be less obvious than simply their physical location. This follows from a judgment in the *Halley* case ([630]). A French couple who died in an aircraft accident held a major shareholding in a large French company listed on the French stock exchange. Mr and Ms Halley were resident in Belgium and therefore Belgian inheritance tax was levied on their estate, including the shares they held in the French listed company. The case

([625]) Idem, paragraph 30.

([626]) Idem, paragraph 31.

([627]) Judgment of 25 October 2007, *Geurts and Vogten*, C-464/05, EU:C:2007:631.

([628]) Idem, paragraphs 21–22. Since it concerned the transmission of shares in a company, freedom of establishment was applicable in this case.

([629]) Judgment of 17 January 2008, *Jäger*, C-256/08, EU:C:2008:20.

([630]) Judgment of 15 September 2011, *Halley*, C-132/10, EU:C:2011:586.

concerns the valuation of the shares for the purposes of the tax declaration and the period of limitation for the administration to contest the value declared by the heirs. If the shares in the estate had been in a Belgian company, the period of limitation for the valuation of the shares would have been 2 years. As the shares were in a foreign, namely French, company, then the period of limitation for the valuation of the shares was extended to 10 years.

The Court of Justice considered that there was a discrimination, since this might well discourage Belgian residents from investing in a company established in another Member State because the heirs would have a longer period of uncertainty about a possible tax adjustment ([631]). In addition, the Court held that there was no valid reason for the difference of treatment, since the shares were listed on the stock exchange and the authorities could therefore simply open the financial newspapers of the date of death for the exact value of the shares ([632]).

6.2.3. Discriminatory taxation of non-residents

A series of cases originated in Germany in connection with different treatment of residents and non-residents regarding tax-free allowances. By way of example, we will look into the case of Ms Mattner ([633]), who received a gift from her mother consisting of a plot of land located in Germany. Both Ms Mattner and her mother were German nationals residing in the Netherlands. The German authorities taxed Ms Mattner on the whole of the value of the real property received, after the deduction of EUR 1 100. If Ms Mattner or her mother had been resident in Germany, Ms Mattner would have been able to claim an allowance of EUR 205 000 to be deducted from the value of the real property, thereby reducing the tax base on which the tax rate was applied. Not surprisingly, the Court of Justice held that this amounted to discrimination contrary to the free movement of capital.

Finally, the case of Ms van Hilten-van der Heijden was rather unusual ([634]). A Dutch national, she had left the Netherlands, first for Belgium and then for Switzerland, and at her death her estate had assets in all three countries. Under Dutch law, a Dutch national remains a tax resident for inheritance tax purposes for 10 years after having taken up residence outside the Netherlands. The only way to avoid Dutch inheritance tax during that 10-year period is to renounce Dutch nationality. Since the deceased died within that 10-year period, the Netherlands levied Dutch inheritance tax on the estate as if she were still a Dutch resident. It did, however, provide relief on the tax paid in the state of residence.

([631]) Idem, paragraph 24.

([632]) Idem, paragraph 38.

([633]) Judgment of 22 April 2010, *Mattner*, C-510/08, EU:C:2010:216.

([634]) Judgment of 23 February 2006, *Heirs of M. E. A. van Hilten-van der Heijden*, C-513/03, EU:C:2006:131.

Contrary to what the heirs maintained, the Court of Justice considers that this legislation does not constitute a restriction on free movement of capital because there is no difference of treatment. The Dutch legislation applies the same legislation in the same manner to residents and non-residents alike.

7. Conclusion

I hope that these pages have contributed to a better understanding of the various ways in which EU law and the EU judicial system shape the development and protection of citizens' freedoms and how these freedoms may be applied to the tax situation of these citizens. More specifically, this chapter seeks to clarify how citizens can use the relevant treaty freedoms throughout the various phases of their lives as taxpayers.

Finally, the process of clarifying the exact extent of the Member States' obligations in relation to these treaty freedoms, and in particular the general principle of non-discrimination on the basis of nationality, is driven by case-law. That reveals the difficulty of searching for a fair and acceptable legal solution for both the citizen as taxpayer and the Member State as tax legislator and receiver. Such a fair and acceptable solution is not always clear from a first judgment but often reveals itself over a number of cases adjudicated over a number of years. That fact is not always duly appreciated.

PART 4

EU LAW ENSURES FAIR COMPETITION IN THE EU INTERNAL MARKET

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THE BENEFITS OF EUROPEAN UNION COMPETITION LAW ENFORCEMENT FOR CONSUMERS

Liane Wildpanner and Clio Zois

1. Introduction

Many consumers will associate EU competition law with the European Commission scrutinising mergers or imposing large fines on multinational corporations in highly complex industries. However, there is much more to this seemingly abstract subject, especially when it comes to benefits for consumers. As the Court of Justice has recently held, 'the well-being of both intermediary and final consumers must be regarded as the ultimate objective warranting the intervention of competition law' ([635]).

This chapter focuses on how EU competition law benefits the daily lives of consumers. Before diving into the details, it is important to recall two main EU competition law treaty provisions, namely Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). In a nutshell, Article 101 TFEU prohibits anti-competitive agreements or concerted practices between undertakings, while Article 102 TFEU prohibits undertakings having a dominant position on a market from abusing their power.

This chapter focuses on two ways that EU competition law benefits consumers. Section 2 delves into the establishment of EU citizens' direct right to claim damages for an infringement of competition law before their national courts. It analyses how this right was shaped, in particular by the case-law of the Court of Justice. Section 3 provides an overview of various competition law decisions concerning consumer products that we use frequently in our everyday lives. Together, these two sections show that during the 70 years of the Legal Service's involvement in competition law development, EU competition law has significantly benefited the EU consumer.

([635]) Judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraph 46.

2. Benefits for European Union consumers in the private enforcement of competition law

During the Commission Legal Service's 70 years of involvement in competition law development, the EU competition law treaty provisions have been interpreted in a way that allows EU citizens to directly enforce them before national courts in the various EU Member States. As we will see, the Court of Justice played a pivotal role in shaping this right to privately enforce competition law, issuing multiple seminal judgments, which were primarily responses to questions asked by national courts through the preliminary reference procedure.

2.1. Starting point: direct effect – national courts safeguard individual rights

The question of whether an individual can directly rely on EU competition law provisions first arose in a dispute between two artists and the Belgian copyright-collecting society SABAM ([636]). SABAM's standard contracts required artists to assign to SABAM the copyright for all present or future compositions and performances. Moreover, if an artist decided to withdraw from the collecting society, SABAM retained and could exercise this copyright for a further 5 years.

A court in Brussels questioned whether SABAM was abusing its dominant position with these standard contracts, and initiated a preliminary reference procedure, referring its questions to the Court of Justice.

Two points are worth noting at this stage. First, SABAM's standard contracts had already attracted the attention of the European Commission, which had initiated a competition law investigation into these contracts 3 years before the preliminary reference. This investigation was ongoing when the Court of Justice was asked to pronounce on the preliminary questions. Second, specific legislation implementing the EU competition law treaty provisions ([637]) stated that national authorities are not permitted to apply EU competition law while the Commission is investigating a case.

For these reasons, the European Commission, represented by its Legal Service, argued before the Court of Justice that, in view of the ongoing investigation, the Belgian court was no longer permitted to apply Article 102 TFEU and, therefore, it was not within the jurisdiction of the Belgian court to refer preliminary questions to the Court of Justice.

The Court of Justice disagreed with the European Commission. It held that the EU competition law treaty provisions, by their very nature, give individuals **direct rights** that the national courts

([636]) Copyright-collecting societies are organisations that license copyright material on behalf of their members (copyright owners).

([637]) Article 9(3) of EEC Council Regulation No 17: first regulation implementing Articles 85 and 86 of the treaty, OJ 13, 12.2.1962, p. 204/62, currently Article 11(6) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the treaty, OJ L 1, 4.1.2003, p. 1.

must safeguard ([638]). According to the Court of Justice, declaring that national courts do not have jurisdiction over this safeguard would amount to depriving individuals of these direct rights ([639]). Therefore, it was ruled that national courts are permitted or, in other words, that they have the **competence** to apply EU competition law in a private law dispute brought before them ([640]). In this regard, the Court of Justice concluded that only national competition authorities or national courts that are empowered to apply EU competition law in a public enforcement context lose their competence once the Commission initiates an investigation.

The Brussels court therefore had the power to apply Article 102 TFEU by virtue of its direct effect. This means that individuals can rely on the EU competition law treaty provisions when bringing a case before their national courts.

Hence, with the *SABAM* judgment, the Court of Justice laid the foundation for the private enforcement of competition law. However, at this stage, many questions remained unanswered, in particular as to the consequences of direct effect. An important question in this regard was what **types of relief** individuals could seek before national courts when directly invoking Articles 101 and 102 TFEU.

2.2. Direct effect entails the possibility of seeking damages

Almost 30 years after the *SABAM* judgment, the Court of Justice, in the *Courage* judgment ([641]), considered the question of whether an individual could seek damages when directly invoking Articles 101 and 102 TFEU. In this case, Mr Crehan, a public house (pub) tenant, and Courage Ltd, both a brewing company and the pub's landlord, litigated at the Court of Appeal of England and Wales over unpaid beer bills. The dispute centred on a clause in the 20-year lease contract between Mr Crehan and Courage Ltd, the 'beer tie' clause. This clause required tenants, in this case Mr Crehan, to buy their beer exclusively from Courage Ltd. In turn, Courage Ltd committed to supplying the quantities of beer ordered at the prices specified in its price lists applicable to tenants covered by the beer tie clause.

The national proceedings commenced when Courage Ltd sued Mr Crehan for not having paid for beer deliveries. Mr Crehan argued that Courage Ltd sold its beers to other pub tenants (who were not subject to the beer tie clause) at substantially lower prices. Therefore, Mr Crehan submitted that the beer tie clause constituted an infringement of EU competition law and, in particular, of Article 101 TFEU. Most importantly, Mr Crehan demanded **damages** from Courage Ltd for the harm he suffered.

([638]) Judgment of 27 March 1974, *BRT* v *SABAM*, C-127/73, EU:C:1974:25, paragraph 16.

([639]) Judgment of 27 March 1974, *BRT* v *SABAM*, C-127/73, EU:C:1974:25, paragraph 17.

([640]) Judgment of 27 March 1974, *BRT* v *SABAM*, C-127/73, EU:C:1974:25, paragraphs 15, 18 and 19.

([641]) Judgment of 20 September 2001, *Courage and Crehan*, C-453/99, EU:C:2001:465.

At this point, the Court of Appeal faced a dilemma. On the one hand, under English law, Mr Crehan was not entitled to damages from Courage Ltd because he was a party to the anti-competitive beer tie contract ([642]). On the other hand, the Court of Appeal was aware of case-law in the United States ([643]) that held that a party to an anti-competitive contract can sue its counterparty for damages if he finds himself in an economically weaker position. Therefore, the Court of Appeal asked the Court of Justice to rule on whether the English law barring Mr Crehan from obtaining damages was in line with EU law.

In its observations before the Court of Justice in this case, the Commission, represented by its Legal Service, submitted that the obligation to give full effect to EU competition law entailed the individual's right to claim damages for competition law infringement before their national courts. Moreover, the Commission submitted that the extent of this right to claim damages should not be limited simply because the claimant is a party to an anti-competitive agreement.

This time, the Court of Justice agreed with the Commission. In its *Courage* judgment, the Court of Justice started by recalling that Article 101 TFEU constitutes a fundamental treaty provision, which is essential for the functioning of the internal market ([644]). In addition, the Court of Justice recalled that the EU competition law treaty provisions have direct effect, as indicated in the *SABAM* judgment ([645]). Thus, according to the Court of Justice, 'any individual can rely on a breach of Article [101(1) TFEU] before a national court even where he is a party to a contract that is liable to restrict or distort competition' ([646]). Moreover, the Court of Justice ruled that the full effectiveness and practical effect of Article 101 TFEU would be at risk 'if it were not open to any individual to claim damages for loss caused to him' by anti-competitive conduct ([647]). The Court of Justice concluded that 'actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the [EU]' ([648]).

Hence, in the *Courage* judgment, the Court of Justice made it clear that EU consumers have a direct right to enforce EU competition law before their national courts by launching private damages actions. Building on the *SABAM* case, the *Courage* judgment constituted the basis for the private enforcement of competition law that would start taking shape in the years to follow.

As a result of the *Courage* case, individuals now have the right to claim damages for competition law infringements before their national courts. However, the *Courage* judgment did not determine how these damages actions were to be governed from a procedural point

([642]) Judgment of 20 September 2001, *Courage* and *Crehan*, C-453/99, EU:C:2001:465, paragraph 11.

([643]) *Perma Life Mufflers Inc.* v *International Parts Corp.*, 392 U.S. 134 (1968). See also Judgment of 20 September 2001, *Courage and Crehan*, C-453/99, EU:C:2001:465, paragraph 13.

([644]) Judgment of 20 September 2001, *Courage and Crehan*, C-453/99, EU:C:2001:465, paragraph 20.

([645]) Judgment of 20 September 2001, *Courage and Crehan*, C-453/99, EU:C:2001:465, paragraph 23.

([646]) Judgment of 20 September 2001, *Courage and Crehan*, C-453/99, EU:C:2001:465, paragraph 24.

([647]) Judgment of 20 September 2001, *Courage and Crehan*, C-453/99, EU:C:2001:465, paragraph 26.

([648]) Judgment of 20 September 2001, *Courage and Crehan*, C-453/99, EU:C:2001:465, paragraph 27.

of view. One complication in this regard is that damages actions are traditionally governed by national private law, which varies greatly between the Member States. The Court of Justice clarified this question in the *Manfredi* judgment, 5 years after the *Courage* case ([649]).

2.3. The principles of equivalence and effectiveness

Underlying the *Manfredi* case was a classic cartel. The Italian Competition Authority discovered that several car insurance companies had agreed to fix the prices of civil liability car insurance premiums. Moreover, the Italian Competition Authority's investigation revealed that, as a result of this cartel, the price of civil liability car insurance premiums was, on average, 20 % higher than it would have been if the insurance companies had not engaged in anti-competitive conduct ([650]).

Several individuals, one of whom was a Mr Manfredi, brought before their national court actions for damages against their car insurance companies. They wanted to be reimbursed the excess cost of their insurance premiums. These national damages actions gave rise to multiple procedural questions, which the Italian court referred to the Court of Justice.

In its *Manfredi* judgment, the Court of Justice provided clarifications regarding some of the essential procedural parameters governing actions for damages. Following the interpretation advocated by the Commission, represented by its Legal Service, the Court of Justice ruled that the actions for damages for an infringement of EU competition law were in principle to be governed by national procedural rules, provided these national rules respect two important principles. First, national procedural rules governing damages actions for a breach of EU competition law cannot be less favourable than those governing similar domestic actions (the **principle of equivalence**). Second, these national rules cannot render it practically impossible or excessively difficult to exercise the rights conferred by EU law (the **principle of effectiveness**) ([651]).

The Court of Justice ruled that a party can claim damages for an infringement of EU competition law if there is a causal relationship between the anti-competitive conduct and the harm suffered ([652]).

Furthermore, building on the principles already established in the *Courage* judgment, the Court of Justice ruled that it is for the domestic legal system of each Member State to prescribe **limitation periods** for EU competition law damages actions, provided that the principles of equivalence and effectiveness are respected ([653]). In this regard, the Court clarified that limitation periods such as the one in the *Manfredi* case, which begin the day an anti-competitive

([649]) Judgment of 13 July 2006, *Manfredi*, Joined Cases C-295/04 to C-298/04, EU:C:2006:461.

([650]) Judgment of 13 July 2006, *Manfredi*, Joined Cases C-295/04 to C-298/04, EU:C:2006:461, paragraphs 11 and 14.

([651]) Judgment of 20 September 2001, *Courage and Crehan*, C-453/99, EU:C:2001:465, paragraph 29.

([652]) Judgment of 13 July 2006, *Manfredi*, Joined Cases C-295/04 to C-298/04, EU:C:2006:461, paragraph 63.

([653]) Judgment of 13 July 2006, *Manfredi*, Joined Cases C-295/04 to C-298/04, EU:C:2006:461, paragraph 72.

agreement is adopted, could make it practically impossible for individuals to exercise their right to damages and hence could infringe the principle of effectiveness ([654]).

Finally, the Court of Justice clarified what **types of damages** a plaintiff can claim in a private enforcement action. According to the Court, it follows from the principle of equivalence that, if it is possible to award certain types of damages (e.g. punitive) in similar actions based on an infringement of national law, it must also be possible to award these types of damages in actions based on an infringement of EU competition law ([655]). Moreover, the Court of Justice held that it follows from the principle of effectiveness that individuals must be able to seek compensation not only for actual loss, but also for loss of profit suffered as a result of an infringement of EU competition rules, plus interest ([656]).

Hence, these three judgments, *SABAM, Courage* and *Manfredi*, together set out in law the substantive right of private individuals to seek damages for an infringement of EU competition law and the essential procedural parameters governing such damages actions.

2.4. Obtaining access to evidence

The years that followed the three judgments discussed saw further clarifications to the laws governing private enforcement actions. The private enforcement of competition law started to take off in the EU Member States, and citizens and undertakings were increasingly instituting private damages actions following an infringement of EU competition law before national courts. With more damages actions came more substantive and procedural questions as to how to conduct such damages actions in practice.

One key element needed for a plaintiff to be successful in a private damages action is evidence of anti-competitive conduct. In the context of damages actions for competition law infringements, this evidence is most often in the hands of the competition authority that pursued the competition law infringement. Competition authorities often obtain evidence through so-called leniency programmes. This means, in essence, that, in return for submitting evidence of a cartel it participated in, an undertaking receives a reduced fine, or even complete immunity from fines if it was the first to reveal the cartel to the competition authority ([657]).

([654]) Judgment of 13 July 2006, *Manfredi*, Joined Cases C-295/04 to C-298/04, EU:C:2006:461, paragraphs 73, 78 and 79. This is especially the case if such limitation periods are very short and cannot be suspended, resulting in them expiring before the anti-competitive infringement ends.

([655]) Judgment of 13 July 2006, *Manfredi*, Joined Cases C-295/04 to C-298/04, EU:C:2006:461, paragraph 93.

([656]) Judgment of 13 July 2006, *Manfredi*, Joined Cases C-295/04 to C-298/04, EU:C:2006:461, paragraphs 95–97. In the Court of Justice's view, a total exclusion of damages for loss of profit would make the reparation of damage practically impossible.

([657]) The Commission's leniency programme is enshrined in the 'Leniency Notice' (Commission Notice on immunity from fines and reduction of fines in cartel cases, OJ C 298, 8.12.2006, p. 17). Most Member States operate their own leniency programmes. The leniency programme relevant to the *Pfleiderer* case discussed below was the German leniency programme, the 'Bonusregelung'.

Evidently, it would be very helpful for a plaintiff to have access to leniency documents as evidence in support of its damages claim. However, undertakings are unlikely to cooperate with competition authorities if they know that self-incriminating documents could be disclosed in damages proceedings. This represents a serious risk to the effectiveness of leniency programmes and, in turn, to public competition law enforcement. Thus, a delicate balance must be struck between the plaintiff's right to obtain evidence when seeking damages in national courts and the protection of leniency applicants who cooperated with a competition authority.

The question of to what extent leniency submissions should benefit from special protection when a plaintiff seeking evidence for a damages action asks to access these documents arose in the landmark *Pfleiderer* judgment of the Court of Justice in 2011 ([658]).

In early 2008, the German Competition Authority fined several companies that produce paper for participating in a cartel. As a result, a customer of one of the producers, Pfleiderer, sought to obtain damages in the German courts and to this end asked the German Competition Authority for access to the documents in its file, including leniency documents submitted by a cartel member. The request was refused. A German court then turned to the Court of Justice, requesting a preliminary ruling on whether the authority was obliged to provide this access.

In its observations in the preliminary reference procedure, both the Commission Legal Service and the Advocate General ([659]) suggested that a competition authority could give access to its file, including leniency documents, but that it had to consider the potential negative effects of such disclosure, and should take particular care to protect oral statements provided by leniency applicants in proceedings. Oral statements provided by undertakings cooperating with a competition authority are usually self-incriminating and are not written down so that they cannot be disclosed in national courts. These statements are of the utmost importance and highly valuable in competition proceedings.

The Court of Justice did not follow the suggestions of the Commission and the Advocate General entirely, as it did not distinguish between oral statements and other evidence of anti-competitive conduct. In answering the national court's question, the Court of Justice first reminded the national court that national competition authorities and national courts must apply EU competition rules (Articles 101 and 102 TFEU). However, EU law has no rules on access to documents relating to a leniency procedure that have been voluntarily submitted to a national competition authority pursuant to a national leniency programme ([660]). In the absence of such rules at EU level, Member States must establish and apply national rules on the right of access to documents relating to leniency procedures ([661]). However, Member States must act in

([658]) Judgment of 14 June 2021, *Pfleiderer*, C-360/09, EU:C:2011:389.

([659]) Opinion of Advocate General Mazák delivered on 16 December 2010 in *Pfleiderer*, C-360/09, EU:C:2010:782.

([660]) Judgment of 14 June 2011, *Pfleiderer*, C-360/09, EU:C:2011:389, paragraph 19.

([661]) Judgment of 14 June 2011, *Pfleiderer*, C-360/09, EU:C:2011:389, paragraph 23.

accordance with EU law and, in particular, with the principle of effectiveness. They cannot make the implementation of EU law impossible or excessively difficult ([662]).

The Court of Justice also pointed out that leniency programmes are useful tools for uncovering and ending infringements of competition rules, and serve the objective of effectively applying those rules ([663]). The Court recognised that the effectiveness of the leniency programmes could be compromised if these documents were disclosed to persons wishing to bring an action for damages ([664]). Finally, the Court of Justice mentioned its previous case-law on private enforcement to emphasise that any individual has the right to claim damages for loss caused to him by conduct which is liable to restrict or distort competition ([665]).

Accordingly, the Court of Justice concluded that a weighing of interests in favour of disclosing the information and in favour of protecting the information provided voluntarily by the leniency applicant should be carried out. The Court of Justice stated that the national courts must undertake this on a case-by-case basis, in accordance with national law and taking into account all relevant factors of the case ([666]).

2.5. The damages directive: a harmonised framework for the private enforcement of competition law

The damages directive ([667]), which entered into force on 26 December 2014, was a key driver of further clarifications of the law governing private enforcement actions. The aim of this directive is to remove practical obstacles to compensation for plaintiffs in private enforcement actions by providing a harmonised framework for the institution of these actions. For instance, the directive contains provisions on limitation periods (Article 10), on the liability of competition law infringers (Article 11), on the disclosure of evidence (Articles 5 and 6) and on the quantification of harm (Article 17). Moreover, the directive aims to facilitate the institution of private damages actions by reducing the wide divergence of national procedural laws governing these actions. Importantly, the damages directive recognises the central role of EU consumers in the private enforcement of competition law, stating explicitly that the objective is 'to establish rules concerning actions for damages for infringements of Union competition law in order to ensure

([662]) Judgment of 14 June 2011, *Pfleiderer*, C-360/09, EU:C:2011:389, paragraph 24.

([663]) Judgment of 14 June 2011, *Pfleiderer*, C-360/09, EU:C:2011:389, paragraph 25.

([664]) Judgment of 14 June 2011, *Pfleiderer*, C-360/09, EU:C:2011:389, paragraph 26.

([665]) Judgment of 14 June 2011, *Pfleiderer*, C-360/09, EU:C:2011:389, paragraph 28.

([666]) Judgment of 14 June 2011, *Pfleiderer*, C-360/09, EU:C:2011:389, paragraphs 30-32. The damages directive (see footnote below) clarified this point further, providing detailed rules for the disclosure of evidence included in the file of a competition authority. In particular, Article 6(6) of the damages directive states that Member States must ensure that national courts cannot at any time order a party or a third party to disclose leniency statements and settlement submissions.

([667]) Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1.

the full effect of Articles 101 and 102 TFEU, and the proper functioning of the internal market for undertakings and consumers' ([668]).

Following the damages directive's entry into force, and especially following its implementation in the Member States' national laws, the number of private damages actions brought before national courts for competition law infringements increased significantly ([669]). With this increase came an increasing number of preliminary references to the Court of Justice.

2.6. Seeking damages from local subsidiaries of the cartel participants

Undertakings involved in competition proceedings are often large multinational groups consisting of many holding companies, operational parent companies and subsidiaries in various countries. In the private enforcement of competition law, one question that arises is which of these companies can be sued in national courts. The Court of Justice answered this question in the *Sumal* case ([670]).

The Commission ruled that the major trucks producers Volvo, Iveco, Daimler, MAN, DAF and Scania had formed a cartel ([671]). These manufacturers were deemed to have coordinated truck prices, and the timing and prices of emission technologies (better known as 'EURO-standards').

The trucks cartel gave rise to a large number of damages actions across the EU, with one of the most prominent preliminary reference cases being the Court of Justice's *Sumal* judgment. Sumal, a Spanish customer, had bought trucks through a Spanish subsidiary of cartel member Daimler and sought damages. National proceedings questioned whether Sumal could claim damages from this subsidiary, and the national court turned to the Court of Justice.

EU competition law addresses 'undertakings'. According to EU competition law, an economic unit is considered an undertaking even if it consists of several natural or legal persons ([672]). This means that, in EU competition law, a parent and a subsidiary constitute one undertaking if the parent exercises decisive influence over its subsidiary. In other words, it is the undertaking,

([668]) Damages directive, recital 54.

([669]) Commission staff working document on the implementation of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, SWD(2020) 338 final, 14.12.2020, pp. 3–4.

([670]) Judgment of 6 October 2021, *Sumal*, C-882/19, EU:C:2021:800.

([671]) Although the other truck manufacturers had engaged in a settlement procedure with the Commission and were addressees of a settlement decision in July 2016, Scania did not settle the case with the Commission and a decision against it was adopted in September 2017. Scania challenged the Commission's decision at the General Court (Judgment of 2 February 2022, *Scania and Others* v *Commission*, T-799/17, EU:T:2022:48). The General Court upheld the Commission's decision in full in its judgment, which Scania appealed to the Court of Justice and which is pending (*Scania and Others* v *Commission*, C-251/22 P, case ongoing).

([672]) Judgment of 25 March 2021, *Deutsche Telekom* v *Commission*, C-152/19 P, EU:C:2021:238, paragraph 72.

rather than the individual legal entity, that is seen as the infringer of competition rules. As a consequence, a parent company is regularly held liable for the conduct of its subsidiary.

The facts of the *Sumal* case were unusual for at least two reasons. First, the case did not concern the more common question of whether a parent company can be held liable for the conduct of a subsidiary it controls. Rather, the question was whether the subsidiary could be held liable for the conduct of its parent company. Second, the subsidiary had not been an addressee of the Commission decision establishing the infringement.

In the *Sumal* judgment, the Court of Justice, essentially following what the Commission suggested in its observations, ruled that a plaintiff seeking damages for a competition law infringement may seek damages from the subsidiary company of a cartel member if those companies constitute one undertaking. However, the subsidiary company concerned must be allowed to exercise its rights of defence. This means it must have the chance to show that it does not belong to the undertaking that is a cartel member and to dispute the infringement. The Court of Justice also held that companies constitute a single undertaking only if the subsidiary is active in the same economic market as the parent company – in other words, if the cartel concerns a product that the subsidiary markets ([673]).

The *Sumal* ruling of the Court of Justice thus clarifies and simplifies access to justice for private damages plaintiffs. It makes it possible for plaintiffs to obtain compensation not only from the addressees of a Commission decision, but also from their subsidiaries. This makes it easier for citizens or companies resident in the Member States where the subsidiaries are located to seek access to justice for private damages claims.

2.7. Private enforcement even when public enforcement is restricted

A more recent judgment in a preliminary reference on the private enforcement of competition law is the *Stichting Cartel* case ([674]), which originated in the Netherlands. In this case, two litigation vehicles ([675]) were seeking damages from multiple air cargo carriers following the Commission's finding that these carriers operated a price-fixing cartel ([676]). In its decisions on the matter, the Commission found evidence that these price-fixing practices began as early as 1999. However, with respect to certain earlier flight routes, due to the applicable secondary

([673]) Judgment of 6 October 2021, *Sumal*, C-882/19, EU:C:2021:800, paragraph 47.

([674]) Judgment of 11 November 2021, *Stichting Cartel Compensation and Equilib Netherlands*, C-819/19, EU:C:2021:904.

([675]) Litigation vehicles are organisations whose business model consists of bringing to court bundled claims assigned to them by allegedly injured parties.

([676]) European Commission, Commission Decisions of 9 November 2010 and of 17 March 2017 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union, Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on air transport (Case AT.39258 – *Airfreight*), C(2017) 1742.

legislation at the time, the Commission found that it only had jurisdiction to find an infringement starting from a later period. Therefore, for certain time periods, certain flight routes were excluded from Commission decisions.

The plaintiffs in the national procedure also requested damages for the routes that were not covered by the Commission decisions. The Amsterdam District Court asked the Court of Justice whether national judges have the power to award damages for the operation of a cartel on these routes falling outside the Commission's administrative jurisdiction.

In its observations before the Court of Justice, the Commission, taking into consideration earlier case-law of the Court of Justice ([677]), argued that, in principle, national courts do not have jurisdiction to award damages for routes that were excluded from the decisions. Nevertheless, the Commission also questioned whether such a strict approach is in line with Court of Justice case-law on the private enforcement of competition law, such as the *SABAM* case (which pre-dated these strict jurisdictional judgments) and the *Courage* case (which came later).

The judgment of the Court of Justice in the *Stichting Cartel* case was characterised by a pro-private enforcement approach. The Court of Justice ruled that it was within the jurisdiction of the Amsterdam District Court to award damages for the routes that were excluded from the Commission's decisions. The Court of Justice based its reasoning primarily on the direct effect of Article 101 TFEU, as established in the *SABAM* case and elaborated in the *Courage* and *Manfredi* cases ([678]). According to the Court, this direct effect creates rights for individuals that national courts must protect. Moreover, the Court distinguished between the public enforcement of the competition rules and the private enforcement of the rules by national courts. It ruled that, although public enforcement was limited in this case by the applicable legislation, this did not restrict the private enforcement of competition law by national courts ([679]).

([677]) Judgments of 30 April 1986, *Ministère public* v *Asjes*, C-209/84, EU:C:1986:188; and of 11 April 1989, *Ahmed Saeed Flugreisen and Others* v *Zentrale zur Bekämpfung unlauteren Wettbewerbs*, C-66/86, EU:C:1989:140.

([678]) Judgment of 11 November 2021, *Stichting Cartel Compensation and Equilib Netherlands*, C-819/19, EU:C:2021:904, paragraphs 47–52.

([679]) Judgment of 11 November 2021, *Stichting Cartel Compensation and Equilib Netherlands*, C-819/19, EU:C:2021:904, paragraph 53.

2.8. Seventy years of competition law development in the interest of the European Union consumer

The foregoing overview of cases shows that EU consumers have been central to the case-law on the private enforcement of competition law over the last 70 years.

The Court of Justice's ruling, in the *SABAM* case, that the EU competition law treaty provisions have direct effect paved the way for granting EU consumers a direct right to enforce competition law before their national courts through damages actions in the *Courage* judgment. The *Manfredi* case ensured that EU consumers claiming damages for an infringement of EU competition law were in an equivalent procedural position to consumers claiming damages for similar infringements of national law. Moreover, it entrusted national courts with ensuring that claiming damages for an infringement of EU competition would not be excessively difficult or practically impossible. Thereafter, the *Pfleiderer* judgment helped damages plaintiffs to substantiate their claims by establishing when consumers could access (leniency) documents in the possession of national competition authorities. In addition, the *Sumal* judgment made it possible for damages plaintiffs to obtain compensation from not only the addressees of a Commission decision, but also the addressees' subsidiaries, thereby clarifying and simplifying EU consumers' access to justice. Finally, the *Stichting Cartel* case expanded the scope of behaviour for which damages could be claimed by ruling that damages for an infringement of EU competition law can be claimed even when public enforcement of competition law is limited.

3. Benefits for European Union consumers in the public enforcement of competition law

In Section 2, we looked at the private enforcement of competition law. We saw how competition law benefits consumers by giving them a direct right to claim damages before their national court.

This section focuses on the Commission's enforcement of competition law. In other words, it deals with the public enforcement of competition law. The Commission has vigorously enforced competition law in nearly all sectors of the economy over the past 70 years, serving European consumers and businesses, and seeking to ensure that European markets remain fair and contestable.

Providing an exhaustive overview of the multitude of public enforcement cases would far exceed the scope of this chapter. However, the sections below seek to provide an insight into the Commission's public enforcement by focusing on the areas or goods that are most prominent in EU consumers' daily lives or are most important for their overall well-being. These are (i) cartels in consumer products, (ii) geo-blocking restrictions, (iii) digital goods and (iv) pharmaceuticals.

3.1. The fight against cartels in consumer products

Cartels are agreements between competitors to coordinate their behaviour in the market in which they operate ([680]). Cartels are among the most serious infringements of competition law ([681]), and the Commission often imposes heavy fines on cartel members. The fines collected contribute to the EU's budget, because the Member States' contributions are reduced as a result of the fines collected.

During the last 70 years of the Commission Legal Service's involvement in competition law development and enforcement, the Commission has uncovered and sanctioned a multitude of cartels in a wide array of sectors, with consumer products being among the most prominent examples. Most of these cartels involve classic cartel conduct, such as collusion on prices or market-sharing agreements.

By way of example, the Commission uncovered and sanctioned several longstanding secret cartels in the beer sector that harmed competition and led to higher prices for consumers ([682]). In 2001, the Commission fined several Belgian beer brewers for sharing markets, fixing prices and exchanging sensitive business information. In the same year, the Commission sanctioned Luxembourg beer brewers for, among other things, taking steps to restrict foreign brewers' penetration of the domestic beer sector. In 2004, the Commission fined the well-known beer producer Heineken and its main competitor EUR 2.5 million for agreeing not to purchase drinks from wholesalers in France, among other things ([683]). Finally, the Commission fined a beer cartel in the Netherlands, which included the famous brands Grolsch and Heineken, over EUR 273 million in 2007 for coordinating prices ([684]).

The Commission has also pursued an unprecedented number of cases in the car industry, especially in relation to a variety of car components, including wire harnesses, flexible foam, seat belts,

([680]) Article 2 (14) of the damages directive states that a cartel is 'an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition through practices such as, but not limited to, the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property rights, the allocation of production or sales quotas, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors'.

([681]) As, by way of example, stated in paragraph 1 of the Leniency Notice. See also Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 on fines, OJ C 210, 1.9.2006, p. 2, paragraph 23. Horizontal price-fixing, market-sharing and output limitation agreements, which are usually secret, are, by their nature, among the practices most harmful to competition.

([682]) In the litigation against this decision (Judgment of 25 October 2005, *Groupe Danone* v *Commission*, T-38/02, EU:T:2005:367), the General Court reduced the fine imposed on Danone, a parent company of one of the Belgian beer producers, to EUR 42.4 million but otherwise rejected the appeal against the decision. On appeal, the Court of Justice upheld the judgment of the General Court in full (see Judgment of 8 February 2007, *Groupe Danone* v *Commission*, C-3/06, EU:C:2007:88).

([683]) European Commission, 'Cartel fine in the French beer market', press release, IP/04/1153, Brussels, 29 September 2004.

([684]) European Commission, 'Competition: Commission fines members of been cartel in the Netherlands over €273 million', press release, IP/07/509, Brussels, 18 April 2007. In the ensuing litigation (Judgment of 16 June 2011, *Heineken Nederland and Heineken* v *Commission*, T-240/07, EU:T:2011:284), the General Court reduced the fine imposed on Heineken from EUR 219 million to EUR 198 million.

steering wheels, airbags, brakes, lights, alternators, parking heaters, closure systems, and starters or spark plugs.

For example, air-conditioning suppliers coordinated prices or markets for the supply of climate control and engine-cooling components to EU car manufacturers; the suppliers were fined a total of EUR 155 million in 2017. And, in 2018, the Commission fined spark plugs and braking systems manufacturers, including Bosch, for avoiding competition by agreeing not to target their competitors' customers ([685]). Companies selling car safety equipment, such as seatbelts, airbags and steering wheels, to well-known car producers Volkswagen and BMW also formed a cartel to exchange sensitive information; in 2019, the Commission fined cartel members a total of EUR 368 million ([686]).

While cartels often concern price agreements or market-sharing, competition can also be restricted through collusion on technical development. For example, the Commission found that Daimler, BMW and Volkswagen had agreed to restrict emission cleaning in new diesel cars. The companies restricted technical development by colluding on a technology to reduce harmful emissions from diesel cars ('AdBlue-technology'), and in 2021 were fined a total of more than EUR 875 million ([687]).

Cartels remain one of the most important areas in public enforcement, and pave the way for private enforcement claims of consumers who suffered harm as a result of anti-competitive conduct.

3.2. Unlocking location restrictions: geo-blocking and competition law

Many internet users are familiar with the practice of 'geo-blocking'. Geo-blocking mechanisms restrict access to internet content based on the user's location. Geo-blocking has been discussed widely in EU policy-making ([688]), but what is less widely known is that geo-blocking can – in certain circumstances – constitute an infringement of EU competition rules.

A notable judgment of the Court of Justice in this area, and one that paved the way for the Commission's enforcement action, is the *Premier League* case. The Court of Justice assessed upon request by a national court whether certain licence agreements between the Premier League and national broadcasters were illegal under the EU's competition rules ([689]). The agreements at issue

([685]) Spark plugs are automotive electric devices in petrol engines that deliver high-voltage electric sparks into the combustion chamber.

([686]) European Commission, 'Antitrust: Commission fines car safety equipment suppliers € 368 million in cartel settlement', press release, IP/19/1512, Brussels, 5 March 2019.

([687]) European Commission, 'Antitrust: Commission fines car manufacturers €875 million for restricting competition in emission cleaning for new diesel passenger cars', press release, IP/21/3581, Brussels, 8 July 2021.

([688]) See European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: a digital single market strategy for Europe, COM(2015) 192 final, p. 6.

([689]) Judgment of 4 October 2011, *Football Association Premier League and Others*, Joined Cases C-403/08 and C-429/08, EU:C:2011:631.

required national broadcasters to broadcast Premier League football matches only within a single Member State. In addition, the agreements required the broadcasters to prevent their satellite decoder cards, which enable reception of the licensed programme content, from being used outside the assigned Member State. Although the Court of Justice had no issue with the granting of exclusive territorial licences, it ruled that the additional agreements on the restricted use of satellite decoder cards were illegal. These additional agreements, the Court of Justice held, restricted the broadcasters, both passively and actively, from providing any cross-border broadcasts of football matches, thus eliminating all competition between broadcasters in that field.

Following this judgment, the Commission started an investigation in the pay-TV sector. This investigation aimed to determine if certain geo-blocking obligations set out in licensing agreements between several major US film studios and the European pay-TV broadcaster Sky were anti-competitive. Ultimately, all the studios and Sky committed to ending the geo-blocking practices, and the Commission made these commitments binding by adopting 'commitment decisions' ([690]).

The French broadcaster Canal+, which had similar agreements with some of the US film studios, appealed against these commitment decisions. On appeal, the Court of Justice confirmed that the Commission was right to raise competition concerns with regard to the geo-blocking obligations in the agreements concerned. However, it annulled one of the decisions on grounds of proportionality ([691]).

A more recent case relating to geo-blocking concerns video games. In this case, the Commission fined Valve, the owner of the well-known video games platform Steam, and several video games publishers for geo-blocking access to video games. Valve and the publishers had agreed to limit competition using 'Steam keys', which – similar to the decoder cards in the Premier League case – could be activated only in certain countries, thereby restricting competition. Although the publishers had cooperated with the Commission and received a reduction in their fine for acknowledging the competition law infringement, Valve disagreed and challenged the Commission's decision at the General Court, where the case is currently pending and the Commission Legal Service is defending the decision ([692]).

The Commission has thus tackled restrictions on a variety of online content from a competition law angle. Its actions on geo-blocking seek to ensure fair competition in online content and to grant consumers unrestricted access to such content on the internet.

([690]) These decisions were taken based on the commitments resolving the Commission's competition concerns on a preliminary assessment of the practices; however, they did not make a definitive finding that the conduct was anti-competitive.

([691]) Judgment of 9 December 2020, *Groupe Canal+* v *Commission*, C-132/19 P, EU:C:2020:1007, paragraph 54.

([692]) *Valve* v *Commission*, T-172/21, case ongoing.

3.3. Fighting abuses of dominance in the digital world

As societies have become more and more digitalised and with the rise of digital products, competition law enforcement has increasingly extended to the digital sector.

The Commission's enforcement of cases in the digital sector started some decades ago. One of the most notable earlier cases concerns Microsoft, at the time the owner of the most used operating system for personal computers (PCs). In 2004, the Commission found that Microsoft had abused its dominant position in the market for operating systems for PCs by (i) deliberately restricting interoperability between Microsoft PCs and non-Microsoft work group servers, and (ii) tying ([693]) its Windows Media Player, a product facing competition, to its famous Windows operating system. Microsoft thus aimed to extend its power in the market for operating systems to the areas of media players and group servers.

The Commission not only imposed on Microsoft a fine of close to EUR 500 million, but also ordered it to disclose complete and accurate interface documentation that would allow non-Microsoft work group servers to achieve full interoperability with Windows PCs and servers. The Commission's decision also required Microsoft to offer PC manufacturers a version of its Windows client PC operating system without Windows Media Player ([694]).

The Commission Legal Service defended the case successfully when Microsoft challenged the Commission's decision at the General Court, as the judgment of the General Court upheld the finding that Microsoft had acted counter to the competition rules and endorsed the fine the Commission had imposed ([695]).

A more recent prominent case in the area of digital goods is the Commission's *Google Shopping* investigation. In June 2017, the Commission imposed a fine of EUR 2.42 billion on tech giant Google for abusing its dominant position in the search engine market. Google was deemed to have abused this market dominance by giving prominent placement in its search results to its own comparison shopping service, while demoting rival services ([696]).

([693]) Tying in this context means a practice of selling one product as a mandatory addition to the purchase of another product.

([694]) European Commission, 'Commission concludes on Microsoft investigation, imposes conduct remedies and a fine', press release, COM IP/04/382, Brussels, 24 March 2004; European Commission, Commission decision of 24 May 2004 relating to a proceeding pursuant to Article 82 of the EC Treaty and Article 54 of the EEA Agreement against Microsoft Corporation (Case COMP/C-3/37.792— Microsoft) (notified under document number C(2004) 900), OJ L 32, 6.2.2007, p. 23. A public version of the decision is available online (https://ec.europa.eu/competition/antitrust/cases/dec_docs/37792/37792_4177_3.pdf).

([695]) Judgment of 17 September 2007, *Microsoft* v *Commission*, T-201/04, EU:T:2007:289.

([696]) European Commission, 'Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service – factsheet', memo, MEMO/17/1785, Brussels, 27 June 2017.

Again, the Legal Service defended the Commission successfully when Google tried to challenge the Commission's decision at the General Court ([697]). Google has challenged the General Court's judgment and appealed to the Court of Justice, where the case is pending ([698]).

But the Commission's enforcement action against Google does not end there. For example, the Commission fined Google more than EUR 1.49 billion in the *Google Search (Ad Sense)* case. In this case, the Commission found Google liable for protecting and thereby abusing its dominant position in search advertising, as clauses in Google's search advertising intermediation agreements restricted website owners' freedom to source search ads from companies offering competing search advertising ([699]).

The highest fine imposed on Google to date is EUR 4.3 billion in the *Google Android* case, in which the Commission found that Google had abused its dominant position through conditions in agreements associated with the use of Google's smart mobile operating system, Android, and certain proprietary mobile applications (apps) and services. In this decision, the Commission established, among other things, that Google had abused its dominant position by tying certain products together. For example, the Google Play Store could not be obtained without the Google Search app, and the Google Play Store and the Google Search app could not be obtained without Google Chrome ([700]).

As digital goods become more common, and given their increasing importance to consumers, the Commission has focused its competition enforcement actions in this area. Some of the most important cases in recent years have concerned the digital world. In particular, enforcement actions in the digital area have focused on dominant firms' abuse of market power.

3.4. Competition law enforcement in the pharmaceutical sector

3.4.1. Affordable and innovative medicines drive European Union citizens' welfare

The pharmaceutical sector is of major societal and economic importance. Having access to affordable and innovative medicines is a cornerstone of EU citizens' well-being and welfare. Therefore, anti-competitive practices by pharmaceutical companies that artificially seek to maintain high prices or to curb innovation are a particular concern. Competition law

([697]) Judgment of 10 November 2021, *Google and Alphabet* v *Commission (Google Shopping)*, T-612/17, EU:T:2021:763.

([698]) *Google and Alphabet* v *Commission (Google Shopping)*, C-48/22 P, case ongoing.

([699]) European Commission, Summary of Commission Decision of 20 March 2019 relating to a proceeding under Article 102 Treaty on the Functioning of the European Union and Article 54 EEA Agreement (Case AT.40411 – *Google Search (AdSense)*), OJ C 369, 3.11.2020, p. 6. Google has challenged the Commission's decision at the General Court, where the case is pending (*Google and Alphabet* v *Commission (Google AdSense)*, T-334/19, case ongoing).

([700]) Google challenged the Commission's decision at the General Court. In a judgment delivered on 14 September 2022, the General Court largely dismissed Google's challenge of the Commission's decision (Judgment of 14 September 2022, *Google and Alphabet* v *Commission (Google Android)*, T-604/18, EU:T:2022:541). The General Court reduced the fine to EUR 4.125 billion.

enforcement in the pharmaceutical sector can contribute to safeguarding EU patients' access to both affordable and innovative medicines, and has been a high priority for the Commission over the last two decades ([701]).

3.4.2. Safeguarding competition in the pharmaceutical market

The European Commission has been particularly vigorous in investigating and sanctioning anti-competitive practices that lead to higher prices for pharmaceuticals.

Price competition on the pharmaceutical markets is, to a large extent, driven by effective competition from **generic pharmaceuticals** ([702]). For instance, a 2018 study prepared for the Commission found that, on average, the prices of medicinal products drop by 40 % in the period after the generic products enter the market ([703]). To keep their profits high, companies controlling the patents of the original pharmaceuticals ('originator companies') sometimes implement strategies to mitigate the impact of the generic product's entry and to extend the commercial life of their medicines for which patents have expired ([704]). Two such strategies have particularly attracted the European Commission's attention in recent years: 'pay-for-delay' agreements and practices misusing the existing regulatory framework.

3.4.3. Tackling pay-for-delay agreements

In pay-for-delay agreements, a generics company agrees to give up, restrict or delay its plans to enter a certain pharmaceutical market in exchange for (financial) benefits from the originator company. As a result of pay-for-delay agreements, prices for certain pharmaceuticals can remain artificially high for a much longer period, at the expense of healthcare systems and patients. The Commission sought to fight such pay-for-delay agreements in a sequence of three decisions starting in the summer of 2013.

The first Commission decision with regard to pay-for-delay agreements was the *Lundbeck* case ([705]). Lundbeck is a Danish company that specialises in researching and marketing new medicinal products, including for the treatment of depression. After the patent for its

([701]) European Commission, Report from the Commission to the Council and the European Parliament: competition enforcement in the pharmaceutical sector (2009–2017), COM(2019) 17 final, p. 1.

([702]) Generic pharmaceuticals are pharmaceutical products that contain the same chemical substance as the pharmaceuticals that were originally protected by patents, and are allowed to be sold once the patents on the original pharmaceutical have expired.

([703]) Copenhagen Economics, *Study on the economic impact of supplementary protection certificates, pharmaceutical incentives and rewards in Europe*, final report, European Commission, Brussels, 2018. See also European Commission, Report from the Commission to the Council and the European Parliament – competition enforcement in the pharmaceutical sector (2009–2017), COM(2019) 17 final, p. 24.

([704]) European Commission, Report from the Commission to the Council and the European Parliament – competition enforcement in the pharmaceutical sector (2009–2017), COM(2019) 17 final, p. 1–2.

([705]) European Commission, Commission Decision of 19 June 2013 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement – AT.39226 – *Lundbeck*, C(2013) 3803 final.

antidepressant expired, Lundbeck concluded agreements with four undertakings that produced or sold a generic version of the medicine ([706]). These generics producers agreed not to enter the market in return for substantial payments and other inducements from Lundbeck amounting to tens of millions of euro. In particular, Lundbeck paid the generics producers significant lump sums, purchased stocks of generic medicines for the sole purpose of destroying them and offered guaranteed profits in a distribution agreement. The pay-for-delay agreements in question gave Lundbeck the certainty that the generics producers would stay out of the market for the duration of the agreements ([707]).

In its decision issued in June 2013, the European Commission found that these pay-for-delay agreements violated the EU competition rules that prohibit anti-competitive agreements (in particular Article 101 TFEU). It imposed fines on the companies concerned that totalled nearly EUR 150 million. The undertakings appealed the Commission's decision in two instances. The Legal Service successfully defended the European Commission's decision at the General Court (in the first instance) ([708]), and the Court of Justice (in the appeal) ([709]) dismissed the appeals of the pharmaceutical companies and endorsed the fines imposed.

The *Fentanyl* case was the second Commission decision with regard to pay-for-delay agreements ([710]). Fentanyl is a painkiller that is up to 100 times more potent than morphine and is used notably for the treatment of cancer patients. The case concerned an agreement concluded by originator manufacturer, Johnson & Johnson, and generics manufacturer Novartis. In 2005, Johnson & Johnson's patents on fentanyl expired in the Netherlands and Novartis was on the verge of launching its generic fentanyl patch, having already produced the necessary packaging material ([711]). However, instead of launching its generic product, Novartis and Johnson & Johnson concluded an agreement to the effect that Novartis would not enter

([706]) General Court of the European Union, 'The General Court of the European Union confirms the fines of almost €150 million imposed on several undertakings in the context of an infringement intended to delay the marketing of generic versions of the antidepressant citalopram', press release, No 90/16, Luxembourg, 8 September 2016.

([707]) European Commission, 'Antitrust: Commission fines Lundbeck and other pharma companies for delaying market entry of generic medicines', press release, IP/13/563, Brussels, 19 June 2013.

([708]) Judgments of 8 September 2016, *Sun Pharmaceutical Industries and Ranbaxy* v *Commission*, T-460/13, EU:T:2016:453; of 8 September 2016, *Arrow Group and Arrow Generics* v *Commission*, T-467/13, EU:T:2016:450; of 8 September 2016, *Generics (UK)* v *Commission*, T-469/13, EU:T:2016:454; of 8 September 2016, *Merck* v *Commission*, T-470/13, EU:T:2016:452; of 8 September 2016, *Xellia Pharmaceuticals and Alpharma* v *Commission*, T-471/13, EU:T:2016:460; and of 8 September 2016, *Lundbeck* v *Commission*, T-472/13, EU:T:2016:449.

([709]) Judgments of 25 March 2021, *Sun Pharmaceutical Industries and Ranbaxy (UK)* v *Commission*, C-586/16 P, EU:C:2021:241; of 25 March 2021, *Generics (UK)* v *Commission*, C-588/16 P, EU:C:2021:242; of 25 March 2021, *Lundbeck* v *Commission*, C-591/16 P, EU:C:2021:243; of 25 March 2021, *Arrow Group and Arrow Generics* v *Commission*, C-601/16 P, EU:C:2021:244; of 25 March 2021 *Xellia Pharmaceuticals and Alpharma* v *Commission*, C-611/16 P, EU:C:2021:245; and of 25 March 2021, *Merck* v *Commission*, C-614/16 P, EU:C:2021:246.

([710]) European Commission, Commission Decision of 10 December 2013 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union – AT.39685 – *Fentanyl*, C(2013) 8870 final.

([711]) European Commission, Report from the Commission to the Council and the European Parliament: competition enforcement in the pharmaceutical sector (2009–2017), COM(2019) 17 final, p. 25.

the Dutch market in return for 'a part of [the] cake', receiving monthly payments that were calculated to exceed the profits Novartis expected from selling its generic fentanyl patch ([712]).

The European Commission concluded in its decision that this agreement infringed EU competition law rules (in particular Article 101 TFEU) and imposed fines of more than EUR 15 million on the pharmaceutical manufacturers concerned, which did not appeal the decision.

The Commission's third 'pay-for-delay' decision was the *Servier* case ([713]). In this decision, the Commission fined the French pharmaceutical company Servier and five generics producers for concluding agreements that aimed to shield Servier's bestselling blood pressure medicine from competition from generics ([714]). In particular, Servier's strategy of delaying entry to the market of a competitor generic medicine included acquiring a competing technology and concluding settlement agreements with the generics companies when these companies challenged Servier's patents before the courts. As part of these settlement agreements, the generics companies agreed to refrain from entering the market or from challenging Servier's patents in return for cash payments amounting to several tens of millions of euro. The Commission concluded that the agreements in question constituted a violation of EU competition rules. The decision was largely upheld by the General Court in appeal ([715]) and is currently being appealed to the Court of Justice, where the Commission is represented by the Commission of the Legal Service.

3.4.4. Misuse of the existing regulatory framework

A decade before the three pay-for-delay cases, the European Commission issued a fines decision against pharmaceutical company AstraZeneca ([716]). Between 1993 and 2000, AstraZeneca engaged in multiple practices seeking to block or delay entry to the market of generic competitors of Losec, a medicine used to treat gastrointestinal conditions. In particular, the Commission found that AstraZeneca misled several national patent offices when making

([712]) European Commission, 'Antitrust: Commission fines Johnson & Johnson and Novartis €16 million for delaying market entry of generic pain-killer fentanyl', press release, IP/13/1233, Brussels, 10 December 2013.

([713]) European Commission, Commission Decision of 9 July 2014 relating to a proceeding under Article 101 and Article 102 of the Treaty on the Functioning of the European Union – AT.39612 – *Servier*, C(2014) 4955 final.

([714]) European Commission, 'Antitrust: Commission fines Servier and five generic companies for curbing entry of cheaper versions of cardiovascular medicine', press release, IP/14/799, Brussels, 9 July 2014.

([715]) Judgment of 12 December 2018, *Biogaran* v *Commission*, T-677/14, EU:T:2018:910; of 12 December 2018, *Teva UK and Others* v *Commission*, T-679/14, EU:T:2018:919; of 12 December 2018, *Lupin* v *Commission*, T-680/14, EU:T:2018:908; of 12 December 2018, *Mylan Laboratories and Mylan* v *Commission*, T-682/14, EU:T:2018:907; of 12 December 2018, *Krka* v *Commission*, T-684/14, EU:T:2018:918; of 12 December 2018, *Niche Generics* v *Commission*, T-701/14, EU:T:2018:921; of 12 December 2018, *Unichem Laboratories* v *Commission*, T-705/14, EU:T:2018:915; and of 12 December 2018, *Servier and Others* v *Commission*, T-691/14, EU:T:2018:922.

([716]) European Commission, Commission Decision of 15 June 2005 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement – COMP/AT.37507/F3 – *AstraZeneca*, C(2005) 1757.

representations to extend the period of patent protection for Losec ([717]). Moreover, AstraZeneca selectively deregistered the market authorisations for Losec in certain Member States. At the time, generic and parallel imported products could be marketed in a given Member State only if the market authorisation for the originator product was still in force. AstraZeneca's strategic deregistration of its market authorisation for Losec therefore made it impossible for generic competitors to compete with AstraZeneca ([718]).

In its decision, the European Commission found that this behaviour infringed EU competition rules, and in particular Article 102 TFEU, which prohibits dominant undertakings from abusing their position in the market. The decision was largely upheld by the General Court and the Court of Justice in appeal ([719]), where the Commission was represented by its Legal Service.

Hence, strict enforcement of competition law in the pharmaceuticals sector over the past two decades has covered a wide range of pharmaceutical products (including antidepressants, painkillers, drugs to reduce high blood pressure and gastrointestinal medicines) and sought to ensure fair competition by reducing barriers to entry for manufacturers of generic medicines and encouraging sound use of the existing regulatory frameworks, with the ultimate goal of providing affordable and innovative medicines to the benefit of EU consumers.

4. Conclusion

In the 70 years of the Commission Legal Service's involvement in competition law development, competition law has been shaped to increasingly aid EU consumers.

First, through developments in the case-law, starting with the *SABAM, Courage* and *Manfredi* cases, consumers were granted a direct right to claim damages for an infringement of EU competition law before their national courts. By granting EU consumers this substantive right, competition law was transformed from an abstract concept governed by public institutions into a direct right that benefits consumers.

Moreover, judgments such as *Manfredi*, *Pfleiderer* and *Sumal* clarified the procedures governing these damages actions. In this regard, the principles of equivalence and effectiveness assist EU consumers by ensuring that national procedural rules governing damages actions for a breach of EU competition law are not less favourable than those governing similar

([717]) European Commission, 'Competition: Commission fines AstraZeneca €60 million for misusing patent system to delay market entry of competing generic drugs', press release, IP/05/737, Brussels, 15 June 2005.

([718]) European Commission, Report from the Commission to the Council and the European Parliament: competition enforcement in the pharmaceutical sector (2009–2017), COM(2019) 17 final, p. 27.

([719]) Judgments of 1 July 2010, *AstraZeneca* v *Commission*, T-321/05, EU:T:2010:266; and of 6 December 2012, *AstraZeneca* v *Commission*, C-457/10 P, EU:C:2012:770.

domestic actions, and that claiming such damages is not practically impossible or excessively difficult. Furthermore, it is now clear that EU consumers seeking damages for a competition law infringement can, in principle, directly sue the subsidiary company of a cartel member and that they can request access to certain documents in the possession of a competition authority in order to help build their case.

Finally, cases such as the recent *Stichting Cartel* case show that EU consumers can even claim damages for conduct that cannot be sanctioned by public authorities such as the Commission. In this manner, national courts can truly fulfil their duty of protecting the direct rights that EU competition law grants EU consumers.

Second, the Commission's competition law enforcement covers a range of areas directly relevant to consumers. The Commission continues its fight against cartels, which, if they were not pursued, could lead to price rises for consumers. Moreover, the Commission's investigations cover a range of everyday consumer products, such as pharmaceuticals, beverages and cars. In the digital era, digital products and anti-competitive practices relating to the use of the internet have become a focus of the Commission's work. Hence, through its enforcement of competition law, the Commission seeks to ensure that markets in the EU remain healthy and fair, to the benefit of consumers.

REMEDIES IN STATE AID DECISIONS: RESTORING THE LEVEL PLAYING FIELD

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1. Introduction

1.1. Topic and structure of the chapter

The concept of remedies is an integral part of the EU's law on State aid. However, the legal rules on remedies we have in 2022 emerged from the case-law of the EU courts because the founding treaties of the EU are silent about what happens when a Member State grants aid that is not compatible with the internal market created by those treaties. This chapter aims to provide an overview of the remedies available in State aid law and how they play a decisive part in establishing a level playing field in EU competition law in general, to the benefit of citizens, undertakings and Member States.

To put into perspective the role of remedies in the State aid discipline, this chapter first sketches briefly the EU's State aid law and its overall aims. It then elaborates on why there is a need for remedies in the form of recovery in this area of law, before providing an overview of the historical development of remedies in the case-law of the Court of Justice and EU legislation. The chapter will then turn to specific issues that arise regarding recovery decisions before concluding on how to enforce such recovery decisions in the EU courts.

1.2. Overview of the EU law on State aid

Articles 107 to 109 of the Treaty on the Functioning of the European Union (TFEU) contain the fundamental rules of the EU State aid law. Article 108 *et seq.* TFEU set out basic procedural rules, but we find the substantive 'heart' of the EU State aid law in Article 107 TFEU: paragraph 1 contains a basic principle prohibiting all forms of aid (i.e. all benefits granted by the public authorities of a Member State involving State resources), of any form, that distort or threaten to distort competition by favouring certain undertakings or the production of certain goods ([720]). Article 107(2) and (3) TFEU spells out the most prominent exceptions to that prohibition ([721]).

([720]) Judgments of 2 July 1974, *Italy* v *Commission*, C-173/73, EU:C:1974:71, paragraph 13; and of 24 February 1987, *Deufil* v *Commission*, C-310/85, EU:C:1987:96, paragraph 8.

([721]) There are further exceptions in Articles 42, 93, 106(2) and 108(4) TFEU.

The drafters of the treaties put the EU State aid law in Chapter 1 of Title VII of the TFEU along with the rules that ban anti-competitive agreements and abuses of a dominant market position. They are all part of the chapter enshrining the general rules on competition and they have one thing in common: their objective is to preserve the concept of competition ([722]) and so help protect the internal market, which lies at the very heart of the idea of European integration ([723]).

The ultimate goal of the EU's State aid law is to protect the internal market by maintaining fair competition between Member States (which cannot rely on their 'deep pockets' to attract investment that would otherwise go elsewhere in the internal market) and therefore ensuring effective competition between businesses. It is obvious that effective competition can be distorted by collusion among undertakings or by undertakings abusing their position on a market. However, Member States that grant State aid, thus giving preferential treatment to particular sectors or individual businesses, also distort competition. These actions inhibit competition and imperil the merits and – ultimately – the very concept of an internal market. These harms are not just theoretical: they do in fact damage consumers, undertakings and other Member States.

State aid can lead to inefficient subsidy races to the bottom, in which Member States waste their resources by trying to outbid each other to bring investments to their territories.

State aid may also sustain inefficient firms or whole industries that would otherwise have to adapt to the forces of the market. As well as slowing innovation, State aid that keeps obsolete business models alive also harms consumers, who face outdated products that can crowd out new or more efficient producers. Finally, moral hazard can arise if public authorities grant subsidies without supervision. When Member States bail out failing undertakings with taxpayers' money, other market players may engage in excessive risk-taking in the belief that they are 'too big to fail' or that they will be shielded from the consequences of their actions.

These potentially negative consequences do not mean that State aid is always detrimental to the internal market. On the contrary, when used appropriately and proportionately, aid can yield positive results for both citizens and businesses. In that way, Member States can be authorised to grant aid to ensure that individuals can access goods and services that the market could not deliver on its own, or to deliver policy goals reflecting national views on what is equitable. To take the most extreme example, in reaction to unexpected and severe crises, the European Commission has acted swiftly and allowed Member States to use various State aid instruments to cushion their economies from the negative economic effects that followed. For instance, at the outbreak of the COVID-19 pandemic in 2020, the Commission adopted a Temporary Framework setting out the forms of aid it would approve so that Member States could help

([722]) For State aid law in particular, see judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, Joined Cases C-622/16 P, C-623/16 P and C-624/16 P, EU:C:2018:873, paragraph 43.

([723]) See Article 3 of the Treaty on European Union and Article 3(1)(b) TFEU in conjunction with Protocol No 27 on the internal market and competition.

revive their locked-down economies ([724]). Similarly, it adopted a Temporary Crisis Framework after the outbreak of Russian military aggression against Ukraine to mitigate the economic impact of that war and to support the worst-hit sectors in a coordinated manner ([725]). As a result, Member States could offer targeted support, with liquidity kept available for businesses throughout the COVID-19 pandemic and with compensation available to companies for their increased costs resulting from exceptionally high gas and electricity prices after February 2022.

2. Recovery as a core instrument in the State aid discipline

The EU's State aid rules in Article 107 *et seq.* TFEU says nothing about remedies. However, the recovery of incompatible aid has become a core element in the toolbox through which the Commission enforces its State aid policy ([726]). This section explains why the treaties are silent about remedies and why recovery is such an important instrument.

2.1. Preventive nature of State aid assessment

To deal with problematic competition between Member States in how they grant financial assistance to businesses, the EU's State aid law has a finely balanced approval system for subsidies by Member States. The Commission, being in the centre of that system, has an almost exclusive competence ([727]) to determine whether a measure that a Member State intends to grant amounts to State aid for the purposes of Article 107(1) TFEU ([728]). In doing so, the Commission considers whether that planned measure is compatible with the internal market, that is whether it is within one of the exceptions in Article 107(2) and (3) TFEU.

The EU's procedural rules on State aid are designed to avert the need to recover State aid.

While the Commission is in the process of assessing the notified measure, the Member State is under a 'standstill obligation'. In other words, a Member State may not implement the measure it notified to the Commission

In principle, that procedure is preventive in nature: the Member State must notify the Commission of what it plans to do and must wait until the Commission takes a decision on that plan.

([724]) European Commission, Temporary framework for State aid measures to support the economy in the current COVID-19 outbreak, OJ CI 91I, 20.3.2020, p. 1, paragraph 10 *et seqq.*

([725]) European Commission, Temporary crisis framework for State aid measures to support the economy following the aggression against Ukraine by Russia, OJ CI 131I, 24.3.2022, p. 1.

([726]) See, for example, European Commission, Commission Notice on the recovery of unlawful and incompatible State aid, OJ C 247, 23.7.2019, p. 1 (hereinafter the '2019 Recovery Notice').

([727]) In very limited circumstances, Article 108(2) TFEU allows the Council to authorise State aid, but the Council rarely uses that power and it cannot interfere with the Commission's decisions.

([728]) See, for example, judgment of 21 November 1991, *Fédération nationale du commerce extérieur des produits alimentaires and Others* v *France*, C-354/90, EU:C:1991:371, paragraph 14.

until the Commission has taken a view as to whether the measure amounts to State aid and – if so – whether it falls within one of the exceptions from the general prohibition of State aid. The standstill obligation has direct effect ([729]). As a result, if a Member State fails to respect it, any competitor of a potential beneficiary of the measure may go to a national court asking it to do everything in its power to stop the breach of the obligation.

The TFEU therefore envisages a system in which the Commission carries out its assessment without the threat of a Member State dispensing benefits in the meantime, thereby creating a *fait accompli*.

2.2. Unlawful and misused aid

However, this procedural architecture, based on preventive scrutiny of State aid, can sometimes fail. For example, a Member State may implement a new measure without any prior notification to the Commission, or it may do so while the Commission is still analysing whether a measure amounts to State aid or assessing its compatibility with the internal market. In theory, as the Member State in these scenarios is in violation of its standstill obligation, it must stop implementing the measure immediately. In such a case the benefits already dispensed are unlawful aid ([730]). But the fact that an aid measure is unlawful does not make the aid incompatible with the internal market. When the Commission learns of unlawful aid, whether this is because the Member State is late in notifying them, a competitor of beneficiaries of the aid complains or the situation comes to the notice of the Commission by some other means, it must investigate the aid's compatibility with the internal market. At the end of its investigation into unlawful aid, if none of the treaty exceptions apply, the Commission issues a negative decision and declares the subsidies paid out to be incompatible aid.

This finding of incompatibility in relation to unlawful aid triggers the recovery process. Once the Commission decides that unlawful aid is incompatible with the internal market, it must – in principle ([731]) – order the recovery of the unlawful aid in its entirety. Unless recovery would result in an outcome contrary to general principles of EU law ([732]), the Commission has no choice but to order recovery of the unlawful aid in full. That order will also require the Member State to charge the beneficiary interest from the date when the aid was made available to it until the recovery of aid. The principle of full recovery of the aid has been confirmed by case-law, which emphasises that the recovery of aid is the logical consequence of the finding that incompatible aid was unlawful ([733]).

([729]) Judgment of 11 July 1996, *SFEI and others*, C-39/94, EU:C:1996:285, paragraph 39.

([730]) Article 1(f) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ L 248, 24.9.2015, p. 9 (the 'Procedural Regulation').

([731]) Cf. Section 4.3 of this chapter for certain exceptions to that rule.

([732]) Exceptions also apply when ordering recovery would be time barred; see Article 17 of the Procedural Regulation.

([733]) Judgment of 21 March 1999, *Belgium* v *Commission*, C-142/87, EU:C:2002:143, paragraph 66; and of 8 May 2003, *Italy and SIM 2 Multimedia* v *Commission*, Joined Cases C-328/99 and C-399/00, EU:C:2003:252, paragraph 66.

However, ordering recovery cannot always perfectly reproduce the outcomes of an absence of aid (which is what would have happened if the Member State granting incompatible aid had notified the Commission of its intentions). An undertaking that received unlawful aid will most likely have consumed it before being ordered to repay the aid with interest. This means that the undertaking will still have reaped the benefits of the unlawful aid for a period of time. The Commission does not quantify the additional advantage conferred on a beneficiary through using an aid measure at a particularly pertinent moment in time. In addition, the Commission rarely accepts recovery in kind ([734]), meaning that, for example, in the case of aid to support the building of a factory, the beneficiary will still have access to infrastructure financed by unlawful aid after reimbursing the aid amount.

2.3. The objective of recovery

It is important to point out that recovery is not akin to a penalty under criminal law ([735]). This means that the Commission may not, out of sympathy with the beneficiary, order the recovery of an amount that is less than the value of the aid received. Similarly, it may not signal disapproval of the serious nature of the illegality by ordering recovery of an amount in excess of the value of the aid ([736]).

In essence, recovery must be limited to the financial advantages arising from placing the aid at the disposal of the beneficiary ([737]). In other words, the beneficiary is meant to forfeit the advantages that it has enjoyed over its competitors in the form of the unlawful aid ([738]). This is also why the Commission orders the Member State to charge interest on the unlawfully granted aid, as this eliminates any further incidental advantage.

Because a recovery order requires a finding that the aid was unlawful, the actual objective of recovery is aimed at restoring the status quo ante.

It follows from the rationale of the preventive nature of State aid control that the recovery of unlawful aid must, ultimately, aim to ensure a level playing field between undertakings ([739]), and thereby restore effective competition between them, the original goal of the EU's State aid regime.

([734]) In principle, recovery should be achieved by a cash payment: see point 123 *et seq.* of the 2019 Recovery Notice.

([735]) Judgment of 17 June 1999, *Belgium* v *Commission*, C-75/97, EU:C:1999:311, paragraph 65.

([736]) Judgment of 5 February 2015, *Aer Lingus* v *Commission*, T-473/12, EU:T:2015:78, paragraph 86.

([737]) Judgment of 22 January 2013, *Salzgitter* v *Commission*, T-308/00 RENV, EU:T:2013:30, paragraph 138.

([738]) Judgment of 8 December 2011, *Residex Capital IV*, C-275/10, EU:C:2011:814, paragraph 34.

([739]) Judgment of 31 May 2018, *Groningen Seaports and Others* v *Commission*, T-160/16, EU:T:2018:317, paragraph 98 *et seq.*

3. Historical perspective

The rules governing recovery of unlawfully granted incompatible aid have evolved over several decades. This section sets out the main milestones in that history.

3.1. The early years, 1970s and 1980s

It is striking that the Treaty establishing the European Economic Community (the EEC Treaty), signed in Rome in 1957, did not even mention the notion of recovering State aid, a silence replicated in the TFEU. As already noted, Article 107 TFEU relates to the existence and compatibility of aid, whereas Article 108 TFEU talks only about the 'constant review' of all systems of aid and about the obligation of the Member State to 'abolish or alter such aid' found to be incompatible or misused. The concept of recovering aid developed through litigation, driven by the Court of Justice's concern with ensuring the effectiveness of the State aid rules.

The question of whether it was possible for the Commission to order recovery of unlawfully granted incompatible State aid first arose in the so-called *Kohlegesetz* case in 1973 ([740]). Germany had notified the Commission of a draft law on support for mining regions, which the Commission approved. However, the German authorities extended the duration of the law without notifying the Commission. The Commission ordered Germany to take all necessary measures to end the investment grants in the mining regions of North Rhine-Westphalia and to abolish or alter the aid. When Germany did not implement that decision, the Commission brought an infringement action, asking the Court of Justice to declare that the Member State had not complied with the decision. Although the Commission's decision referred only to abolishing the aid, in the infringement action, the Commission asked the Court of Justice to order the repayment of the grants awarded under the altered aid scheme. In response to Germany's argument that no such recovery could be sought, the Court of Justice stated that '[t]o be of practical effect, this abolition or modification may include an obligation to require repayment of aid granted in breach of the Treaty, so that in the absence of measures for recovery, the Commission may bring the matter before the Court.' As the Court of Justice had thus confirmed that, in principle, a negative decision can include a recovery order, from then onwards the Commission started to include such orders in its negative decisions rather than waiting to raise the matter in infringement proceedings.

As sometimes happens in judgments in which the Court of Justice establishes a new principle, the Court dismissed the action of the Commission in the *Kohlegesetz* case because the decision was unclear about exactly what Germany had to do, and by when. Even so, that judgment plays an important role in the history of recovery, as it was the first step towards the broad case-law practice and comprehensive system of recovery that we have today.

([740]) Judgment of 12 July 1973, *Commission* v *Germany*, 70/72, EU:C:1973:87, paragraph 13.

Although the Court of Justice gave the Commission the green light to adopt recovery orders in 1973, it took another decade for the Commission to start systematically including them in its negative decisions finding unlawful and incompatible aid. Initially, the Commission simply reminded Member States and potential beneficiaries (e.g. in communications of 1980 and 1983) of the consequences of breaching the standstill obligation, that is, that unlawful aid may have to be recovered. From 1983 onwards, the Commission's 'opening decisions', that is, decisions initiating the formal investigation procedure under Article 108(3) TFEU, included a warning about the potential recovery of unlawful aid. However, as the amount of unlawful aid was still increasing in many Member States, the Commission began to order recovery systematically when taking negative decisions. By 1991, it had issued around 50 such recovery orders.

3.2. Proliferation of case-law in the 1990s and 2000s

As the number of recovery orders issued by the Commission increased, so too did the number of challenges to the decisions containing recovery orders. This proliferation of litigation on recovery required the EU courts to rule on more and more procedural and substantive questions regarding the recovery process. The courts have had to consider the purpose of recovery, the amount of aid to be recovered, the duty to pay interest and other issues, generating broad case-law regarding the recovery process over the years. It is worth recalling some key judgments.

In the *Deufil judgment* ([741]), the Court of Justice found that the recovery of unlawful aid is the logical consequence of the finding that aid is unlawful; in a subsequent case, the Court added that that consequence cannot depend on the form in which the Member State granted the aid ([742]).

Later, in *Commission* v *Italy* ([743]), the Court of Justice held that the goal of re-establishing the situation that prevailed before the unlawful granting of incompatible aid is attained once the recipient has repaid the aid in question – with default interest, where appropriate – and thus forfeited the advantage that it had enjoyed over its competitors on the market. In so ruling, the Court of Justice confirmed the Commission's right to require the Member State to levy interest when it recovers aid granted unlawfully to a beneficiary.

However, the national authorities cannot blindly follow national rules: the rules must be disapplied if they would render recovery impossible or excessively difficult in practice, and, if there is a choice between different procedures in the national legal order, the

Because there are no detailed rules in EU law on many aspects of the recovery process, the Member State must carry out recovery of aid in accordance with the rules and procedures under its national law.

([741]) Judgment of 24 February 1987, *Deufil* v *Commission*, C-310/85, EU:C:1987:96.

([742]) Judgment of 10 June 1993, *Commission* v *Greece*, C-183/91, EU:C:1993:233.

([743]) Judgment of 4 April 1995, *Commission* v *Italy*, C-348/93, EU:C:1995:95.

Member State must comply with the principle of equivalence, using the procedures that govern similar but purely national disputes ([744]).

When the Commission issues a recovery order to the Member State as part of a negative decision, it need not quantify the exact amount to be recovered. The Court of Justice has accepted that it is sufficient for the decision to contain appropriate information for the Member State to calculate the amount it must recover. This is because the calculation often depends on information that the Commission lacks, as the Member State has not provided it ([745]).

In the *Boussac* judgment ([746]), the Court of Justice confirmed the Commission's right to demand that the Member State obtain repayment of unlawful aid by issuing a recovery order, but the Court also placed limits on when the Commission could do so. The Commission had argued that it should be able to order recovery solely on the basis that aid was granted without any notification, but the Court of Justice rejected that claim. Instead, the Court held that the Commission must always examine the compatibility of the aid, even if the Member State did not notify the Commission of the aid measure before implementing it. Therefore, the Commission can order the recovery only of incompatible aid.

By contrast, the Court of Justice found in the *SFEI* judgment ([747]) that national courts must, in principle, order recovery when faced with an aid measure implemented unlawfully. In other words, if a competitor of an aid beneficiary asks a national court to order the repayment of aid, the judge must grant that application if they find that the Member State did not notify the Commission of the aid, unless there are exceptional circumstances that make repayment inappropriate.

Precisely because a national judge faced with unlawful aid has more extensive powers in relation to recovery than the Commission has (since the latter must show incompatibility to order recovery), the interaction between the recovery ordered by the Commission and that requested directly from a national court is litigated regularly. Over time, the Court of Justice has refined its doctrines on how these powers relate to one another. In the *Transalpine Ölleitung* judgment ([748]), the Court of Justice found that a national judge must order recovery even if the applicant before the national court started its action after the Commission had found the unlawful aid to be compatible with the internal market. The Court of Justice modulated that approach in the *CELF case* ([749]), when it reiterated that EU law does not impose an obligation to fully recover the unlawful aid. If the Commission declares the unlawful aid to be compatible,

([744]) Judgment of 21 September 1983, *Deutsche Milchkontor GmbH*, Joined Cases 205/82 to 215/82, EU:C:1983:233, paragraph 19.

([745]) Judgment of 13 June 2002, *Netherlands* v *Commission*, C-382/99, EU:C:2002:363, paragraph 91.

([746]) Judgment of 14 February 1990, *France* v *Commission*, C-301/87, EU:C:1990:67, paragraphs 21 and 22.

([747]) Judgment of 11 July 1996, *SFEI and Others*, C-39/94, EU:C:1996:285, paragraphs 70 and 71.

([748]) Judgment of 5 October 2006, *Transalpine Ölleitung in Österreich*, C-368/04, EU:C:2006:644, paragraphs 41–44 and 56.

([749]) Judgment of 12 February 2008, *CELF and Ministre de la Culture et de la Communication*, C-199/06, EU:C:2008:79, paragraphs 39–53.

the national court must order the beneficiary to pay interest for the period of unlawfulness when the applicant asks the judge to impose 'illegality interest'. Furthermore, if domestic law allows the judge to do so (in other words, EU law does not require such action but does not prevent it), they may also order the full recovery of the unlawful aid, but the Member State will be able to reimplement the aid after it receives the Commission's favourable decision on compatibility.

In the *Scott* judgment ([750]), the Court of Justice emphasised the need for an immediate and effective execution of recovery decisions. It also held that the national authorities must not apply any national procedures that do not fulfil the conditions for an effective and timely recovery.

3.3. Building on case-law: the Procedural Regulation and soft law instruments

For over five decades after the treaties laid down a prohibition, in principle, of State aid and a mechanism to ensure that Member States grant aid only once the Commission finds it to be compatible with the internal market, there was no single document setting out detailed rules regarding these procedures. However, by the late 1990s, with extensive case-law in place that dealt with many aspects of the process, the EU legislator had an adequate basis for providing a more detailed and systematic framework for the process of recovery.

The legislative regulation of recovery took place with the adoption of Regulation 659/1999 ([751]), the predecessor of the current Procedural Regulation ([752]). The entirety of Chapter III of Regulation 659/1999 is devoted to unlawful aid, including rules on recovery.

Regulation 659/1999 was, in essence, a codification of the case-law dating back to the *Kohlgesetz* judgment. It clearly established a basis for the Commission to demand recovery by issuing a recovery injunction or adopting a recovery decision. It confirmed the Commission's right to calculate interest at a suitable rate, and created a limitation period after which the Commission cannot require recovery of unlawful State aid.

Article 14 Regulation 659/1999 governed the Commission's power to compel a Member State to recover unlawful aid that is incompatible with the internal market by adopting a recovery decision (that is, a recovery order within a negative decision). In line with the by then well-established case-law, the regulation provided in paragraph 1 that '[w]here negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary … The

([750]) Judgment of 5 October 2006, *Commission* v *France*, C-232/05, EU:C:2006:651. See also judgment of 12 May 2005, *Commission* v *Greece*, C-415/03, EU:C:2005:287.

([751]) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83, 27.03.1999, p. 1.

([752]) The Procedural Regulation replicates the provisions on recovery from Regulation 659/1999, changing only the numbers of the relevant articles and updating the terminology to reflect the entry into force of the TFEU.

Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law.' In addition, according to Article 14(2), the Member State had to recover that aid with interest at an appropriate rate fixed by the Commission. Interest was payable from the date on which the beneficiary had the unlawful aid at its disposal until the date of recovery. Article 14(3) emphasised the need for timely and effective recovery.

Regulation 659/1999 also repeated the main limits to such recovery deriving from the case-law, namely cases in which the recovery of the aid would be contrary to a general principle of Community law (Article 14), and laid down a limitation period. Article 15 of Regulation 659/1999 fixed a 10-year limit on the Commission's power to issue recovery orders. As a result, any aid for which the limitation period had expired was deemed existing aid and could not be recovered. Article 15 also laid down the main rules on the starting date, interruption and suspension of the limitation period.

For unambiguous and urgent cases, Article 11(2) of Regulation 659/1999 took the Court of Justice's case-law and codified the possibility of ordering provisional recovery through a recovery injunction. These decisions allow the Commission to preserve the effectiveness of State aid rules during the period it takes for a decision on the compatibility of the aid with the internal market to be made.

Although the Procedural Regulation brings together the central principles governing the recovery procedure, it is silent on a series of practical issues that arise in the field of recuperation of unlawful aid.

In reaction to the desire of the Member States (who are, under the TFEU, the sole interlocutors of the Commission in the control of State aid) for guidance on the approach that the Commission would follow or that would be expected from them, the Commission issued its first recovery notice in 2007 ([753]). The 2007 Recovery Notice reiterated the purpose of recovery and the basic principles underlying the implementation of recovery decisions, seeking to elaborate usefully the practical implications of those basic principles for the Commission and Member States.

Considering the role of the Commission, the 2007 Recovery Notice noted that a recovery decision imposes on the Member State to which it is addressed a duty to recover the incompatible aid it granted unlawfully and requires that Member State to recover a certain amount of aid from the beneficiaries within a given time frame. Because the recovery order is directed at the Member State, it is that Member State, not the Commission, that must implement the decision, and it is obliged to initiate recovery proceedings without any delay. The 2007 Recovery Notice also detailed what happens when the Member State concerned fails to implement a recovery order. In that situation, and when the Member State is unable to show absolute impossibility, the

([753]) Notice from the Commission – Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid, 15 November 2007, OJ C 272, 15.11.2007, p. 4 (the '2007 Recovery Notice). The Commission updated and replaced it with the 2019 Recovery Notice.

Commission may start an infringement action. In addition, in application of the *Deggendorf* ([754]) case-law, the Commission may require the Member State concerned to suspend the payment of new compatible aid to a beneficiary until that undertaking has reimbursed older unlawful and incompatible aid that is subject to a recovery decision.

While the 2007 and 2019 Recovery Notices set out how to handle incompatible aid granted unlawfully, the Commission published its first Notice on the enforcement of State aid law by national courts in 2007 ([755]) (which it updated and replaced in 2021 ([756])), summarising, among other things, the role of national courts with respect to recovering of unlawful aid.

3.4. Evolution in numbers

More detailed legal regulation, as well as an increasing awareness of recovery among Member States, competitors and citizens, has led to a sharp rise in the amounts recovered since 2000. The Commission regularly publishes statistics on recovery ([757]) (reproduced in part in Table 1 below), which show that the number of recovery decisions each year is fairly stable (between 5 and 30), with substantial amounts of aid recovered since 1999. Table 2 shows higher amounts of full recovery for earlier years because recovery may take years to accomplish in practice, with recovery often ongoing for more recent years. In practice, although the effectiveness of recovery is much greater than it was 25 years ago, there is room for improvement in its speed and scope.

Table 1: Recovery of aid from all Member States (1999–2021)

All Member States	1999	2004	2009	2014	2015	2019	Subtotal (1999–2014)	Subtotal (2015–2021)	Total (1999–2021)
Total number of recovery decisions adopted	26	26	13	18	19	5	255	61	316
Number of recovery decisions adopted for which recovery is fully implemented	21	21	11	4	8	0	178	14	192

([754]) Judgment of 9 March 1994, *TWD* v *Bundesrepublik Deutschland*, C-188/92, EU:C:1994:90.

([755]) Commission Notice on the enforcement of State aid law by national courts, OJ C 85, 9.4.2009, p. 1.

([756]) Commission Notice on the enforcement of State aid law by national courts, OJ C 305, 30.7.2021, p. 1.

([757]) See the European Commission webpage on recovery of unlawful aid (https://ec.europa.eu/competition-policy/state-aid/procedures/recovery-unlawful-aid_en).

Table 2: Recovery results of aid from all Member States (amounts in million EUR)

All Member States	1999	2004	2009	2014	2015	2019	Subtotal (1999–2014)	Subtotal (2015–2021)	Total (1999–2021)
Aid to be recovered (principal amount)	531.3	4 952.1	286.9	48.1	1 201.3	-	13 536.8	1 517.3	15 054.1
Aid repaid	210.7	4 081.0	286.9	48.1	908.0	-	10 210.5	1 224.0	11 434.4
Aid lost	320.6	871.1	0.0	0.0	293.4	-	3 326.3	293.4	3 619.7

4. The recovery discipline in operation

When it comes to the application of recovery orders in practice, several issues recur. This section examines the most important of them, namely the time by when the Member State must ensure recovery, how much must be reclaimed by the Member State and under which circumstances there should be no recovery.

4.1. Deadlines for recovering aid

When the Commission issues a recovery order as part of a negative decision, it fixes two deadlines for the Member State concerned. The first sets the period within which the Member State must inform the Commission of the steps it is taking to ensure recovery (including, in the case of aid schemes with multiple beneficiaries, the identification of the beneficiaries). The second sets the period within which the Member State must complete the recovery process. The Commission usually requires the Member State to achieve full recovery within 2 months of the date on which the State is notified of the recovery order.

In practice, Member States rarely complete recovery before the deadline expires, and there is often extensive correspondence between the Member State and the services of the Commission about how the recovery process is progressing. In the letters from its services, the Commission sets new deadlines for the Member State to provide information and finalise recovery. The Court of Justice has accepted that if the Commission later brings the Member State before it for a declaration of failure to execute the recovery order, these new deadlines replace those set out in the order itself.

That flexibility was key in litigation on the recovery of unlawful aid provided to the Magafesa group of companies, a Spanish manufacturer of household goods. In 1998, the Commission made a recovery order relating to several companies in that group, including one called Indosa.

In 1999, the Commission started an infringement action against Spain that included the claim that Spain had not ensured full recovery of the aid provided to Indosa by the date set in the 1998 order ([758]). During the action, Spain informed the Commission that the creditors of Indosa had put it into liquidation in 2000, so the Commission gave the Court of Justice no further evidence of non-recovery and the Court therefore rejected that part of the action. However, as Indosa continued to operate after being declared insolvent, the Commission, in 2009, instituted a second infringement action against Spain for failure to implement the 1999 decision ([759]). Spain argued that the Court of Justice had settled the issue of its compliance with the decision in Case C-499/99 and that, under the principle of res judicata (meaning that a matter is definitively settled by a court judgement), the Commission could not argue that recovery from Indosa was incomplete. The Court of Justice rejected this argument. Res judicata applies when a court has previously ruled on the same dispute between the same two parties. Although the Commission and Spain were the two parties in both Case C-499/99 and Case C-529/09, the Court of Justice found that the deadline in the 1999 recovery order had been replaced in 2005 when the Commission prescribed a new period for Spain to show that Indosa not only had been put into liquidation, but also had ceased trading. Because of the new deadline, the dispute in the second case was not the same as the one on which the Court had previously ruled. The Court of Justice thus accepted the Commission's argument that accepting Spain's thesis would render the rules on the monitoring of State aid redundant.

4.2. Quantifying the amount to be recovered

Recovery is limited to the financial advantages actually arising from placing the aid at the disposal of the beneficiary. The amount to be recovered cannot be higher or lower than the initial amount the beneficiary obtained.

Recovery is not about the restitution of all economic benefits a recipient gained by exploiting the advantage. The benefit from exploiting the advantage may be different from the advantage constituting the aid. That distinction emerged in the *Unicredito Italiano* case, in which an aid beneficiary argued that, since it had to carry out operations that were otherwise unprofitable in order to obtain the aid in the form of a tax advantage, its economic benefit from the aid was overall less than the value of the financial advantage from those tax breaks and it would be disproportionate for it to have to repay the higher amount. The Court of Justice rejected that view, saying that it would be wrong to determine the aid amount to be repaid based on choices the beneficiary would have made if it were not given the aid ([760]).

It is also irrelevant that the aid recipient passed on part or all of the aid to third parties. For example, in the *Aer Lingus* cases regarding Ireland's air travel tax, Ireland gave airlines aid by

([758]) Judgment of 2 July 2002, *Commission* v *Spain*, C-499/99, EU:C:2002:408.

([759]) Judgment of 24 January 2013, *Commission* v *Spain*, C-529/09, EU:C:2013:31.

([760]) Judgment of 15 December 2005, *Unicredito Italiano*, C-148/04, EU:C:2005:774, paragraph 114.

levying a tax of EUR 10 per passenger on some flights and of only EUR 2 on others. The airlines argued that they charged travellers on the latter flights less than they would otherwise have done, so at least some of the EUR 8 advantage ended up with those passengers. However, the Court of Justice rejected this theory of economic passing on of the advantage, holding that the aid amount to be recovered is the nominal amount ([761]).

In addition to the nominal amount of the aid, recovery includes interest that the beneficiary must pay on the nominal amount of aid it received, with the interest accrued from the payment of the aid until the date of its effective recovery. The recovery interest is calculated in accordance with Article 9 of Regulation (EC) 794/2004 ([762]).

There have been discussions of whether the recovery interest should be simple interest or compound interest (in the latter case, the beneficiary pays interest on the interest charged). The use of compound interest ensures full neutralisation of the financial advantages the beneficiary gained ([763]). The Member State fulfils its recovery obligation only when it has effectively recovered all of the unlawful aid, including the recovery interest.

However, in some rare cases, although the Member State has unlawfully granted incompatible aid, the amount subject to recovery could be zero. Such a situation arose in the *Mediaset* case ([764]), in which Italy provided a voucher of EUR 150 to every user buying a decoder to receive TV signals transmitted through digital terrestrial technology. Approximately 2 million people in Italy bought a subsidised decoder. The Commission found that, although the direct beneficiaries of that grant were final consumers (who cannot be recipients of State aid because they are not undertakings), the voucher measure benefited indirectly those broadcasters using the digital terrestrial platforms. However, the Commission decided that it would be complex to determine the amount of aid given to those broadcasters because the aid depended on the profits the broadcasters gained from the increased demand for their services due to viewers buying subsidised decoders.

An Italian court asked whether, in such a configuration, the broadcasters might have to repay the Member State nothing at all. The Court of Justice indicated that such an outcome was indeed possible: here, market surveys indicated that the vouchers had not increased the numbers of decoders sold, meaning that broadcasters gained no profits, as the vouchers did not result in increased demand for their services , and so 'without calling into question the validity of the Commission's decision or the obligation to repay the aid declared unlawful and incompatible with the internal market, the national court may fix an amount of aid equal to zero

([761]) Judgment of 21 December 2016, *Commission* v *Aer Lingus*, Joined Cases C-164/15 P and C-165/15 P, EU:C:2016:990, paragraphs 92–100.

([762]) Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 140, 30.4.2004, p. 1.

([763]) Judgment of 11 December 2008, *Commission* v *Département du Loiret*, C-295/07 P, EU:C:2008:707.

([764]) Judgment of 13 February 2014, *Mediaset*, C-69/13, EU:C:2014:71.

to the extent that that determination follows directly from the quantification of the sums to be recovered' ([765]). Obviously, if the recovery order sets out the amount that the Member State must recover, such a scenario cannot arise.

4.3. Limits to the obligation to recover unlawful aid

4.3.1. Absolute impossibility to recover unlawful aid

A Member State that has granted unlawful aid must take all necessary measures to recover it. In exceptional circumstances, in line with the principle that 'no one is obliged to do the impossible', a Member State can justify not recovering unlawful aid ([766]). The application of that principle supposes that the Commission and the Member State work together in good faith to overcome the difficulties triggered by the recovery process. In such a situation, the Member State should envisage alternative methods of recovery, including methods leading to partial recovery. Recovery is, of course, an absolute impossibility if the Commission finds that the difficulties relayed by the Member State are real and that the unlawful aid cannot be recovered by any other means.

In the *Montessori* case ([767]), the Court of Justice found that there is no absolute impossibility of recovering aid if a Member State simply informs the Commission of internal difficulties of a legal, political or practical nature without taking genuine steps to recover the aid and without suggesting alternative methods to implement the decision. In line with that stringent approach, the Court of Justice has rejected claims of impossibility founded on national limitation periods ([768]), the absence of a right under national law to require recovery ([769]) or concerns of social unrest ([770]).

In those situations, the Member State can only justify its inability to recover the entire aid amount and interest if the beneficiary was liquidated and no assets are recoverable.

Financial difficulties or even the insolvency of a beneficiary do not constitute impossibility of recovering the aid.

In the *Hellenic Shipyards II* case, Greece relied on the essential security interest exception contained in Article 346(1)(b) TFEU to challenge a recovery order. It argued that recovery would lead to the winding up of the beneficiary and its liquidation, undermining the essential interest

([765]) Judgment of 13 February 2014, *Mediaset*, C-69/13, EU:C:2014:71, paragraph 40.

([766]) Judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, Joined Cases C-622/16 P, C-623/16 P and C-624/16 P, EU:C:2018:873, paragraph 79.

([767]) Judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, Joined Cases C-622/16 P, C-623/16 P and C-624/16 P, EU:C:2018:873, paragraph 91.

([768]) Judgment of 20 March 1997, *Land Rheinland-Pfalz* v *Alcan Deutschland*, C-24/95, EU:C:1997:163, paragraphs 34–37.

([769]) Judgment of 21 March 1991, *Italy* v *Commission*, C-303/88, EU:C:1991:136, paragraphs 52 and 60.

([770]) Judgment of 9 July 2015, *Commission* v *France*, C-63/14, EU:C:2015:458, paragraph 52.

of the Member State's security. The beneficiary, in addition to carrying out civilian activities, built and modernised submarines. In that context, the Commission, Greece and the beneficiary committed to implementing an alternative recovery method so as to implement fully the Commission's recovery order. When that method was not implemented and the Commission brought infringement proceedings against Greece, the Court of Justice accepted that Greece could indeed invoke public security, but found that doing so did not justify the Member State's failure to implement the alternative measures ([771]).

4.3.2. Legal certainty

Member States and aid beneficiaries are afforded protection against a recovery order if recovery would conflict with the principle of legal certainty. However, that principle has a narrow scope, so such protection is exceptional ([772]).

In addition, legal certainty cannot trump the principles of the primacy and effectiveness of EU law. Member States and beneficiaries cannot rely on invoking legal certainty to limit recovery by pointing to a conflict between national law and EU law. For that reason, in the *Scott and Kimberley Clark* judgment, the Court of Justice held that, when such a conflict arises, the national authorities must leave the domestic law rules unapplied or interpret them in a way that preserves the effectiveness of EU law ([773]). That case stems from a Commission decision about unlawful aid in which the Commission ordered France to recover the aid amount from the beneficiary. After the French authorities issued a recovery order, the beneficiary challenged it, and a national court asked the Court of Justice whether it could annul the order because of its flaws in terms of French administrative law. Such a ruling could have led to France repaying the beneficiary the recovered aid amount, with the beneficiary once again enjoying an unfair competitive advantage. The Court of Justice held that if the authority that made the order could correct it without the beneficiary receiving the aid again, such an outcome would be in line with EU law, but, if it could not do so, the national court could not compromise the restoration of the situation from before the granting of the aid. There could be no return of the aid to the beneficiary, not even provisionally.

4.3.3. Legitimate expectations

One of the general principles of EU law is the protection of legitimate expectations. When the Commission creates these expectations, that principle protects Member States and beneficiaries who have good reason to believe that the Commission will not order the recovery of aid.

([771]) Judgment of 14 November 2018, *Commission* v *Greece*, C-93/17, EU:C:2018:903, paragraph 90.

([772]) Judgment of 22 January 2013, *Salzgitter* v *Commission*, T-308/00 RENV, EU:T:2013:30.

([773]) Judgment of 20 May 2010, *Scott and Kimberley Clark*, C-210/09, EU:C:2010:294, paragraphs 29–33.

However, a beneficiary cannot entertain a legitimate expectation that the aid is lawful (and so cannot expect that it will not have to repay the aid) unless the Member State notified the Commission of the relevant measure under Article 108(3) TFEU ([774]). Equally, a Member State that granted aid in breach of the standstill obligation cannot claim legitimate expectations that it would not have to recover the aid. Any other approach would deprive Articles 107 and 108 TFEU of useful effect ([775]). Moreover, the Court of Justice has held that even when a Commission decision declares an aid measure compatible, no legitimate expectations can arise if an applicant seeks the annulment of that decision before the EU courts, for as long as those courts have not delivered a definitive ruling ([776]).

5. Enforcing recovery decisions

In this final section, we will look at how the Commission enforces recovery decisions that the Member State has not implemented. The basic principle underlined throughout this chapter – the need for full, effective and timely recovery of aid granted unlawfully – is central in that regard.

5.1. Infringement action under Article 108(2) TFEU

When the Commission addresses a recovery order to a Member State, the latter often finds itself in a rather delicate situation because it is forced to oblige the beneficiary to repay the aid that the Member State itself previously granted. If the Member State fails to implement the Commission's recovery decision within the set deadline, the Commission can proceed to the Court of Justice to seek enforcement of its decision. The Commission usually pursues the Member State for its failure to execute the recovery order under Article 108(2) TFEU ([777]).

The relevant date for determining whether a recovery obligation has been successfully implemented is the one established in the Commission's recovery decision or subsequently fixed by the Commission ([778]).

Unlike the procedure set out in Article 258 TFEU, Article 108(2) TFEU does not envisage a pre-litigation stage implemented by sending a reasoned opinion to the Member State that, among

([774]) Judgment of 19 September 2018, *HH Ferries and others* v *Commission*, T-68/15, EU:T:2018:563, paragraph 307.

([775]) Judgment of 9 June 2011, *Diputación Foral de Vizcaya and Others* v *Commission*, Joined Cases C-465/09 P to C-470/09 P, EU:C:2011:372, paragraph 150.

([776]) Judgment of 11 March 2010, *CELF and Ministre de la Culture et de la Communication*, C-1/09, EU:C:2010:136, paragraphs 51, 52 and 55.

([777]) The Commission could, in principle, pursue the infringement by means of a 'double procedural approach' under both Article 108(2) and Article 258 TFEU, especially if the Commission considers that the Member State not only failed to implement the specific recovery decision but also breached the State aid rules in a more systemic way because of, for example, national rules of general application.

([778]) Judgment of 2 July 2002, *Commission* v *Spain*, Case C-499/99, EU:C:2002:408, paragraph 28.

other things, sets out a period for remedying the infringement. For that reason, in the *Olympic Airways* case ([779]), the Court of Justice ruled that Greece breached its recovery obligations by not taking all the measures necessary to end the illegal State aid within the period established in the recovery order, even though Greece presented evidence at the hearing allegedly proving that it had recovered the aid in question after the end of that period.

Once the Commission brings a Member State to court for failing to implement the recovery decision by the established deadline, the Member State has few defences available. In principle, almost the only defence that could be used effectively by the Member State in opposing the Commission under Article 108(2) TFEU is to plead absolute impossibility for it to implement the recovery order ([780]).

The Member State has the burden of showing why it did not implement the recovery order in due time ([781]). In the same vein, it is for the Member State to demonstrate by means of precise and specific data in relation to each specific beneficiary concerned whether the conditions for applying grounds for non-recovery were met.

That latter requirement was central to the *Plans de campagne* case ([782]). In it, the Court of Justice examined the Commission's claim that France had failed to take the necessary measures to recover from the beneficiaries aid granted illegally in the context of 'contingency plans' in the fruit and vegetable sector. When the Court of Justice heard the case, the national procedures for the recovery of the aid were still ongoing 6 years after France had been notified of the recovery decision. That aid, meant to prevent or at least mitigate the effects of supply temporarily exceeding demand, went first to producer organisations, which then passed it on to the producers. France argued that the disappearance of some producer organisations, due to mergers, takeovers or liquidations, rendered the recovery impossible, but the Court of Justice held that France had not shown that it could no longer identify the members of those organisations or extrapolate the amount of the aid paid to them. The Court of Justice also ruled that France had to take every measure to facilitate the reimbursement of the aid even though some beneficiaries were in difficulty, bankrupt or the object of a buyout or merger takeover. Thus, as we have already seen, the Member State must even recover aid from undertakings in difficulty, regardless of whether the recovery would trigger the liquidation of those undertakings ([783]).

([779]) Judgment of 14 February 2008, *Commission* v *Greece*, C-419/06, EU:C:2008:89, paragraphs 37, 38 and 61.

([780]) Judgment of 12 May 2005, *Commission* v *Greece*, C-415/03, EU:C:2005:287, paragraph 35.

([781]) Judgment of 5 June 2014, *Commission* v *Italy*, C-547/11, EU:C:2014:1319, paragraph 55.

([782]) Judgment of 12 February 2015, *Commission* v *France*, C-37/14, EU:C:2015:90.

([783]) Judgment of 9 November 2017, *Commission* v *Greece*, C-481/16, EU:C:2017:845, paragraph 25.

5.2. Application of penalties under Article 260 TFEU

The infringement procedure available to the Commission under Article 108(2) TFEU or Article 258 TFEU, unfortunately, does not always guarantee the successful implementation of its recovery decisions. If a Member State does not bring itself in line with the Court of Justice's finding that it has failed to execute the recovery order, the Commission may need to have recourse to Article 260 TFEU. In Article 260 TFEU actions, the Commission must give the Court of Justice the information necessary to determine the extent to which a Member State has complied with a judgment declaring it to be in breach of its recovery obligations. When the Commission has demonstrated with sufficient evidence an ongoing breach of obligations, it is for the Member State to challenge – in substance and in detail – the information and its consequences ([784]).

Pursuant to Article 260 TFEU, the Commission may ask the Court of Justice to impose a periodic payment and/or a lump sum payment on the Member State. These payments are meant to fight the inertia of the Member State, penalising it for not remedying the infringement after the Court of Justice delivered its first judgment. For the sake of fairness, the reasons for the slow recovery implementation often go beyond the specific recovery decision of the Commission and can be found in national legislation or in the Member State's established application practices. Although the Commission only alleges that a Member State is not enforcing a specific recovery decision under Article 108(2) TFEU, Article 260 TFEU could also indirectly force the Member State to address more general systemic impediments to recovery of unlawful aid.

The Commission first relied on Article 260 TFEU in the *Commission* v *Greece* case ([785]), in which the Court of Justice, in exercising the discretion conferred on it, imposed both a penalty payment and a lump sum payment. It imposed a penalty payment of EUR 16 000 per day and a lump sum payment of EUR 2 million for the failure to implement a recovery decision regarding aid granted to Olympic Airways ([786]).

The Court of Justice consistently rules that the imposition of a penalty payment is, in principle, justified only if the failure to comply with an earlier judgment of the Court continues up to when the Court examines the facts ([787]). As a result, it will take account of measures that Member State adopted after the period prescribed in the reasoned opinion.

([784]) Judgment of 18 July 2006, *Commission* v *Italy*, C-119/04, EU:C:2006:489, paragraph 41 and case-law cited.

([785]) Judgments of 7 July 2009, *Commission* v *Greece*, C-369/07, EU:C:2009:428; and of 14 November 2018, *Commission* v *Greece*, C-93/17, EU:C:2018:903, paragraph 153.

([786]) There remained to be recovered EUR 41 million of capital contribution for restructuring aid, EUR 2.5 million of rentals for certain airports and EUR 61 million for the tax to be paid by passengers departing from Greek airports.

([787]) Judgment of 18 July 2007, *Commission* v *Germany*, C-503/04, EU:C:2007:432, paragraph 40.

The Court of Justice determines the need for and size of financial penalties to be imposed in the light of the circumstances of each specific case ([788]). Therefore, the Court of Justice is not bound by the financial penalties that the Commission suggests when it starts the action. The suggestions are just a useful point of reference.

In exercising its discretion, the Court of Justice sets the penalty payment after applying some basic criteria that help to ensure that penalty payments have coercive force and that EU law is applied uniformly and effectively. The criteria include the duration of the infringement, its degree of seriousness and the ability to pay of the Member State concerned. In applying these criteria, the Court of Justice also considers the effects of the Member State's failure to comply with the Court's judgment on public and private interests, and the urgency for the Member State concerned to fulfil its obligations ([789]).

For instance, in *Commission* v *Greece* ([790]), the infringement of the rules of the treaty on State aid was considered very serious by the Court of Justice because Greece had already been declared to have failed to fulfil obligations in four actions brought by the Commission under Article 108(2) TFEU ([791]) and in an action under Article 260(2) TFEU ([792]).

As with penalty payments, the Court of Justice decides on an individual case basis whether to impose a lump sum payment, taking into account the nature of the particular infringement established and the individual conduct of the Member State involved ([793]). The factors examined by the Court of Justice include how long the breach of obligations has persisted since the earlier judgment, and the public and private interests involved.

As imposition of a lump sum payment can be very dissuasive, the Court of Justice is most likely to impose such a penalty on a Member State when future similar infringements of EU law must be effectively prevented ([794]).

When the Court of Justice is looking at non-execution of a recovery order for an aid scheme with many beneficiaries, it often requires the Member State to pay lower penalty payments as the number of recoveries under the scheme increase. However, in its *Commission* v *Italy (Venise and Chioggia)* judgment ([795]), the Court of Justice took a severe approach with regard

([788]) Judgment of 12 July 2005, *Commission* v *France*, C-304/02, EU:C:2005:444, paragraph 86

([789]) Judgment of 12 July 2005, *Commission* v *France*, C-304/02, EU:C:2005:444, paragraph 104.

([790]) Judgment of 14 November 2018, *Commission* v *Greece*, C-93/17, EU:C:2018:903.

([791]) Judgments of 1 March 2012, *Commission* v *Greece*, C-354/10, EU:C:2012:109; of 17 October 2013, *Commission* v *Greece*, C-263/12, EU:C:2013:673; of 9 November 2017, *Commission* v *Greece*, C-481/16, EU:C:2017:845; and of 17 January 2018, *Commission* v *Greece*, C-363/16, EU:C:2018:12.

([792]) Judgment of 14 November 2018, *Commission* v *Greece*, C-93/17, EU:C:2018:903.

([793]) Judgment of 9 December 2008, *Commission* v *France*, C-121/07, EU:C:2008:695, paragraph 62.

([794]) Judgment of 14 November 2018, *Commission* v *Greece*, C-93/17, EU:C:2018:903, paragraph 155.

([795]) Judgment of 17 September 2015, *Commission* v Italy, C-367/14, EU:C:2015:611.

to the 'degressivity' of penalty payments, which it imposed along with a lump sum payment of EUR 30 million. The Court of Justice allowed no reduction in the payments of EUR 12 million per semester until full recovery, and required Italy to continue paying until it showed the Commission that the recovery was complete.

The story behind that judgment is, however, quite complex. In its recovery decision, the Commission found that Italy had granted incompatible aid in the form of reductions in and/or relief from social security contributions to certain undertakings in the regions of Venice and Chioggia. In total, 59 actions against that decision were brought before the General Court, and all of them were rejected. In parallel, the Commission, acting under what is now Article 108(2) TFEU, brought an action for failure to fulfil obligations against Italy ([796]). However, despite the judgment of the Court of Justice, Italy had still not recovered all the aid and had even suspended the recovery of some of it. These factors were relevant to the Court of Justice when it ruled under Article 260 TFEU in the Commission's follow-up action against Italy.

6. Conclusion

The case-law concerning enforcement of the Commission's recovery decisions demonstrates that the final phase of the State aid control procedure is effective and could be reliably used by the Commission to address Member States' failures to meet their legal obligations on the recovery of incompatible aid granted unlawfully. The mechanism envisaged in Article 260 TFEU provides the Commission with the ultimate tool to penalise, with the Court of Justice's help, the disregard of the judgments following the procedure envisaged in Article 108(2) TFEU.

([796]) Judgment of 6 October 2011, *Commission* v *Italy*, C-302/09, EU:C:2011:634.

THE EUROPEAN UNION CARBON BORDER ADJUSTMENT MECHANISM AND ITS CONSISTENCY WITH WORLD TRADE ORGANIZATION LAW

James Flett

1. Introduction

This chapter will focus on an important new piece of legislation currently being adopted by the European Union: the Carbon Border Adjustment Mechanism (CBAM) ([797]), which is the flagship measure in the Green Deal ([798]), the defining policy of the current European Commission. The EU aims to reduce carbon emissions by 55 % by 2030 and become climate neutral by 2050. The CBAM requires that, for all products subject to the relevant legislation ([799]), whether domestic or imported, a carbon price is paid commensurate with the carbon emissions generated during production. If, for an imported product, a carbon price has been paid in the non-EU country, no adjustment is required upon import to the EU. If not, an adjustment must be made, equivalent to the carbon price that would have been paid if the product had been made in the EU. The purpose of the measure is to address climate change by giving effect to the 'polluter pays' principle – that is, by internalising the otherwise exogenous environmental costs of carbon emissions.

Specifically, the CBAM is designed to prevent so-called carbon leakage: the risk that, as the EU increases the level of its environmental ambitions, industry simply shifts offshore, continuing to serve the EU market from non-EU countries with less regulated markets, without diminishing its carbon emissions.

The chapter will situate the CBAM in the context of the EU's international obligations and rights, particularly as regards World Trade Organization (WTO) law, and explain why it is consistent with those obligations and rights. It will explain why the CBAM is an idea, and a measure, whose time has come.

([797]) European Commission, Proposal for a regulation of the Parliament and of the Council establishing a carbon border adjustment mechanism, COM(2021) 564 final.

([798]) European Commission, Commission communication – 'Fit for 55': Delivering the EU's 2030 climate target on the way to climate neutrality, COM(2021) 550 final.

([799]) Iron and steel, cement, fertiliser, aluminium and electricity.

In order to do that, the chapter will briefly describe certain aspects of the historical development of international trade law, which is rather similar to EU law (the law of international economic integration), albeit with some important differences. It will consider how the context has changed from one in which states and firms were primarily or even only concerned with boosting exports and keeping imports out ('Where can I sell my stuff?') to one in which states and firms are now just as concerned about where they get their inputs from ('Where do I make my stuff?').

The chapter will also explain how, in this new globalised world, states are collectively presented with new problems that demand (preferably collective) action, of which climate change is probably the prime example. It will identify a specific activity that, historically, the WTO legal establishment has assumed is not normal or usual regulatory activity. This is the regulation by the EU of so-called non-product-related processes and production methods (PPMs) – that is, those that do not manifest themselves in the characteristics of the product – in a third country. It is this historical assumption that such measures, if non-discriminatory, are not obviously regulated by the General Agreement on Tariffs and Trade (GATT), which has thrown up a whole series of intellectual problems that have been resolved in various ways. This is also the reason why such measures are largely excluded from the relevant subsidiary WTO agreements (the TBT Agreement and the SPS Agreement) ([800]). The chapter will make clear that, although relatively novel, such measures are consistent with WTO law, if their design and architecture ensures that they treat imports and domestic products in an even-handed manner and that any differences flow exclusively from the pursuit of the relevant legitimate regulatory objectives (including, in this case, the protection of the environment).

In order to do that, the chapter will shift to a higher level of abstraction and explain that much of the law is about not how it is to be interpreted in isolation from particular fact patterns but, rather, how it is to be applied to particular and changing fact patterns. This is particularly true of WTO law, because it is replete with so-called constructive ambiguity. This is an inevitable feature of WTO law, given that it is created based on what many different states are capable of agreeing to, despite their very different interests and stakeholders. This often results in rules that are stated in somewhat general and abstract terms. What this means is that, even though important parts of WTO law (notably the GATT) are essentially unchanged since they were first agreed in 1947, the fact patterns to which the law is to be applied have certainly changed, and it is here that we find the flexibility to accommodate measures such as the CBAM. As others have observed, a judge, in adjudicating, must not be influenced by the weather of the day, but must surely be sensitive to the climate of the era (a particularly apt observation in this context) ([801]).

([800]) The WTO Agreement on Technical Barriers to Trade, which applies to technical regulations, standards and conformity assessment procedures, and the WTO Agreement on the Application of Sanitary and Phytosanitary Measures, which applies specifically to measures adopted to protect human, animal or plant life or health on the territory of the regulating member.

([801]) Professor Paul Freund, Harvard University, often referenced by Ruth Bader Ginsburg, Justice of the US Supreme Court.

However, the paradigm change that the CBAM will bring is not something that can be lightly or easily achieved. Legislators, trading partners and, of course, judges will need to be persuaded. This will require deep knowledge and experience of the whole legal system that applies in order to situate the right arguments in the right context. No lawyer coming to the WTO jurisdiction for the first time, however brilliant, could hope to achieve that, because it requires sufficient balance, perspective and authority to present the arguments as fundamentally reasonable and to carry the court. That is where the Commission Legal Service has a central and indeed determinative role to play. Unlike other WTO members, which may not have the necessary resources, the EU, and the Commission Legal Service in particular, maintains an internal team of WTO lawyers with vast experience and knowledge of the subject matter. This skill set and these resources are more or less unique among WTO members, and ultimately it is the Commission Legal Service that will assume, on behalf of the EU, the necessary leadership role in the field of international trade law, bringing the CBAM and eventually the Green Deal as a whole to fruition. In terms of the history of international legal policy, the EU, on behalf of its citizens, will be decisively projecting its values into the international arena in a manner that is both novel and durable, and this will ultimately be a key part of the legacy of this Commission.

Although this is a relatively technical subject, throughout the discussion an effort will be made to explain it in a relatively straightforward manner, without excessive recourse to jargon, so that, hopefully, the general reader will be well able to understand the points being made.

2. The climate change crisis, the Paris Agreement, the failure of the top-down approach and the bottom-up approach as the only remaining option

It is not the purpose of this chapter to rehearse in any detail the evidence regarding climate change and its consequences. Suffice it to say that the Green Deal and the CBAM are grounded in the propositions that climate change and its consequences are real and serious and that they must be addressed through reductions in carbon emissions. If a complainant in international trade litigation were to assert or suggest otherwise, that would surely only make the task of the defendant easier.

International negotiations with the objective of reducing carbon emissions have been continuing for some years, notably within the four corners of the Paris Agreement ([802]). Consensus among participating countries is required, which has proved formidably difficult to reach, and understandably so. Least developed and developing countries take the quite reasonable view that developed countries should bear a greater burden in addressing climate

([802]) See, generally, United Nations Climate Change, 'The Paris Agreement' (https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement).

change since they carry a greater responsibility, having already industrialised and polluted, and are better able to shoulder the burden. China, in particular, continues to characterise itself as a developing country (there is no formal or binding definition in WTO law of what constitutes a developing country) and still tends to put the development objective ahead of the environmental objective. However, a precise formula for calibrating responsibility and allocating the burden of compliance between least developed and developing countries on the one hand and developed countries on the other hand has proved elusive, as has a formula for allocating responsibility among least developed and developing countries. The inevitable result has been a fudge, in the form of the so-called principle of combined but differentiated responsibility. National commitments to reduce carbon emissions are not binding and cannot be enforced. The level of ambition is simply not high enough, and the available mechanisms incapable of delivering the necessary outcome. In the meantime, the planet is on fire, and the matter is becoming increasingly urgent.

Against this background, the Green Deal and the CBAM are grounded in the proposition that the only way forward at this point is to adopt more of a bottom-up approach. That is not to say that the approach is simply 'unilateral'. It is easy enough to use such pejorative terms. One may reasonably point out that when a country continues to pollute a common good, which all the citizens of the world have a right to enjoy, including EU citizens, it is in fact that country that is acting 'unilaterally'. In any event, the EU approach is not simply unilateral, because, while taking necessary action, the EU continues to engage with other countries, and in particular with its main trading partners, in an effort to explain the reasons for the measures it has adopted and to encourage them to follow suit. Furthermore, the EU does not (of course) have the pretension to direct non-EU countries as to how they must produce for their own market, or for markets in other non-EU countries. We may hope that our measures contribute to further movement in that direction, but we do not, of course, seek direct regulation of those matters. Rather, we simply condition access to our market on a requirement that a carbon price has been paid for the product in question, either in the non-EU country where it was produced or at the EU border. At this point, there is simply no other choice.

It has been said in the past that globalisation is not a policy choice but a fact; one may equally state today with good reason that taking action with respect to climate change is not a policy choice but an overwhelming governmental and moral imperative.

3. The law of economic integration, the design and architecture of GATT 1994 and the TBT Agreement, *de facto* discrimination and the necessity test

At this point, it is perhaps helpful to step back and consider the law of economic integration, and particularly WTO law, which is something of an analogue of EU law, albeit with more participants (164 compared with 27 states) and somewhat less complete. We are speaking of the law of economic integration between states, through treaty law. That is, the entire structure is conceptualised through the lens of states as the basic building blocks, both as the authors of the agreements and as the subjects of the law. There is nothing particularly objective about this; it is just historically the case. Thus, the very concept of trade, in terms of volume and/or value, as something that occurs between states, as a protected interest, flows from the state-centred lens on which the entire structure is based. We should constantly bear in mind that trade is just a subset of economic activity more generally (including transactions within states). It is precisely such conceptual assumptions, even as reflected in or written into the relevant treaties, that come under increasing stress as the processes of integration and globalisation progress. Citizens are simply becoming progressively more central to the thinking ([803]).

We also need to bear in mind that we are speaking of the World Trade Organization, not the World Organization for the Protection of the Environment. Trade is an interest protected by the WTO by definition; the environment is not (in the absence of any specific environmental agreement to that effect). States may act for environmental reasons and their measures may be tested by the WTO to ensure that they are not excessively trade restrictive. But the WTO will never tell a state that it must do more to protect the environment.

Finally, we must also be aware of the concepts of absolute and comparative advantage; the latter explains why least developed and developing countries have an interest in participating in the system. A particular developed country may have an absolute advantage over a particular developing country with respect to two different products (making the first two times more efficiently and the second three times more efficiently). The developing country does not have an absolute advantage with respect to either product; however, it has a comparative advantage with respect to the product that it makes only two times less efficiently. The developed country has an absolute advantage with respect to both products but a comparative advantage only with respect to the product it makes three times more efficiently. It is rational for the developing country to specialise in the first product, for the developed country to specialise in the second product, and for the two countries to trade. It is this economic theory of comparative advantage that explains why developing countries have an interest in participating in the system even if they do not have an absolute advantage with respect to any product. We will return to this point below.

([803]) See, for example, Petersmann E.-U., *Constitutional functions and constitutional problems of international economic law*, first edn, Routledge, Abingdon, 2020.

Against that background, the structure of the main relevant treaty, GATT 1994 (which originally dates from 1947), is conceptually relatively straightforward. The main rule is that each member must treat goods from other members in a non-discriminatory way (that is, no discrimination between goods on grounds of origin). The rule covering non-discrimination between other members is known as the most favoured nation (MFN) rule; that covering non-discriminatory treatment of domestic goods and imported goods is known as the national treatment rule ([804]). Naturally, what happens at the border is regulated. In principle, the only tariffs that can be applied are those in the agreed schedule of concessions (unless, exceptionally, anti-dumping or countervailing duties are justified) ([805]). Quantitative restrictions on imports are also generally prohibited (unless the conditions for a safeguard measure are present) ([806]). Internal measures, both fiscal and regulatory, are also regulated: they must be non-discriminatory ([807]). Internal taxes and regulations enforced at the border are analysed under Article III, as opposed to Article XI ([808]). If a subsidy is used as a policy instrument (as opposed to as a fiscal measure or regulation), it is acceptable for it to be granted only to firms on the territory of the subsidising member (the member does not have to make the subsidy available globally), provided that it is not contingent upon export or the use of domestic in preference to imported goods and does not adversely affect the interests of trading partners ([809]).

Importantly, for indirect fiscal measures such as value added tax (VAT) the law provides for the operation of the so-called destination principle. According to this principle, the rate of tax to be paid is that applicable in the country in which the product is sold. Thus, when an imported product enters a country, it is subject to the tax applicable in that country; when a domestically produced product is exported, it is not subject to that tax, or a rebate applies. Such rebates are specifically carved out of subsidies law – that is, they are deemed not to be subsidies ([810]). Critically, as discussed below, no such mechanism exists for regulatory measures.

At the same time, the treaty states that nothing in the GATT is to be construed as preventing a member from adopting a measure necessary to protect an enumerated list of protected legitimate policy objectives, including the protection of public morals, or human, animal or plant life or health, or the conservation of exhaustible natural resources. There is also a provision covering security-related exceptions ([811]).

([804]) GATT 1994, Articles I and III.

([805]) GATT 1994, Articles II and VI; Agreement on Implementation of Article VI of GATT 1994 (Anti-Dumping Agreement); Agreement on Subsidies and Countervailing Measures (SCM Agreement).

([806]) GATT 1994, Articles XI and XIX; Agreement on Safeguards.

([807]) GATT, Articles III:1, III:2 and III:4.

([808]) Note Ad Article III.

([809]) GATT, Article III:8(b); SCM Agreement, Articles 3.1(a) and (b) and Part III.

([810]) Note to Article XVI of GATT 1994; SCM Agreement, footnote 1 and Annex I, particularly items (e) and (h) and footnote 58.

([811]) GATT 1994, Articles XX and XXI, particularly Articles XX(g), XX(b) and XX(a).

Traditionally, the treaty has been interpreted and applied by taking a bifurcated approach to the obligations (such as the MFN rule) on the one hand and the rights or exceptions (such as the so-called environmental exception) on the other hand. Following this approach, one speaks of a 'violation' of an obligation and then considers whether that violation is 'justified' by one of the rights. However, this is not how the treaty is actually written. Rather, it is written in a more integrated or unitary manner, providing that nothing in the GATT is to be construed as preventing the adoption of a measure that pursues one of the enumerated legitimate policy objectives (including environmental objectives). There is a difference between a violation that is justified and a measure that, as a whole, is consistent with the balance of obligations and rights under the treaty ([812]). This is a point to which we shall also return.

With this brief summary of the design and architecture of the GATT in mind, we may see how it functions tolerably well with regard to the regulation of product characteristics. Traditionally, countries may regulate the characteristics of products sold in their market on the grounds that these may have implications for, notably, human, animal or plant life or health, or the environment. Similarly, countries may also regulate production processes, including those carried out in other countries, to the extent that they are expressed in the characteristics of the product. However, traditionally, countries do not normally or extensively regulate production processes in other countries that are not expressed in the characteristics of a product sold into the market of the regulating member.

It is important to note that, in accepting non-discriminatory but autonomous national regulation, the system accommodates limitations on the protected trade interest. That is, while it welcomes and encourages internationally agreed rules, at the same time it accepts in principle a situation in which each of the 164 WTO members may have a different regulation concerning the product characteristics of a particular item (such as a plug), with respect both to domestic production and imports. Obviously, this is not ideal for achieving economies of scale or for specialisation or, thus, for exploiting comparative advantages, but it is inherent in the design and architecture of the system. It is a compromise.

Finally, we must consider the problem of the regulatory measure that is non-discriminatory on its face. Without more, this would not appear to be caught. It would not appear to violate the rules against discrimination on grounds of origin, or the rules regarding the schedule of concessions, or the rules regarding quantitative restrictions. Thus, without more, the measure would never be subject to the necessity test under Article XX of the GATT (that is, it would never be scrutinised in order to ensure that it was the least trade-restrictive measure available and that there was no alternative, less trade-restrictive possibility that would make an equivalent contribution to the legitimate policy objective).

([812]) See, for example, Weiler, J., 'Law, culture and values in the WTO: gazing into the crystal ball', in Bethlehem, D., McRae, D., Neufeld, R. and Van Damme, I. (eds), *Oxford Handbook of International Trade Law,* Oxford University Press, Oxford, 2009.

The main solution to this problem ([813]) has been the development of the concept of so-called *de facto* discrimination. This concept is based on the provisions concerning internal taxation, which seem to create a second category, leaving aside measures that expressly discriminate on grounds of origin ([814]). This category consists of measures that are origin neutral on their face but are nevertheless applied so as to afford protection to domestic production. Apparently, the concept requires that the measure may be expected to have an asymmetrical economic impact on imports and competing domestic products. This is already a problematic proposition, because the situation under scrutiny may be said to result in part from the measure but equally in part because of the decisions made by economic operators in the exporting country. In addition, most academic commentators support the view that, conceptually and intellectually, the notion of *de facto* discrimination necessarily requires regulatory purpose to be taken into account. That is because a genuine environmental measure that is origin neutral on its face may well impact existing economic operators differently, and indeed is likely to do so. This does not mean that it discriminates on grounds of origin. Despite this, the WTO's Appellate Body has decided that the concept of *de facto* discrimination in the GATT need not involve any consideration of regulatory purpose (this being a matter reserved eventually for the interpretation and application of Article XX of the GATT) ([815]). This is the case for both fiscal and regulatory measures, and for the national treatment and MFN rules. In practice, since it is essentially impossible to design an origin-neutral measure that affects all of the other 163 WTO members equally, this means that all regulations will violate some obligation, and therefore all regulations will be subject to the necessity test under Article XX of the GATT. In effect, the necessity test introduced in Article 2 of the TBT Agreement (further discussed below) has been reverse-engineered into the GATT. The end result is to make the analysis required less like a bifurcated approach and more akin to an integrated or unitary approach.

An important part of this puzzle is the concept of 'like product', about which a great deal has been written and which is much misunderstood. The correct approach is actually quite simple. First, one has to consider what is the definition of the product – that is, which things can be grouped together and referred to as one product. There is no absolutely 'right' answer to this question, because it depends on the cross-price elasticities of demand (and to a lesser extent supply) that are deemed sufficient to establish that two things compete sufficiently closely to be grouped together as a single product. Next, in examining whether or not there is *de facto* discrimination, and in particular whether or not there is an asymmetrical adverse impact on imports, one must define the domestic product and the imported product, categorically, in identical terms. Then, one must examine the entire content of the domestic category and the entire content of the

([813]) An earlier theory posited that non-product-related PPM regulations are controlled by Article XI of GATT 1994, which prohibits quantitative restrictions on imports. See, for example, GATT Panel Report, *US-Tuna (Mexico)*, paras. 5.11-5.14 (unadopted by the Dispute Settlement Body); GATT Panel Report, *US-Tuna (EEC)*, paras. 5.8–5.10 (unadopted by the Dispute Settlement Body). This theory has now been largely discredited.

([814]) GATT 1994, Article III:2, first and second sentences.

([815]) Appellate Body Report, *European Communities – Measures prohibiting the importation and marketing of seal products*, paras. 5.101–5.530.

imported category for the purposes of reaching a conclusion regarding *de facto* discrimination. What one is not permitted to do is to compare one domestic subcategory with one different imported subcategory; such a comparison is just economic and legal nonsense ([816]).

In considering whether or not two things compete and may be considered together as a product, it is legitimate to take into account not just their physical characteristics but also other considerations relevant to the operation of the forces of supply and demand, including the manner in which they have been produced. Consider, for example, two identical items, one of which has been produced in an environmentally friendly manner and the other of which has not. It is possible to argue that, if consumers care about the environment and are informed by an appropriate label, a situation might in theory be reached in which all consumers always choose the environmentally friendly item, there being no price difference at which they would switch to the other. In that case, one might argue that the two items were in different markets – that is, that they did not compete at all. Accordingly, one could argue that a regulation banning the environmentally unfriendly item (both domestically and with respect to imports) does not give rise to *de facto* discrimination, because in order for there to be *de facto* discrimination there must be competition between the two items in question. One could even try to develop this argument by focusing only on those consumers who always choose the environmentally friendly product and asserting that they constitute a different market. However, such an argument is hardly realistic. In the real world, price will continue to play a role. One also needs to be wary of situations that are created by the measure under scrutiny itself. But perhaps most importantly, one has to be alert to the fact that there is no way an international trade adjudicator is going to sign off on a relatively intrusive non-product-related PPM regulation on the grounds that it is non-discriminatory. This would represent a binary analysis and outcome. Instead, the adjudicator will always seek, and find, a way to get to the calibrated necessity test under Article XX of GATT 1994, and with good reason.

Layered on top of the GATT is the TBT Agreement, the two agreements applying concurrently. The TBT Agreement, which dates from 1995, controls technical regulations and standards, which are precisely defined. Article 2.2 of the TBT Agreement contains a necessity test that is an analogue of the necessity test in Article XX of the GATT. The problem of getting to the necessity test is thus solved, since the TBT Agreement simply applies to the relevant types of measures (arguably, it requires that the measure may have a significant effect on trade, but this is probably an extremely low threshold). While there has been some controversy about the issue, it appears that the TBT Agreement does not apply to non-product-related PPM regulations, except, possibly, to the extent that they deal with terminology, symbols, packing, marking or labelling requirements ([817]). Similarly, the SPS Agreement only applies to the protection of interests on the territory of the regulating member. This drafting probably

([816]) Flett, J., 'WTO space for national regulation: requiem for a diagonal vector test', *Journal of International Economic Law*, Vol. 16, No. 1, p. 37, 2013.

([817]) Appellate Body Report, *European Communities – Measures prohibiting the importation and marketing of seal products*, paras. 5.8–5.12.

reflects a (misconceived) assumption that WTO members do not generally regulate non-product-related PPMs. Were it not for the expansive understanding of the concept of *de facto* discrimination described above, this would have created an anomalous situation in which non-product-related PPM regulations (which are potentially highly intrusive on the policy calculus of trading partners) would have been subject to limited scrutiny. In summary, from a legal policy point of view, the expansive approach to the concept of *de facto* discrimination kills two birds with one stone: it makes the GATT necessity test generally applicable, and it ensures that non-product-related PPM regulations are subject to the same intensity of control as other types of regulation, notwithstanding their exclusion from the TBT Agreement.

4. The European Union emissions trading system

With the foregoing observations in mind, the next step is to consider the EU emissions trading system (ETS) ([818]), which is commonly referred to as a 'cap and trade' system. The objective of the EU ETS is environmental, and specifically to reduce carbon emissions by putting a price on them. It reflects the fact that the EU is pursuing a particular level of environmental ambition, in terms of reducing carbon emissions, higher than that of certain of its trading partners, and indeed higher than that of the Paris Agreement.

Under the ETS, firms producing the designated products in the EU are required to purchase and surrender certificates entitling them to do that. Because this relates to production in the EU, it does not apply to imports. The total number of available certificates is fixed in such a way as to exert downward pressure on the carbon emissions of EU industry. The certificates can be traded. This introduces certain market-based mechanisms into the process. The system creates an incentive for firms to consider alternatives to carbon emissions (and the associated purchase and surrender of certificates). They can decide instead to produce in a more efficient manner, avoiding carbon emissions and thus avoiding the obligation to purchase and surrender certificates. In this way, firms compete with each other not just in terms of price or product characteristics but also in terms of carbon emissions. In other words, the otherwise exogenous environmental costs of carbon emissions are internalised in the market mechanism, and ultimately through prices, subject to the disciplines of consumer demand. It is important to note that what is not going on here is that the government is intervening directly to require, for example, the use of greener technology. That would be a different approach. The two approaches are not mutually exclusive, and indeed, in the EU, there is a significant amount of regulation that falls into this latter category. The ETS, however, is something quite different. What it represents is not direct regulation of specific actions by firms but rather the general framing, through regulation, of the parameters of a market, including carbon costs, within which the forces of supply and demand will be allowed to play out. The sectors covered by the

([818]) See, generally, European Commission, 'Climate action' (https://ec.europa.eu/clima/index_en).

system are those with the highest carbon emissions, taking into account what can reasonably be achieved, at least as a first step, in administrative terms.

It is in the nature of economic integration from the bottom up that this type of regulatory measure entails what might be termed a 'first-mover disadvantage'. That is, by comparison with its trading partners, the EU has increased its level of environmental ambition, specifically with respect to domestic production. This creates the regulatory problem of carbon leakage, on both the import side and the export side. In other words, all other things being equal, EU producers will have an incentive to shift offshore, to a non-EU country that is less regulated in terms of carbon price, in order to continue serving the EU market with imports. On the export side, they have an incentive to move to the less regulated non-EU country in order to produce there and serve that market. This is a particular problem when one is speaking of a common good such as the environment, which is adversely affected by carbon emissions everywhere. Thus, without more, the very purpose of the EU ETS, which is to reduce carbon emissions, would be frustrated, because industry would just shift offshore and continue polluting, and there would be no impact on climate change.

The solution to this has been to provide for free allowances to those sectors covered by the ETS that are most at risk of delocalisation – that is, the issuance of a certain number of certificates free of charge. This is, of course, a compromise, because it diminishes the environmental effectiveness of the ETS. However, it has the advantage of not burdening imports. On the export side, the free allowances have been considered by at least one trading partner to constitute subsidies (a financial contribution in the form of revenue otherwise due foregone), conferring a benefit, that are specific, and to cause material injury to the domestic industry of that other WTO member, giving rise to countervailing duties. It must be doubtful that a subsidy re-establishing a level playing field in terms of environmental competition can reasonably be said to cause price and thus volume effects for the less regulated industry in the other country, but such countervailing duties have not, to date, been challenged at the WTO. Importantly, any such subsidy relates indistinctly to domestic production and exports, so cannot be said to be a prohibited subsidy, contingent, in law or in fact, upon export. Export subsidies and import substitution subsidies are prohibited, without it being necessary to demonstrate that they cause injury or adverse effects to the interests of another WTO member. Prohibited subsidies cannot benefit from the general exceptions under Article XX of GATT 1994, including the environmental exception, because that provision refers to 'this Agreement', meaning GATT 1994 and not the SCM Agreement. In any event, a prohibited subsidy would never pass the necessity test, because such subsidies are considered to be particularly trade distorting, and there would always be an alternative, less trade-restrictive measure equally capable of contributing to the legitimate policy objective.

The EU ETS has reached the point at which it needs to be updated and complemented with the CBAM. The tension inherent in the system between the relatively increased level of environmental protection and the granting of free allowances can be sustained only up to a

point. It is clear that the Paris Agreement is not delivering a timely solution to the problem of climate change. The level of environmental ambition must be raised further. This means that the free allowances must go. And this means in turn that the problem of carbon leakage, on both the import side and the export side, returns.

5. World Trade Organization law and the regulation of production processes unrelated to product characteristics

Before turning to the CBAM itself, it is opportune to explore in more detail the issue of the regulation of production processes unrelated to product characteristics in international trade law. As explained above, traditionally, this has not been a focus of regulatory efforts, which have been more concerned with the regulation of product characteristics. The introduction of measures to regulate such processes reflects an evolution in the legitimate concerns of trading countries and their regulatory authorities. However, they are relatively rare, and have not usually been controversial, with some exceptions ([819]).

It is helpful perhaps to understand the reticence with which such measures have been considered by the trade establishment in Geneva. As explained above, even in the case of the regulation of product characteristics, multiple national regulations have the effect of fragmenting markets and diminishing the benefits of trade, although this is a compromise that is accepted by the system. The regulation of non-product-related PPMs exacerbates that effect. A national producer in one WTO member might in theory need not just 163 different versions of their product but 163 different production lines. This does more than just hinder economies of scale and the exploitation of comparative advantage; it entirely negates them, because it makes economies of scale impossible to achieve in practice. In addition, another member might legitimately complain that such regulation was relatively intrusive on its domestic policy calculus. It might affirm, for example, that it cared just as much about the environment but had a relatively impoverished population to feed, as a priority. If all 164 WTO members were to adopt non-product-related PPM regulations on all matters of concern to them, the whole international trading system would probably grind to a halt.

However, the fact remains that WTO law does not *per se* prohibit the regulation of non-product-related PPMs. It may be that, when the GATT was originally written in 1947, this was not something that the drafters were thinking about.

([819]) These include, notably, the *US-Shrimp/Turtle*, *US-Tuna/Dolphin* and *EC-Seals* cases. The EU already has measures of this type in place, for example covering genetically modified organisms, the protection of animals at the time of slaughter, the use of animal testing in the development of cosmetics, the labelling of eggs, the use of leghold traps, the sale of cat and dog fur, and the killing of seals.

But the notional intent of a small group of people involved in the negotiation of an agreement is an illusory basis on which to interpret and apply the law. Rather, we must look at the law itself – that is, the words that are actually in the treaty – and, by studying the design and architecture of the relevant provisions, understand their purpose.

This is an objective notion of 'intent' or 'object and purpose'. It is the same way that we can look at a hammer and understand that it is for nails, and look at a screwdriver and understand that it is for screws.

Furthermore, and critically, we must understand that a great deal of the law, perhaps more than 90 % of it, is about not how the law is to be interpreted in abstract terms, divorced from any particular fact pattern, but, rather, how the law is to be applied to a particular fact pattern. This is particularly true of the WTO Agreement, which is replete with constructive ambiguity – that is, rules written in a general and abstract manner in order to facilitate agreement. Thus, when, for example, in the *Shrimp/Turtle* dispute, WTO adjudicators accepted that turtles could be an 'exhaustible natural resource' within the meaning of Article XX(g) ([820]), even though this was probably not in the minds of the original drafters, they were not bending or distorting the law inappropriately. They were simply applying the law, in a balanced and reasonable way, to new fact patterns arising today, as they were bound to do.

Thus, when we examine the GATT, we do not, in truth, find any prohibition on the regulation of non-product-related PPMs. They cannot be said to somehow violate the rules against quantitative restrictions or non-discrimination *per se*, and to be incapable of justification. Article XX of GATT 1994 does not contain a territorial limitation ([821]). On the contrary, certain subparagraphs, such as subparagraph (e) ('relating to the products of prison labour') appear to strongly suggest that such measures are possible. The chapeau of Article XX itself refers to 'countries where the same conditions prevail', apparently directing the reader to consider the conditions prevailing in the third country or countries, and not just the characteristics of the regulated product.

The problem, then, is to try to understand how the system finds a reasonable balance between the acceptable regulation of non-product-related PPMs and a regulation of non-product-related PPMs that would be excessive. The key to this is the necessity test, particularly when applied in the context of a common good, such as the climate – that is, when it is in the nature of the problem being addressed that it necessitates the regulation of non-product-related PPMs. And that brings us, finally, to the CBAM and WTO law.

([820]) Appellate Body Report, *United States – Import prohibition of certain shrimp and shrimp products*, paras. 127–134.

([821]) GATT Panel Report, *US-Tuna (EEC)*, paras. 5.14–5.20; Appellate Body Report, *US-Shrimp*, para. 133 (basing its reasoning on the observation that the relevant species of turtle migrates also in US waters, without ruling on the question of whether or not there is an implied territorial limitation in Article XX(g)).

6. The Carbon Border Adjustment Mechanism and World Trade Organization law

Perfectly aware of the complexity of the problem, and the controversy surrounding it, the EU has for many years been engaged in discussions with its trading partners and with other countries in order to address the problem of carbon emissions and climate change. There have been extensive exchanges of information and analysis directed towards that outcome, and this continues to be the case today. However, at some point it becomes clear that, in addition to continuing discussions, some further action is necessary, even if it needs to be autonomous. That point has been reached. The climate emergency is extremely serious and accelerating. Urgent action is required. European citizens demand it. They will simply not accept that being a member of the WTO and participating in the international trading system has as a consequence that we must sit on our hands while the planet burns. Nor will European consumers accept that they must continue to use goods that have not paid a carbon price, effectively dumping the problem, or at least responsibility for it, on someone else's doorstep. In effect, EU citizens demand that new ways of thinking about, interpreting and applying international trade law be found, in order to allow their legitimate concerns to be addressed. As we will now explain, in this respect, in moving forward, the EU has very carefully selected the least trade-restrictive measure reasonably available, and the only one that creates a regulatory incentive for other countries to follow suit.

6.1. The ETS/CBAM as a whole

The first point to make is that the matter can only sensibly and reasonably be considered by looking at the ETS/CBAM as a whole. That is because the CBAM has been designed to complete and complement the ETS and is dependent upon it. No doubt, complainants may be particularly interested in the CBAM, because it applies to imports, and less interested in the ETS, because it does not. But it is not, or at least should not be, the subjective trade or perceived legal interests of complainants that determines what reasonably constitutes the subject of the discussion.

In WTO case-law there is a certain amount of focus on what constitutes 'the measure at issue'. Lawyers in particular tend to become very focused on this. They like to get absolutely clear from the start what 'the measure at issue' is and then carry that analytical clarity with them all the way through the case. So the question is, is 'the measure at issue' inconsistent with the obligation, is 'the measure at issue' justified by the exception, and so forth. There is certainly some merit in this approach. It brings some analytical clarity and order to debates. But, like anything else, it is possible to have too much of a good thing. In truth, the question of what is 'the measure at issue' is generally rather more subtle than that. One might, for example, begin by identifying a particular piece of legislation set out in a document. Then one might realise that it is a particular article that is the focus of the concern, and perhaps a particular paragraph or subparagraph, or even a particular phrase. But then one might also

realise that one can only understand the complaint being made by referring to other provisions in the same piece of legislation. The point at which these are part of 'the measure at issue' or just part of the context in which 'the measure at issue' exists is quite often far from clear. If the identified provision includes qualifying language, is 'the measure at issue' the general rule or the exception, or both, separately or together? The matter can become even more complicated if it is necessary to look at several documents, or to think not just about the words on the page of the legislative provision but how they have been applied in practice to a particular fact pattern. Further complexity arises if the complainant seeks to identify 'the measure at issue' not by referring directly to particular terms used in municipal law but, rather, using more abstract terms selected by the complainant.

The answer here is that, while it is reasonable to do what is necessary to comply with the procedural requirement that 'the measure at issue' be appropriately identified, one should not overstate the point. As observed above, for example, complainants will no doubt wish to focus on the CBAM, but this should not release them from properly analysing it in the context of the ETS or allow them to ignore the overall design and architecture of the ETS/CBAM. If complainants accept in principle that a measure of this type is possible (which they should), we should not need to read lengthy arguments directed against the regulation of non-product-related PPMs *per se*. To the extent that this implies that there must be a specific aspect of the ETS/CBAM with which complainants may wish to take issue, such as product coverage, we should expect it to be reasonably identified from the outset. And so forth.

There is also a certain line in WTO case-law, consistent with the above point, to the effect that it is in principle for the complainant to identify what 'the measure at issue' is. This is a reasonable point of departure. After all, the complainant should know what it is complaining about. It is not for the defendant or the panel to guess what that might be. That said, as always, there are certainly limits to this proposition. For example, it is probably fair to say that one of the consequences of some of the 'over-lawyering' that has sometimes taken place in WTO litigation is that, having analysed the case, lawyers have attempted to manipulate the process by artificially circumscribing what they assert is 'the measure at issue'. To take a somewhat simplified but obvious example, if Article 1 imposes a tax of 20 % on domestic products and Article 2 imposes a tax of 20 % on imports, one cannot reasonably attempt to limit the definition of 'the measure at issue' to Article 2, then make a claim of discrimination. In an extreme case, I have seen a complainant define the alleged 'measure at issue' in abstract terms of its own invention that by definition violated the relevant obligation, and then simply assert the existence of such a measure, even in the absence of any direct or compelling evidence to that effect.

Linked to this discussion is the fact that the WTO Dispute Settlement Understanding has been interpreted and applied in such a way that the terms of reference of a panel are defined only by the panel request. There is no statement of defence integrated into the terms of reference (even though this is something that could have been done). Such a statement of defence would

give the defendant an opportunity to indicate whether or not it considers the description of 'the measure at issue' advanced by the complainant reasonable (as opposed to under-inclusive or indeed over-inclusive).

The answer here, again, is that one should not overstate the point. While complainants may be expected to identify 'the measure at issue', they should not be permitted to artificially and unfairly control the conduct of the case, including the manner in which the panel eventually frames its analysis, without regard to a more reasonable and objective view about what is or should be the subject of the discussion.

6.2. Product coverage, *de facto* discrimination, and the integrated or unitary approach to obligations and rights under World Trade Organization law

Based on recent experiences in similar cases, one may expect that one of the issues that may come up is product coverage and alleged *de facto* discrimination. The argument goes like this: here is a product that is covered by the ETS/CBAM; here is another product that is not and that competes in some degree; I make or would like to make the product that is covered; regulatory purpose is irrelevant; so there is a violation of the non-discrimination rules. We continue the analysis under Article XX of GATT 1994, according to which the defendant has the burden of proof.

This kind of argument is profoundly unsatisfactory in many ways, legally and intellectually, for the reasons already explained above. At its heart is a concept of *de facto* discrimination that has, at this point, practically become an empty shell – that is, a very low or even non-existent hurdle on the way to Article XX of GATT 1994. As explained above, one cannot meaningfully compare two different products; one must consider the entire category on both sides of the comparison. One cannot reasonably ignore the fact that the situation complained of results, at least in part, from decisions made by the industry of the complainant, or to be made (allegedly) by it in the future. And one cannot reasonably ignore regulatory purpose. The problem is that, if one attempts to argue these points as the defendant, unsuccessfully (because the legal cards have at this point been stacked in favour of the complainant), one arrives at consideration of Article XX as a 'violator' of the rules against discrimination on grounds of origin – and this in a very binary manner (one either violates or not, there being no calibration). And as one tries to explain that one's measure is in truth even-handed, one finds oneself running up against the very same kinds of arguments that one has just lost. This is not conducive to a fair hearing of the defence.

Here is what has, in fact, occurred.

First, the product scope of the ETS was chosen by focusing on sectors with relatively high carbon emissions, but also taking into account what was administratively feasible (the SPS Agreement refers to what is reasonably available, taking into account technical and economic feasibility). No one could even sensibly suggest that, in fixing the product scope of the ETS, the EU was engaging in *de facto* discrimination against imports. The ETS does not even apply to

imports. Exactly the reverse is true. In adopting the ETS, the EU was autonomously increasing the level of its environmental ambition, placing a burden on domestic production that was not placed on imports at all. That is, by its own terms, the ETS represents reverse discrimination. In other words, under the ETS, imports are treated more favourably than domestic products. To characterise this as *de facto* discrimination would be indeed surreal.

Second, the CBAM simply adopts as a starting point the same product scope as the ETS, in order to complete the regulatory structure and eliminate the reverse discrimination. The regulation, therefore, specifically identifies the product scope of the CBAM on the basis of objective criteria, including carbon emissions and the risk of carbon leakage, taking into account what can reasonably be achieved at this point in time, having regard to technical and economic feasibility.

Third, it is certainly the case that some WTO members will produce or assert that they wish to produce a product covered by the ETS/CBAM that competes in some degree with a product that is not covered or not yet covered by the ETS/CBAM. As WTO law has to date been interpreted and applied, it would be impossible to design a measure without this result.

Fourth, one cannot reasonably expect a WTO member seeking to regulate from the bottom up on an issue such as climate change to regulate everything at once. WTO members are permitted to approach a complex and extensive problem progressively when regulating. That is what the EU is doing, with the extension of the ETS/CBAM to more sectors already under discussion and consideration.

Fifth, none of this detracts from the basic observation that the ETS/CBAM is even-handed, that it pursues an exclusively environmental objective and that it does not constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions exist, or a disguised restriction on international trade. In other words, by far the better approach is to adopt an integrated or unitary perspective, rather than a bifurcated one. And any such integrated analysis must also be properly calibrated to take into account such things as the relative remoteness of asserted competitive relationships, the relative propensity of the non-EU country to produce the relevant product as opposed to some other product and the relative implausibility of the proposition that the entire ETS/CBAM edifice has been set up by the EU for protectionist as opposed to environmental reasons. In truth, one could observe that complainants should probably not be attacking the EU at all; they should be thanking it for assuming a large part of the regulatory burden of addressing climate change – an additional environmental effort upon which complainants are, in fact, free-riding.

Sixth, complainants making such arguments should take great care that they do not get what they wish for. WTO law does not dictate how adverse panel findings are to be implemented. A discrimination finding can be implemented by aligning either with the lower or the higher standard. Thus, if the best a complainant can do is complain that a particular product is covered while another is not, it would be a simple matter to implement such findings by extending the

product scope of the ETS/CBAM, which would, of course, not be the result actually sought by complainants. In bringing the case, the complainant would in fact be doing the environmental lobby in the EU a big favour. Potential complainants should probably therefore think very carefully before acting as to what they are trying to achieve, and not be misled by enthusiastic lawyers, who will, of course, have their own agenda.

6.3. Exclusively legitimate policy objectives

One of the points that will no doubt come up in the litigation is the question of what objectives the EU is pursuing in adopting the ETS/CBAM. The EU will explain that it is pursuing an environmental objective, seeking to address climate change by reducing carbon emissions ([822]). There cannot be any doubt that this comfortably meets the requirements of Article XX(g) of GATT 1994, which refers to 'the conservation of exhaustible natural resources', or that the CBAM is made effective in conjunction with restrictions on domestic production or consumption. It also falls within the scope of Article XX(a) (public morals). There is nothing to prevent the subparagraphs of Article XX overlapping. One cannot, in this case, deny the public morals aspect of the measure, and this does have consequences. Specifically, the concept of concurrent defences (to mirror the concept of concurrent obligations) has yet to be properly developed in WTO law. What this means is that one should not split the measure into a public morals element and an environmental element (something that would surely be impossible in this case in any event) and analyse each element separately under each exemption. Nor should one assess the defences in the alternative – that is, first test the entire measure against the environmental objective, then test the entire measure against the public morals objective. Rather, the defences are invoked concurrently: there is a single measure with a double objective. The specific consequence of this is that any alternative mooted by the complainant must make an equivalent contribution to both legitimate policy objectives, a point we return to below.

Complainants are likely to assert that the objective or one of the objectives of the CBAM is to raise revenues. That is not particularly the case. Like many such measures, the ETS/CBAM may reasonably be expected, at least in the short term, to have both a behaviour-changing and a revenue-raising outcome. Taxes often have both consequences and are rarely set so as to be entirely behaviour changing (that is, prohibitive) or entirely revenue raising (that is, with no impact on behaviour). But the fact remains that, in the ideal world that the EU would like to see evolve, all its trading partners would introduce carbon pricing, and no one would ever pay a CBAM charge. In any event, raising revenue is an entirely respectable exercise for all WTO members, and they all do it all of the time, so the fact that the ETS/CBAM may have that outcome, at least in the short term, certainly does not take it outside the four corners of Article XX of GATT 1994.

([822]) As indicated above, other general exceptions are or may be relevant, including those under Article XX(b) (measures to protect human, animal or plant life or health), Article XX(a) (public morals) and Article XX(d) (measures necessary to secure compliance with law or regulations not inconsistent with GATT 1994).

Of course, the term 'exclusively' here is important. In other words, they will need to be satisfied that the design and architecture of the ETS/CBAM does not reveal that it has the objective of discriminating between countries where the same conditions prevail or of creating unnecessary obstacles to international trade (that is, that it is protectionist).

One does quite often see over-enthusiastic complainants, no doubt encouraged by their lawyers, attempting to persuade adjudicators to find in their favour on this point. This would be a kind of knockout blow, making it unnecessary to consider the rest of Article XX. It would imply that the defending WTO member was lying, both in its legislation and in the litigation, about the purpose of the measure. This is generally not the case and in any event would be extremely difficult to establish. Adjudicators are, understandably, reluctant to find that the defendant is in bad faith. This is not, therefore, how the matter will be decided. Rather, it will be decided, one way or another, by examining specific elements of the ETS/CBAM, in the context of the necessity test, to which we return below.

6.4. Addressing carbon leakage on the import side only as a necessary means of achieving legitimate policy objectives

We may also anticipate that complainants will repeatedly affirm that the EU is acting to address carbon leakage on the import side only because it does not want its industry to shift offshore, for industrial policy reasons. They will argue that this is an end in itself and sufficient to establish the protectionist nature of the measures. However, the measures themselves explain at great length, and this is also very clear from the context and from the design and architecture of the measures, that they address the problem of carbon leakage on the import side not as an end in itself but only as a necessary means of achieving the overarching environmental objective. This is a subtle but important distinction.

6.5. Even-handedness: the ETS/CBAM is always calibrated to carbon emissions

Keeping in mind the foregoing discussions regarding the concept of *de facto* discrimination, the important point to note is that the ETS/CBAM is even-handed because it is always calibrated to carbon emissions. That is, it merely sets out to ensure that all the relevant products produced or sold in the EU have paid a carbon price at least once. If a carbon price has not been paid in the non-EU country, a CBAM payment will be due. If a carbon price has been paid in the non-EU country, no CBAM payment will be due.

It is important in this context to think very carefully about what one actually means by the concept of discrimination on grounds of origin. What that concept actually means is that two identical products are treated differently only because of their origin. If they are treated differently for any other reason, one is not looking at discrimination on grounds of origin at all but

at discrimination on grounds of whatever that other difference may be. Here, the difference is whether or not a carbon price has been paid. In other words, once it is successfully demonstrated that the ETS/CBAM is consistent with Article XX of GATT 1994, the logical conclusion is actually that it does not involve *de facto* discrimination at all. Hence the observation that what is really going on, or at least what should really be going on, is not a bifurcated analysis but rather an integrated or unitary analysis.

No doubt complainants will seek to scrutinise any differences between the ETS and the CBAM. Such differences certainly exist for a variety of very good reasons. For example, the ETS is a cap and trade system. One could not have such a cap and trade system on the import side without introducing quantitative restrictions, which would be more trade restrictive. And in any event one could not reasonably, as a regulating authority, have the pretension to cap production in non-EU countries. The EU is confident that the various differences that exist all flow exclusively from the legitimate policy objectives being pursued, taking into account what is reasonably feasible from a technical and economic point of view. No doubt these are matters that may be explored in more detail during any eventual litigation.

6.6. The key feature of the measure: the regulatory incentive to price carbon and the unsuitability of a tax based on the destination principle

It should now be apparent from the foregoing discussion that the key feature of the measure is the regulatory incentive for non-EU countries to introduce carbon pricing of their own, at least for exports to the EU. This is the regulatory nudge that is designed to overcome the blockage at the level of the Paris Agreement and to precipitate or catalyse the necessary action by other countries. In this respect, it is to be very carefully noted that the EU is not conditioning access to its market by using a stick. It is using instead a carrot. That is, it is creating a situation in which the exporting member faces a choice: either it does not introduce carbon pricing and pays CBAM (to the EU), or it introduces carbon pricing, collects the relevant funds itself, redistributes them as it sees fit and pays no CBAM. All other things being equal, the hope is that this relatively simply calculus will produce the desired result. And of course the EU hopes that the process may spill over into carbon pricing for the domestic market of the non-EU country and its other export markets, even if this is not directly the object of the measures it has adopted.

This feature confirms that the ETS/CBAM is not a tax but a regulatory measure. There is a certain amount of pseudo-technical analysis that has gone into the question of which substantive obligations under GATT 1994 may be employed in order to assess the ETS/CBAM – that is, whether it is a border or internal measure, a tax (whether direct or indirect) or a regulation. This is not or does not need to be the centre of gravity of the debate, and one should not get lost in the detail, since it will not, or at least should not, change the outcome. The most straightforward observation one can reasonably make is that the ETS/CBAM is, in essence, a behaviour-changing regulatory measure that pursues exclusively legitimate objectives and, at this point, is the least trade-restrictive option available to address the urgent problem of climate change.

It should also be reasonably clear that creating an incentive for non-EU countries to adopt carbon pricing, at least for exports to the EU, is a legitimate objective, even though it is in some sense extra-territorial. That flows from the nature of the climate as a common good. The EU cannot simply address itself to the European climate. We must, necessarily, address the climate as a whole.

A carbon price based on the destination principle would not make the same contribution to achieving the overarching legitimate policy objectives of the EU. It would not create the same regulatory nudge for non-EU countries, because no credit would be given for carbon pricing in the non-EU country. In other words, it simply would not create any incentive for non-EU countries to introduce carbon pricing of their own. Furthermore, on the export side, it would not make the same contribution to the legitimate objectives being pursued (because there would be a rebate). Finally, even though subsidising or supporting exports might seem to enhance trade, when trade deflection and diversion effects are taken into account such measures actually tend to introduce inefficiencies, and at least in this sense would be more trade restrictive. We will return to the question of subsidies, but at this point we may reasonably observe that the necessarily relatively intrusive nature of the ETS/CBAM on the import side is nicely and appropriately balanced by forbearance on the export side, given the absence of the rebates that would be associated with a tax based on the destination principle.

6.7. Countries where the same conditions (in terms of carbon pricing) prevail: different measures address the development objective

As explained at the beginning of this chapter, a very important part of the discussion in the context of the Paris Agreement relates to the balance to be struck between the environmental objective and the development objective, taking into account, in particular, the costs of past industrialisation and pollution. This is quintessentially a matter of international climate change politics, which is precisely why the discussion is stuck and is unlikely to progress further in a timely manner.

However, the question that we must ask ourselves as lawyers is whether or not, as a matter of law, the WTO requires the EU to integrate the development objective into the ETS/CBAM. The answer to that question is that clearly it does not. The key provision is the chapeau of Article XX of GATT 1994, which refers to countries where the same conditions exist. The question, of course, is what are the relevant conditions – that is, what is the metric by reference to which sameness is to be determined as present or not. Clearly, it cannot be all the characteristics of a country, since no two countries are the same, and if this were the meaning the term 'where the same conditions exist' would be redundant. The answer is that the metric can only be the metric determined by the measure that is being adopted, which here is environmental, and not developmental. There is simply no language in Article XX or in any other provision of GATT 1994 that compels or even supports a different conclusion.

That is not to say that the EU is not concerned about such matters. It is, and there is a whole host of flanking measures adopted by the EU that are designed to help other countries, including in particular least developed countries and developing countries, to adjust to the EU's new environmental measures and to deal with the challenges posed by climate change. But the point is that, legally, the EU is not required to integrate these concerns into the ETS/CBAM.

6.8. Addressing carbon leakage on the export side: subsidies, but no subsidies contingent in law or in fact upon export

We turn now to briefly address the final piece of the puzzle, which relates to the problem of carbon leakage on the export side. As we have explained above, in the case of a fiscal measure, the WTO agreements provide for the operation of the destination principle. This means that the rate of tax paid is that in the country where the product is sold. Consistently with this, rebates are granted on exports and the tax at destination imposed on imports. Such arrangements are carved out of WTO subsidies law ([823]).

However, as we have also explained above, the ETS/CBAM is not a tax but a regulatory measure, whose purpose is in essence behaviour changing, which is why credit is given for a carbon price paid in the non-EU country. For regulatory measures, there is no equivalent to the destination principle. The SCM Agreement applies. This means that, if subsidies are given (for example, in the form of free allowances), they may not be contingent, in law or in fact, upon export. These would be prohibited subsidies that could not benefit, in law or in fact, from the exceptions in Article XX of GATT 1994.

However, what is perfectly possible is that the EU can grant subsidies that are available indistinctly as regards domestic sales and export sales, such as subsidies for green innovation. We are entitled to do this precisely in order to retain industry on our territory; we are not required to make the subsidies available to firms in all parts of the world ([824]). This therefore provides a legitimate policy tool for the EU to address the problem of carbon leakage on the export side. In this respect, it is important to note that the case-law makes it very clear that it is not the reason for which a subsidy is granted that determines whether or not it is a subsidy contingent in law or in fact upon export, but rather whether or not it is tied specifically to exports, which would not be the case, for example, with green technology subsidies.

([823]) SCM Agreement, footnote 1.

([824]) GATT 1994, Article III:8(b).

7. Conclusion

In line with the general theme of this book, and using the example of the CBAM and the balance of the EU's international trade law obligations and rights, this chapter has set out to explain how the law can and must be interpreted and applied with the interests of European citizens in mind.

Ultimately, it is citizens who elect the legislature that makes the laws, and those laws must answer to their legitimate concerns. This is also true of international trade law.

In the case of WTO law, which is replete with constructive ambiguity, it is particularly true that the way in which the law is applied can and should adapt as the relevant fact patterns evolve. Climate change is today a real and pressing issue, especially for European citizens. They rightly expect government actors to find solutions to the pressing problems of the day and bring the law to bear accordingly. That is where the Commission Legal Service has a particular role to play, because the key to being able to do that effectively is having the deep knowledge and experience that goes with specialised in-house training and professional activity. This is what provides the skill set that makes it possible for lawyers to persuade judges that, although they must remain independent, they should certainly be sensitive to the climate of the era.

PART 5

THE COMMISSION AS CENTRAL ACTOR OF EU LAW

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THE INFRINGEMENT PROCEDURE: A KEY DRIVER OF THE DEVELOPMENT OF EUROPEAN UNION LAW

Karen Banks and Gregor von Rintelen

1. Introduction

The basic provision of EU law on the role of the European Commission, set out in Article 17(1) of the Treaty on European Union (TEU), mandates that EU institution to 'ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them'. To that end, the Commission oversees the application of EU law under the control of the Court of Justice. Articles 258 and 260 of the Treaty on the Functioning of the European Union (TFEU) provide the main tool for the Commission to fulfil that mandate: the infringement procedure. If the Commission considers that a Member State has failed to fulfil an obligation under the EU treaties, it is required to deliver a reasoned opinion on the matter after giving the Member State concerned the opportunity to submit its observations. If the Member State concerned does not comply with the opinion within the period laid down, the Commission may bring the matter before the Court of Justice. If the Court of Justice finds that a Member State has failed to fulfil an obligation under the treaties, the Member State must take the necessary measures to comply with the judgment of the Court of Justice.

Although Article 17 TEU and Article 258 TFEU give the Commission a pre-eminent role as guardian of the EU treaties in ensuring the correct application of EU law, this does not confer a monopoly right to bring actions for the failure to comply with EU law. Article 259 TFEU entitles any Member State that considers another Member State to have failed to fulfil an obligation under the EU treaties to bring the matter before the Court of Justice.

Articles 258 to 260(1) TFEU have remained unchanged since the Treaty of Rome, the Treaty establishing the European Economic Community that entered into force in 1958. In successive revisions of the EU treaties, Article 260 TFEU was amended to enable the Court of Justice to impose sanctions on defaulting Member States under the specific conditions laid down in Article 260(2) and (3) TFEU.

By 1 July 2022, the infringement procedure had led to 2 383 judgments of the Court of Justice. The very first judgment under the Treaty of Rome was made on 19 December 1961 in Case 7/61, Commission of the ECC *v* Italy.

More recent judgments of note include that of 16 June 2022 in Case C-328/20, *Commission* v *Austria (Indexation des prestations familiales)*, fighting discrimination against migrant workers based on their nationality (in adjusting family allowances and various tax advantages to workers based on their children's state of residence, Austria had acted unlawfully), and that of 28 June 2022 in Case C-278/20, *Commission* v *Spain (Violation du droit de l'Union par le législateur)*, in which, following a complaint from individuals, the Commission declared that the Spanish rules on state liability for violation of EU law by legislative acts are contrary to the principle of effectiveness.

This chapter will show that the infringement procedure is a powerful means of ensuring the respect of EU law, especially following steps taken to increase its efficiency (see Section 3 below). The procedure serves the interests of the EU as a community of law by enforcing the rules of the EU treaties. Moreover, even allowing for the procedure's specific nature and the Commission's role within it (see Sections 2 and 4 below), it often also serves the specific interests of citizens by securing individual rights that flow from EU law (Section 5).

2. The nature of the infringement procedure

The Commission communication of 2017 'EU law: better results through better application' (hereinafter 'the 2017 communication') emphasised that 'it is fundamentally important that citizens understand the nature of the infringement process and set their expectations accordingly. Many submit complaints, expecting that they may obtain financial or other redress for a breach of EU law. They are disappointed to discover that, whilst being designed to promote the general interest of the Union, the infringement process may not be in all circumstances the appropriate vehicle through which to respond to such situations.' Therefore, it is worth setting out the nature, purpose and ensuing limitations of the infringement procedure.

2.1. A weak(er) role for the Commission but an important role for the Court of Justice

The power of the Commission under Article 258 TFEU is limited to delivering a reasoned opinion, as opposed to a decision. According to Article 288 TFEU, opinions have no binding force, while a decision is binding in its entirety. In the Joined Cases 142 and 143/80, *Amministrazione delle finanze dello Stato* v *Essevi and Salengo*, the Court of Justice emphasised that the Commission is not empowered to determine conclusively, by reasoned opinions or by other statements of its attitude under the infringement procedure, the rights and duties of a Member State. The Court

of Justice insisted that opinions delivered by the Commission pursuant to Article 258 TFEU have legal effect only in relation to the commencement of proceedings before the Court of Justice against a Member State alleged to have failed to fulfil its obligations under the EU treaties.

Compared to the Treaty establishing the European Coal and Steel Community (ECSC), which applied from 23 July 1952 to 22 July 2002, under Article 258 TFEU power has shifted from the Commission to the Court of Justice. Under Article 88 of the ECSC Treaty, the High Authority, the predecessor of the Commission, was empowered to adopt binding decisions establishing the existence of an infringement of that treaty, subject to ultimate recourse to the Court of Justice.

Under the TFEU, the Court of Justice has sole responsibility for deciding the existence of an infringement of EU law.

Accordingly, the Commission has to bring an action before that court in order to obtain a binding act establishing a Member State's violation of EU law.

Despite the weaker power of the Commission, Article 258 TFEU nevertheless requires the Commission to give the Member State concerned the opportunity to submit its observations before adopting a non-binding reasoned opinion. That requirement reflects the general principle of good administration to make sure that every addressee of an act is heard before a measure is taken that would affect them. In practice, the Commission complies with this requirement by sending a letter of formal notice, inviting the Member State concerned to submit its observations within a period – normally 2 months – of receipt of the letter. The letter of formal notice fulfils two functions. First, the Member State is granted the right to be heard, with the possibility to quickly end the infringement if the Commission manages to persuade the Member State to accept its point of view and to comply with the requirements of the treaty of its own accord. Second, the letter of formal notice circumscribes the subject matter of the future litigation procedure before the Court of Justice.

If the Commission is not satisfied with the Member State's response, or if there is none, it adopts a reasoned opinion inviting the Member State concerned to take the measures necessary to comply with its reasoned opinion within a period – normally 2 months – of receipt of the opinion.

The procedure followed before bringing the matter before the Court of Justice is lengthy. In 2021, the average time taken for the formal pre-litigation infringement procedure, including cases closed at early stages, was 117 weeks.

2.2. Declaratory nature of judgments

If the Court of Justice agrees with the Commission's opinion on the existence of an infringement of EU law, the finding that a Member State has failed to fulfil an obligation under the EU treaties is declaratory in nature. As Advocate General Sharpston put it in her opinion in the cases on relocation of asylum seekers (Joined Cases C-715/17, C-718/17 and C-719/17, *Commission* v

Poland (Temporary mechanism for the relocation of applicants for international protection), paragraph 100), '[a]s such, the purpose of the procedure before the Court is not of itself to eliminate the alleged infringement. The Court merely declares that the Member State has failed to fulfil its obligations or dismisses the action. Once the infringement has been established, the Court does not issue an injunction to the Member State concerned. It is the latter's responsibility, as the case may be, to adopt appropriate measures to ensure its compliance with EU law, pursuant to Article 260(1) TFEU.' Consequently, even after a judgment of the Court of Justice finds a failure to fulfil an obligation under the EU treaties, the national act that constitutes the infringement may continue to be in force and deploy its effects.

This may lead to a situation such as that which arose in Case C-261/20, *Thelen Technopark Berlin*. Despite the judgment of the Court of Justice in Case C-377/17 (*Commission* v *Germany*), which declared the German legislation that sets minimum rates for fees for services provided by architects and engineers (the Honorarordnung für Architekten und Ingenieure (HOAI)) to be contrary to certain provisions of the Services Directive 2006/123/EC, the same Court of Justice interpreted EU law to mean that a national court hearing a dispute that is exclusively between private individuals is not required, solely on the basis of EU law, to disapply the HOAI.

This at first awkward-looking outcome is due to an 'essential characteristic of EU law', namely that a provision of EU law that does not have direct effect may not be relied on, as such, in a dispute coming under EU law before a national court to disapply a conflicting provision of national law. It is settled case-law that a directive cannot of itself impose obligations on an individual and cannot, therefore, be relied on against that individual before a national court (judgment of the Court of Justice in Case C-573/17, *Popławski*, paragraph 59 *et seq.*).

In its judgment in Case C-261/20, the Court of Justice, however, emphasised the right of a party which has been harmed as a result of national law not conforming with EU law to claim compensation from the Member State concerned for the ensuing loss or damage.

2.3. A procedure between institutional players

In contrast to the procedure for a preliminary ruling submitted to the Court of Justice by a national court under Article 267 TFEU, individuals have no formal role in the infringement procedure. The Court of Justice calls the preliminary ruling procedure, which is set in motion through court proceedings brought before national courts, the 'keystone of the judicial system of the EU'. The procedure sets up a dialogue between the Court of Justice and the courts and tribunals of the Member States in order to ensure the full application of EU law throughout the Member States, and, in particular, the judicial protection of an individual's rights under EU law (see Court of Justice, Opinion 2/13 on the draft agreement providing for the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, paragraphs 175–176).

Although the Commission recognises and builds on the essential role played by individual complainants in identifying problems in the enforcement of EU law affecting the interests of citizens and businesses, as emphasised in the 2017 communication, the purpose of the infringement procedure is primarily to objectively lay down whether a Member State has failed to fulfil its obligations under the EU treaties. Consequently, the parties to an infringement procedure are only (i) the Commission, as the institution mandated to promote the general interest of the EU pursuant to Article 17(1) TEU and the Member State alleged to have infringed EU law; or (ii) pursuant to Article 259 TFEU, a complaining Member State and a defending Member State, with the Commission as an umpire with the duty to organise a pre-litigation procedure, following which it must deliver a reasoned opinion. Individuals cannot bring actions against the Commission to oblige it to launch infringement procedures.

3. Increasing the effectiveness of the infringement procedure

The analysis of the nature of the infringement procedure given above may lead to the conclusion that the procedure is not a particularly powerful tool for enforcing EU law. However, the makers of the EU treaties, the Court of Justice and the Commission have put considerable effort into increasing the effectiveness of the infringement procedure.

3.1. Sanctions under Article 260(2) and 260(3) TFEU

If the Court of Justice finds that a Member State has failed to fulfil an obligation under the EU treaties, the Member State concerned must take the measures necessary to comply with the judgment of the Court of Justice, as set out in Article 260(1) TFEU. Before the Treaty of Maastricht, the EU treaties did not include any system for sanctioning failure to respect that obligation. All the Commission could do was to introduce a new infringement procedure asking the Court of Justice to declare that the Member State concerned had not respected that obligation.

3.1.1. Sanctions for not respecting an earlier judgment

To remedy this unsatisfactory situation, the Treaty of Maastricht introduced the possibility of imposing financial sanctions on a Member State that has failed to comply with a judgment establishing an infringement.

According to the provision introduced by that treaty, which largely corresponds to Article 260(2) TFEU, if the Commission considered that the Member State concerned had not taken the necessary measures to comply with the judgment of the Court of Justice, it could, when bringing the case before the Court of Justice, specify the ‘lump sum or penalty payment’ it considered appropriate for the Member State concerned to pay in the circumstances. If the Court of Justice

found that the Member State concerned had not complied with its judgment, it could impose the lump sum or penalty payment on the Member State.

In an initial phase starting with its communication of 1996, 'Memorandum on applying Article 171 of the EC Treaty', the Commission took the approach of asking the Court of Justice to impose a penalty payment only.

The penalty payments apply only to further non-compliance after the judgment imposing it has been handed down. In contrast, the lump sum applies to non-compliance before that judgment was delivered. Consequently, if the Member State concerned remedied the non-compliance with the earlier judgment, even at a very late stage in the litigation procedure, in which the Commission had asked the Court of Justice to impose the sanction, the request to impose a penalty payment became moot. In line with its general policy not to keep infringement cases before the Court of Justice if the Member State had ended the infringement, the Commission withdrew such cases. However, the subsequent behaviour of Member States, which took full advantage of the extra time allowed to bring their laws into compliance with EU law, led to the situation being judged as unsatisfactory.

In the undersized fish case – Case C-304/02 *Commission* v *France* – following an innovative interpretation of the term 'lump sum **or** penalty payment' (emphasis added) proposed by Advocate General Geelhoed in his first opinion of 29 April 2004, the Court of Justice reopened the oral procedure to discuss the meaning of the term. After the reopening of the procedure, the Commission Legal Service provided linguistic expertise to support Advocate General Geelhoed's view that, in order to fulfil the objective of the sanction provision, the term should be interpreted as permitting the Court to impose both types of sanction. The Court of Justice followed the Advocate General and the Commission, imposing both a lump sum and a penalty payment, although the Commission had formally asked for the latter only.

In the light of that judgment, the Commission adapted its approach and announced in its communication of 2005, 'Application of Article 228 of the EC treaty', that it would ask the Court of Justice to impose both types of sanction: a penalty payment that applied to the period of non-compliance from the day on which the judgment imposing the sanction was delivered and a lump sum triggered by and calculated with respect to the period of non-compliance before that judgment was delivered. Thanks to the request for the imposition of a lump sum, the action would not become moot if Member States complied during the course of the litigation procedure. Consequently, the Commission no longer withdrew its actions once submitted to the Court of Justice, even if the Member State concerned ended the infringement during the litigation procedure.

However, if the Member State concerned managed to comply during the pre-litigation procedure, the case was closed and no request for sanctions was submitted to the Court of Justice. Until the entry into force of the Treaty of Lisbon, the pre-litigation procedure was the same three-

step procedure as is now provided for under Article 258 TFEU, meaning that the Commission had to adopt a letter of formal notice followed by a reasoned opinion before bringing the matter before the Court of Justice.

3.1.2. Sanctions for failure to communicate transposition measures

The Treaty of Lisbon further increased the efficiency of sanctions in the field of infringement procedures. First, it shortened the pre-litigation procedure under Article 260(2) TFEU by requiring only a letter of formal notice before the Commission brings the matter to the Court of Justice.

Second, it introduced the option for the Commission to request that the Court of Justice impose sanctions on the Member State concerned in the very first judgment in which it declares that a Member State has failed to communicate measures transposing a directive adopted under a legislative procedure, instead of having to start a second litigation procedure, as required by Article 260(2) TFEU. Incentives for the Member States to ensure the timely transposition of directives and to communicate their incorporation measures to the Commission are important because directives are normally not directly applicable and need to be incorporated into national law to enable individuals to fully benefit from their rules. If a Member State fails to communicate transposition measures to the Commission, it is too burdensome for the latter to check whether there are national provisions that correctly implement a directive.

Similar to its approach under Article 260(2) TFEU, in its communication of 2011, 'Implementation of Article 260(3) of the Treaty', the Commission announced that it would ask the Court of Justice to impose only penalty payments against the defaulting Member State.

However, the consequences were similar to those experienced previously under Article 260(2) TFEU, and the Commission withdrew its actions as soon as the Member State had communicated to it all measures necessary to transpose the directive in question, however late in the litigation procedure this happened. This led to endless cat-and-mouse games between the Commission and the various Member States concerned. The latter were often supported before the Court of Justice by statements in intervention from other Member States, thereby slowing the litigation procedure to the extent that the defendant Member State was able to communicate to the Commission all measures necessary to transpose the directive in question. This bought the Member States extra time to fulfil the obligation to notify transposition measures without having to fear sanctions: 25 cases pending before the Court of Justice were withdrawn between 2013 (Case C-245/12, *Commission* v *Poland*, removed from the Court of Justice's register on 23 July 2013) and 2020 (Case C-165/18, *Commission* v *Spain*, removed from the register on 25 June 2020).

The Commission had to change its tactics again as it had in the framework of Article 260(2) TFEU. In the 2017 communication, it conceded that its initial approach had not provided a

sufficiently strong incentive for the Member States to notify the Commission of transposition measures promptly. Therefore, it announced its intention to ask the Court of Justice to impose both a lump sum and a penalty payment in cases brought under Article 260(3) TFEU.

It is interesting to note that the first judgment applying the sanction regime of Article 260(3) TFEU, Case C-543/17, *Commission* v *Belgium (Article 260(3))*, was delivered in a case brought before the change of policy took effect, in which the Commission asked only for a penalty payment. In that first judgment, the Court of Justice confirmed the interpretation of the Commission on the scope of that provision. In particular, it did not follow the argument of virtually all Member States that the provision could not apply in case of partial, in other words incomplete, notification of transposition measures. The Court of Justice emphasised that the aim of Article 260(3) TFEU would be compromised if the Court of Justice was capable of imposing a financial penalty on a Member State only if the Member State had not communicated any transposition measure.

As a result of Commission's approach of asking for the imposition of a lump sum as well as a periodic penalty payment, since the seminal judgment in Case C-543/17, *Commission* v *Belgium (Article 260(3)),* the Court of Justice had, by 1 July 2022, delivered six further judgments imposing sanctions for the failure to notify the measures transposing a directive, the last judgment being handed down on 25 February 2021 in Case C-658/19, *Commission* v *Spain (Directive données à caractère personnel – domaine pénal)*.

3.2. Interim measures and penalties

According to its settled case-law, the Court of Justice may order the adoption of interim measures under Article 279 TFEU in the context of an infringement action brought under Article 258 TFEU, despite the fact that a judgment under Article 260(1) TFEU is only declaratory in nature. This possibility is sensible given that the objective of an infringement procedure is to enforce the actual application of EU law by the Member State in breach. Therefore, a judgment finding that a Member State has failed to fulfil an obligation under the EU treaties triggers the obligation to take the necessary measures to comply with that judgment, pursuant to Article 260(1) TFEU. If the Member State concerned could not be prevented from creating *faits accomplis* by letting irreparable damage occur pending final judgment against it, the effect of certain infringement procedures would be very limited.

In case C-441/17, *Commission* v *Poland (Białowieża Forest)*, the Commission requested that the Court of Justice order interim measures to suspend forest management measures in Białowieża Forest. By order of 27 July 2017, that request was granted *inaudita altera parte* (i.e. without Poland being heard before the adoption of the order). A hearing was then fixed at which the views of the Polish authorities could be heard, and the Court of Justice's interim order confirmed or varied.

Despite the order of 27 July 2017, the Commission obtained information indicating that Poland was continuing the forest management measures in question and informed the Court of Justice of this. At the oral hearing of 11 September 2017, the possibility of imposing a penalty payment pursuant to Article 279 TFEU in order to secure the defendant's respect of the order was discussed.

Thereafter, the Commission supplemented its application for interim measures by requesting that the Court of Justice additionally order that the defendant pay a periodic penalty payment if it failed to comply with the Court of Justice's order.

The order of the Grand Chamber of the Court of Justice of 20 November 2017, in Case C-441/17 R, confirmed the standstill obligations imposed by the previous order. Moreover, it announced that failure to comply with the new order in the future would result in the imposition of a periodic penalty payment of at least EUR 100 000 per day from the date of notification of the order (i.e. 20 November 2017) until the date Poland complied with that order or final judgment was delivered.

Ultimately, no sanction had to be imposed in the litigation on the Białowieża Forest because Poland eventually complied with the order, but the order of 20 November 2017 paved the way for the application of penalties as interim measures in the framework of infringement procedures if a Member State fails to comply with an earlier injunction.

Penalties in the framework of interim measures were imposed for the first time by order of the Court of Justice on 20 September 2021, in Case C-121/21 R, *Czech Republic* v *Poland (Mine de Turów*), in a dispute concerning the Turów lignite mine near the border between Czechia and Poland. The Court of Justice imposed a penalty payment of EUR 500 000 per day from the date on which Poland was notified of the order until it complied with the obligations arising from an earlier interim measures order of 21 May 2021, in which the Court of Justice had ordered Poland to suspend the operation of the Turów lignite mine.

Another penalty was imposed in the framework of Case C-204/21, *Commission* v *Poland (and vie privée des juges) (*case ongoing as of 1 July 2022), in which the Commission asked the Court of Justice to declare that the Polish law on the judiciary, the 'muzzle law', undermines the independence of Polish judges and is incompatible with the primacy of EU law. On 14 July 2021, in response to the Commission's request that Poland adopt interim measures to prevent the aggravation of serious and irreparable harm to judicial independence and the EU legal order, the Court of Justice ordered Poland to suspend the application of several provisions of the Polish laws on the judiciary that, on the basis of a prima facie assessment, posed a threat to the independence of judges in Poland. As Poland did not comply with that injunction, by the order of 27 October 2021, the Court of Justice imposed a penalty payment of EUR 1 million per day from the date on which Poland was notified of the order until Poland complies with the obligations arising from the earlier interim measures order.

4. The infringement procedure as a policy tool

4.1. Priority setting by the 2017 communication

In its 2017 communication, the Commission announced a more strategic approach to enforcement in terms of handling infringements, laying down positive priorities for pursuing infringement procedures and defining situations in which it will not pursue them. In other words, the infringement procedure is also used as a policy tool to support strategic policy choices.

The priorities set by the 2017 communication are both structural and policy related.

The structural elements represent the overriding aspects of the priority list: Member States' failure to communicate the measures necessary to transpose a directive, incorrect transposition of directives, failure to comply with an earlier judgment of the Court of Justice, infringements that cause serious damage to the EU's financial interests, violation of the EU's exclusive powers and infringements that affect the capacity of national judicial systems to contribute to the effective enforcement of EU law. However, the 2017 communication also prioritises infringements that obstruct the implementation of 'important EU policy objectives'.

However, the situations in which the Commission will not act are of greater practical importance. According to the 2017 communication, it will not act when (i) preliminary ruling proceedings under Article 267 TFEU are pending on the same issue and Commission action would not significantly accelerate the resolution of the case, (ii) pursuing the infringement would contradict the line taken by the Commission in a legislative proposal, (iii) individual cases of incorrect application do not raise issues of wider principle and there is insufficient evidence of a general practice, (iv) individual complaints raise Member States' general shortcomings in the transposition of a directive without raising particular aspects affecting the complainant and (v) complaints are not submitted via the required complaint form.

The structural positive priorities are straightforward. In particular, the priority of pursuing infringements that affect the capacity of national judicial systems to contribute to the effective enforcement of EU law has been implemented vigorously in seven procedures against Poland in the context of its so-called judicial reform. However, reference to important EU policy objectives as a vague positive priority and reference to the negative priorities raise the question of whether this discretion is in line with the Commission's role as guardian of the EU treaty.

4.2. Compatibility of discretion with EU law

Article 17(1) TEU mandates the Commission to ensure the application of the EU treaties and of measures adopted by the institutions pursuant to them, but it does not make any distinction between important, 'big' or other categories of EU law. However, case-law settles that the Commission has discretion over whether or not to initiate an infringement procedure. In its

judgment in Case T-310/18, *EPSU and Goudriaan* v *Commission*, the General Court emphasised that the Commission has complete discretion in that regard. The authors of the TFEU left the initiation of that procedure and the objective judicial review of national measures that it involves to the discretion of the Commission, which is to promote the general interests of the EU pursuant to Article 17(1) TEU, and, in a subsidiary manner, of the Member States within the framework of Article 259 TFEU. Accepting that the Commission could be obliged to pursue infringement procedures would affect the independence that it enjoys in carrying out its responsibilities under Article 17(3) TEU, paragraph 3.

In summary, the discretion of the Commission in the framework of Article 258 TFEU is the corollary of the Commission's function promoting the general interests of the EU as opposed to individual interests. Against that background, the Commission is entitled to set out priorities for its infringement actions and even to lay down selectivity criteria for pursuing cases, as long as it does not renounce its function of effectively overseeing the Member States' application of EU law. Hence, properly communicated priority setting is justified.

4.3. Safeguards

Any discretionary power requires appropriate safeguards to prevent arbitrary use. For the Commission's discretionary power in the context of infringement procedures, the following safeguards exist. With respect to complaints submitted by individuals, the risk of arbitrary closure of cases is mitigated by the commitment of the Commission, confirmed in the 2017 communication, to give the complainant prior notice of its intention to close a case, setting out the grounds on which it is proposing that the case be closed and inviting the complainant to submit any comments within 4 weeks. Closures based on an unconvincing statement of reasons may give rise to discussion in the context of the Commission's political responsibility towards the European Parliament pursuant to Article 17(8) TEU. Such cases may, in particular, be brought to the attention of the European Parliament by a petition pursuant to Article 227 TFEU or via a report by the ombudsman pursuant to Article 228 TFEU.

Moreover, the TFEU has not conferred on the Commission a monopoly on bringing before the Court of Justice actions for the failure to comply with EU law. Article 259 TFEU entitles any Member State that considers another Member State to have failed to fulfil an obligation under the EU treaties to bring the matter before the Court of Justice. If other Member States believe that the Commission is not satisfactorily fulfilling its duty as guardian of the EU treaties, they can launch infringement procedures on their own initiative. Hence, although procedures under Article 259 TFEU are still rare and, out of the 2 383 judgments delivered by the Court of Justice in infringement cases since the infringement procedure was established, only six judgments have been handed down under Article 259 TFEU, it is noteworthy that Member States have recently initiated more infringement cases under that provision. The most recent case was brought in 2022 by Belgium against France concerning the environmental impact assessment

of a proposed wind farm off the coast of Dunkirk. This development should encourage the Commission to consider whether to be more active in overseeing the application of EU law.

4.4. Conclusion

The need to preserve the status of the Commission as the independent promoter of the general interests of the EU justifies the discretion it enjoys in the context of infringement procedures. Safeguards exist to react when it is felt that the Commission has not applied its discretion to the required standards. In that context, properly communicated priority setting, which can be subject to debate, is less problematic. The risk of inappropriate use of the Commission's discretion in the context of infringement procedures lies more in situations where cases are discreetly blocked in the machinery of the Commission services and the offices of the responsible members of the Commission, without an informed decision being taken by the College of Commissioners. It is therefore of paramount importance that the central services of the Commission, the Secretariat-General and the Commission Legal Service keep track of these cases and find leverage to keep them moving, where necessary even against resistance from members of the Commission.

5. Added value for individuals

When taking into account the nature of the infringement procedure – in particular the fact that it is a procedure undertaken by institutional players, the Commission has complete discretion in deciding whether or not to pursue an infringement procedure and that a judgment of the Court of Justice is only of a declaratory nature – one may wonder to what extent it generates added value for individuals.

5.1. Complaint-handling system

Although the Commission has complete discretion in deciding whether or not to pursue an infringement procedure, it has regularly emphasised the importance of complaints from individuals as a means of detecting infringements of EU law. Since 2009, all complaints of an alleged infringement of EU law by Member States have been registered on a dedicated IT system called 'CHAP' (Complaint Handling – Accueil des Plaignants). The system was developed to address criticism from the European Parliament on the lack of transparency in the handling of complaints. In its 2017 communication, the Commission reiterates that it will inform complainants in writing of each procedural step it takes if it launches infringement procedures on the basis of their complaint. If it envisages closing a complaint without taking further action, the Commission gives the complainant prior notice of this in a letter setting out the grounds on which it is proposing that the case be closed and inviting the complainant to submit any comments within 4 weeks.

Complaints are pursued by taking into account the priorities that the Commission established in its 2017 communication.

Cases that fall neither under the list of top priorities nor under the situations in which the Commission does not act are handled according to the usual procedures. This means, in particular, that the Commission's services are to pursue complaints concerning such cases. The complaints may be closed only if the legal analysis shows that there is no case (closure on legal grounds) or if the Commission takes an explicit and informed decision to close them on grounds of expediency.

The fact that the infringement procedure is a procedure between institutional players has the advantage for the complainant that they do not have to intervene or dedicate any resources during the procedure when the Commission follows up on a complaint. This applies even when the Commission brings the matter before the Court of Justice, if necessary including a request to impose sanctions under Article 260(2) TFEU or in the framework of interim measures under Article 279 TFEU.

5.2. Indirect legal effect of judgments under Article 260(1) TFEU

5.2.1. Judgments on provisions of European Union law having direct effect on the individual concerned

As mentioned above, if the Court of Justice finds that a Member State has infringed EU law pursuant to Article 260(1) TFEU, this finding is merely of a declaratory nature and it is the Member State's responsibility to take the measures necessary to comply with the judgment of the Court. Consequently, in Joined Cases 314/81 to 316/81 and 83/82, *Procureur de la République* v *Waterkeyn*, the Court of Justice emphasised that the purpose of judgments delivered under Article 260(1) TFEU is primarily to lay down the duties of Member State when they fail to fulfil their obligations. If such a judgment declares that certain legislative provisions of a Member State are contrary to EU law, it is first and foremost the job of the authorities exercising legislative power to amend the legislative provisions in question so as to bring them into conformity with the requirements of EU law.

However, judgments under Article 260(1) TFEU can give important clarifications of provisions that have direct effect on the individual concerned. As the Court of Justice has emphasised in the *Procureur de la République* v *Waterkeyn* case, rights that benefit individuals flow from the actual provisions of EU law that have direct effect on the Member States' internal legal order. So, if the Court of Justice has declared that a national legislative provision violates a provision of EU law that has direct effect – such as the fundamental freedoms of the TFEU in cross-border situations – the individuals may avail themselves of those provisions in national litigation procedures, in which the authoritative interpretation of EU law given by the Court of Justice under Article 260(1) TFEU must be respected. Consequently, if the Court of Justice finds

that a Member State has failed to fulfil its obligations under a provision that has direct effect, pursuant to the Court of Justice's judgment in Case 106/77, *Amministrazione delle finanze dello Stato* v *Simmenthal*, it is the duty of the national courts to refuse to apply any provision of national legislation that is contrary to EU law.

5.2.2. Judgments on provisions of European Union law having no direct effect on the individual concerned

Even if the Court of Justice finds an infringement by a Member State of a provision of EU law that has no direct effect on an individual, the latter may nevertheless benefit from any action the Member State takes to comply with the judgment of the Court of Justice.

Although, as explained above, a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against that individual before a national court, under Article 260(1) TFEU, the Court of Justice may declare that a national legislative provision violates an EU directive and the Member State has a duty to amend that provision accordingly. This is why the assessment of completeness and conformity of national laws transposing directives by the Commission is so important and is among the Commission's priorities, as declared in its 2017 communication. Moreover, pursuant to the *Francovich and Bonifaci* v *Italy* case-law of the Court of Justice (Joined Cases C-6/90 and C-9/90), any party that has been harmed as a result of national law not conforming with EU law, even if it has no direct effect, may claim compensation from the Member State concerned for any ensuing loss or damage sustained.

A similar situation arises when national provisions contravene a fundamental freedom of the TFEU, but individuals cannot avail themselves of that freedom because of the absence of a cross-border dimension. It is settled case-law that the freedoms do not apply to a situation that is confined in all respects to a single Member State (Case C-268/15, *Ullens de Schooten*). As the Court of Justice emphasised in its judgment in case C-343/17, *Fremoluc,* in such a situation, a preliminary ruling procedure to interpret EU law brought by a national court is inadmissible. Consequently, Belgian nationals may not validly claim that Belgian rules on land policy are contrary to the freedoms. However, the Court of Justice also pointed out in that judgment that an infringement procedure serves a different function, since it requires the Court of Justice to ascertain whether the national measure challenged is, in general, capable of deterring operators from other Member States from using the fundamental freedoms in question. Consequently, there are situations in which an infringement procedure would be promising even though individuals, in the absence of a cross-border dimension, could not rely on EU law in national litigation procedures that they may launch. If the Court of Justice declares the national provision in question to be against EU law, when taking the measures to comply with the judgment, the Member State concerned may remedy the situation with respect to purely domestic situations as well in order to avoid discrimination against its own nationals.

6. Conclusion

The purpose of the infringement procedure is primarily to lay down objectively whether a Member State has failed to fulfil its obligations under the EU treaties, while judgments under Article 260(1) TFEU merely declare that the Member State has failed to fulfil its obligations (or dismiss the action) without issuing an injunction to the Member State concerned, and the Commission has complete discretion in deciding whether to launch an infringement procedure. However, individuals may still benefit from it.

Since its introduction by the Treaty of Rome, the infringement procedure has evolved and become more effective, in particular through the imposition of sanctions under Article 260(2) and (3) TFEU, and under Article 279 TFEU in the context of interim measures.

On the basis of appropriate priority setting by the Commission and accordant pursuit of complaints from individuals, the infringement procedure is an efficient tool for overseeing the application of EU law under the control of the Court of Justice, despite the bottleneck effect of a centralised procedure that would reach its limits if it were the sole instrument to address all possible infringements of EU law.

THE EUROPEAN COMMISSION: THE CLOCK MASTER OF THE EUROPEAN UNION INTERNAL MARKET

Dimitrios Triantafyllou and Luigi Malferrari ([825])

1. Introduction

The Director-General of the Legal Service during the 1990s, Jean-Louis Dewost, used to say that the Legal Service had to make sure that the 'church stands well in the middle of the village'. It could be said that in a town there are several churches, corresponding to the Member States, that are intertwined with each other and whose tasks have become particularly complex. Thus, as European integration tries to progress in the face of major economic, geopolitical, public health and technological challenges, it is much more important that the Commission ensures that the clock in its own clock tower is functioning well and that the clocks of the other churches in the town are in sync with it, in order to effectively pursue the same public objectives.

The current agenda of European integration encompasses not only the abolition of undue national barriers to free movement but also 'regulation' to protect fundamental rights and to pursue other legitimate public interests ([826]). The Schuman Declaration clearly set out a functionalist approach: the fusion of the national socioeconomic systems in order to ensure common economic development and to make war in a united Europe unlikely. As Robert Schuman himself pointed out, 'Europe will not be made all at once, or according to a single plan' ([827]). Since the creation of the European Communities, the accomplishment of the four fundamental freedoms of the Treaty establishing the European Community (TEC) (free movement of goods, workers, services and capital) as part of the abolition of national borders has been pursued with different intensity depending on the focus – first goods and workers, then services and finally capital – the sector and the period. From the outset, the more 'tangible' free movement of goods made good progress, in particular with the famous *Cassis de Dijon* case-law ([828]), which made the mutual recognition of non-harmonised national rules compulsory. By contrast, the freedoms directly involving human action or presence (free movement of services and

([825]) The authors thank Julie Samnadda and Günter Wilms for precious comments on language and substance.

([826]) The references made to legal texts and jurisprudence, far from exhaustive, are only indicative and supportive of the argumentation of the present chapter.

([827]) Declaration of 9 May 1950, paragraph 3.

([828]) Judgment of 20 February 1979, *Rewe*, 120/78, EU:C:1979:42.

freedom of establishment) were accomplished at different paces, the corresponding obstacles proving more difficult to overcome. The freedoms of the treaty received a new 'push' through the liberalisation of the movement of payments and capital more generally ([829]), which is paramount to the exercise of the human and economic activities related to all other freedoms (cf. the empathic use of the term 'completion' of the internal market by 1992 foreseen in the Single European Act). However, the path towards a more united Europe that serves the citizens' interests is still long and arduous.

2. From sporadic regulation to systematic regulation

At the end of the 1980s, the monopolistic sectors of services of general economic interest were regulated at European level very sporadically and in a very limited manner ([830]). The Commission had taken a few innovative decisions based on Article 86(3) TEC (now Article 106(3) of the Treaty on the Functioning of the European Union (TFEU)) ([831]) and had also proposed legislation on that legal basis: for example, the transparency directive, the telecommunications terminal equipment directive and the telecommunications service directive ([832]).

Importantly, at the beginning of the 1990s the Court of Justice started to become more courageous in interpreting the limits that the treaty sets on national monopolies in cases where national rules were challenged (negative integration).

In April 1991 came the judgment in the *Höfner and Elser* case in which the Court of Justice took issue with the monopoly on the recruitment of executives (i.e. managers) in Germany; it ruled that such a monopoly violated Article 90 TEC (now Article 106 TFEU) under certain conditions such as the fact that the public employment agency enjoying the statutory monopoly is manifestly incapable of satisfying the demand prevailing on the market for such activities ([833]).

([829]) See, in particular, Council Directive 88/361/EEC of 24 June 1988 on free movement of capital for the implementation of Article 67 of the Treaty, OJ L 178, 8.7.1988, p. 5.

([830]) See also Triantafyllou, D., 'Enterprises publiques et monopoles nationaux', in *Juridictionnaire Joly Communautaire*, Joly, Paris, 1999 (updated in 2004).

([831]) 85/276/EEC: Commission Decision of 24 April 1985 concerning the insurance in Greece of public property and loans granted by Greek State-owned banks, OJ L 152, 11.6.1985, p. 25; 90/16/EEC: Commission Decision of 20 December 1989 concerning the provision in the Netherlands of express delivery services, OJ L 10, 12.01.1990, p. 47; 90/456/EEC: Commission Decision of 1 August 1990 concerning the provision in Spain of international express courier services, OJ L 233, 28.8.1990, p. 19; 94/119/EC: Commission Decision of 21 December 1993 concerning a refusal to grant access to the facilities of the port of Rødby (Denmark), OJ L 55, 26.2.1994, p. 52; 2000/521/EC: Commission Decision of 26 July 2000 relating to a proceeding pursuant to Article 86(3) of the EC Treaty. See Wilms, G., *Das Europäische Gemeinschaftsrecht und die öffentlichen Unternehmen*, Duncker & Humblot, Berlin, 1996.

([832]) Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings, OJ L 195, 29.7.1980, p. 35; Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment, OJ L 131, 27.5.1988, p. 73; Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services, OJ L 192, 24.7.1990, p. 10. See Wilms, G., *Das Europäische Gemeinschaftsrecht und die öffentlichen Unternehmen*, Duncker & Humblot, Berlin, 1996.

([833]) Judgment of 23 April 1991, *Höfner and Elser*, C-41/90, EU:C:1991:161, paragraphs 31 and 34 (cf. *Corbeau*, C-320, 91:EU:C:1993:198).

A further example of negative integration, which influenced positive integration, is the judgment in the *ERT* case from June 1991, in which the Court of Justice ruled on the Greek monopoly on TV channels ([834]). The Court of Justice started off its analysis by recalling its standard case-law whereby the existence of a monopoly in the provision of services is not as such incompatible with community law; however, it added that the possibility cannot be excluded that the monopoly may be organised in a way that infringes the rules relating to the freedom to provide services. This is the case, in particular, where the monopoly leads to discrimination between national television broadcasts and broadcasts originating in other Member States, to the detriment of the latter ([835]). The Court of Justice also held that the concentration of the monopolies on broadcasting and retransmitting in the hands of a single undertaking gives that undertaking the opportunity both to broadcast its own programmes and to restrict the retransmission of programmes from other Member States. That possibility, in the absence of any guarantee concerning the retransmission of programmes from other Member States, may lead the undertaking to favour its own programmes, to the detriment of foreign programmes; under such a system, equality of opportunity between broadcasts of its own programmes and the retransmission of programmes from other Member States is therefore at risk of becoming seriously compromised ([836]). In the light of this possibility, the Court of Justice ruled that Article 90(1) TEC (now Article 106(1) TFEU) prohibits the granting of an exclusive right to retransmit television broadcasts to an undertaking that has an exclusive right to transmit broadcasts, where those rights are liable to create a situation in which that undertaking is led to infringe Article 86 TEC (now Article 102 TFEU) by virtue of a discriminatory broadcasting policy that favours its own programmes ([837]).

The *ERT* judgment has contributed, together with technological development, to the opening up of the TV markets in the EU. That judgment is also significant because the Court of Justice was given the opportunity to take a stand on compliance with fundamental rights: the Court of Justice held that, where a Member State relies on the combined provisions of Articles 56 and 66 TEC (now Articles 52 and 62 TFEU) in order to justify rules that are likely to obstruct the exercise of the freedom to provide services, such justification, provided for by EU law, must be interpreted in the light of the general principles of law and, in particular of fundamental rights. Thus, the national rules in question can fall under the exceptions provided for by the combined provisions of the above-mentioned treaty articles only if they are compatible with the fundamental rights whose observance is ensured by the Court of Justice ([838]).

([834]) Judgment of 18 June 1991, *ERT*, C-260/89, EU:C:1991:254.

([835]) Ibid., paragraph 20.

([836]) Judgment of 18 June 1991, *ERT*, C-260/89, EU:C:1991:254, paragraph 22.

([837]) Judgment of 18 June 1991, *ERT*, C-260/89, EU:C:1991:254, paragraph 38.

([838]) Judgment of 18 June 1991, *ERT*, C-260/89, EU:C:1991:254, paragraph 43. That dictum will be further developed later, for example in the Hungarian infringement cases regarding usufruct expropriation (judgment of 21 May 2019, *Commission* v *Hungary*, C-235/17, EU:C:2019:432), foreign universities (judgment of 6 October 2020, *Commission* v *Hungary*, C-66/18, EU:C:2020:792) and non-governmental organisations (judgment of 18 June 2020, *Commission* v *Hungary*, C-78/18, EU:C:2020:476).

A few months after *ERT*, the Court of Justice handed down its ruling in *Merci convenzionali porto di Genova* ([839]). Firstly, it specified that, even within the framework of Article 90 TEC (now Article 106 TFEU), the provisions of Articles 30, 48 and 86 TEC (now Articles 34, 45 and 102 TFEU) have direct effect and give interested parties rights that the national courts must protect ([840]). Secondly, it ruled that Article 90(1) TEC, in conjunction with Articles 30, 48 and 86, precludes rules of a Member State that confer on an undertaking established in that state the exclusive right to organise dock work and require it for that purpose to have recourse to a dock work company formed exclusively of national workers ([841]). Three days later, in *GB-Inno* the Court of Justice held that Article 3(f) TEC (now replaced in substance by Article 3(3) of the Treaty on European Union (TEU) and Protocol No 27 annexed to the TFEU), Articles 90 and 86 TEC (now Articles 106 and 102 TFEU) preclude a Member State from granting to the undertaking that operates the public telecommunications (telecoms) network the power to set out standards for telephone equipment and to check that economic operators meet those standards when it is itself competing with those operators on the market for that equipment. The Court of Justice also ruled that Article 30 TEC (now Article 34 TFEU) precludes a public undertaking from being given the power to approve telephone equipment that is intended to be connected to the public network and that it has not supplied if the decisions of that undertaking cannot be challenged before the courts ([842]). The Court of Justice's jurisprudence on the prohibition of abuse of a dominant position (Article 102 TFEU) was also focused on sectors such as telecoms, as will be shown in Section 3.

The implementation of this brave and innovative case-law dating from the early 1990s, regardless of its symbolic dimension, should not, however, distract from the loopholes that persisted in the internal market.

The loopholes that can be inferred from the abovementioned judgments existed because the harmonisation had covered only some sectors, and the negative harmonisation through case-law or Commission decisions based on the the powers under Articles 85–93 TEC (now Articles 101–108 TFEU) was certainly important ([843]) but was piecemeal. Moreover, the most strategic sectors of the economy, namely the 'services of general economic interest' pursuant to Article 86 TEC (now Article 106 TFEU), had been only partly affected by European integration. These sectors largely escaped from liberalisation until the beginning of the 1990s, thanks to Article 86 TEC (now Article 106 TFEU), which preserved them in many respects from the application of the free movement and competition rules.

In that respect, it is true that Article 86 TEC (now Article 106 TFEU) contains a necessity clause, allowing any restrictions to apply only to the extent necessary for the accomplishment of their purposes and, last but not least, a proportionality test ensuring that they would not excessively

([839]) Judgment of 10 December 1991, *Merci convenzionali porto di Genova*, C-170/90, EU:C:1991:464.

([840]) Ibid., paragraph 23.

([841]) Judgment of 10 December 1991, *Merci convenzionali porto di Genova*, C-170/90, EU:C:1991:464, paragraph 24.

([842]) Judgment of 13 December 1991, *GB-Inno*, C-18/88, EU:C:1991:474, paragraphs 28 and 36.

([843]) See Wilms, G., *Das Europäische Gemeinschaftsrecht und die öffentlichen Unternehmen*, Duncker & Humblot, Berlin, 1996.

affect the general interest of the EU ('excess test'). However, that same provision gave rise to some interesting jurisprudence of the Court that in substance recognised the legitimacy of some legal monopolies, to the extent that they were necessary for the performance of the tasks assigned to them, such as the universality of the postal service (for example in the *Corbeau* case) ([844]), and of some exclusive distribution contracts creating a whole network securing energy supply for entire countries (for example in *Almelo* ([845]), regarding electricity). Article 86(2) TEC (now Article 106(2) TFEU was also interpreted to allow exceptions to the application of the free movement rules and the competition rules on the abuse of a dominant position and cartels, which also apply to the Member States in relation to undertakings they control ([846]); so that provision also served, for example, as a basis for the justification of some restrictions to free movement, as the *EDF* case ([847]) shows in respect of the import/export of electricity. The application of Article 86 TEC (now Article 106 TFEU) was not easy. As a result of its necessity (and ultimately excess) test, it was accompanied by some uncertainty: the restriction had to be necessary without extending to services that could not be sufficiently provided by the undertaking at stake, unless the restriction was still necessary for the financial or economic equilibrium of its activities (as in the *Corbeau* and *EDF* cases). Even if these two tests were practically merged in order to legitimise the amounts of State aid that were necessary for providing services of general economic interest (even for monopolies; see the *FFSA* case) ([848]), the exceptions/reservations laid down in that treaty provision made its application in practice hardly feasible for resolving several issues; the significance of those cases showed the need to regulate the services in question specifically and in detail ([849]).

This is how 'regulation' in the EU started: as a liberalisation instrument in order to abolish the monopolistic structures that existed before the treaties, rather than as an action aimed at organising and controlling natural competition that was already in place. That is the main difference from what happened in the United States, where competition was the natural status (for instance in the electricity market) and regulation was needed to protect the market from competition excesses that sometimes led to bankruptcies and the interruption of critical supplies (such as in California), in order to preserve the general interest. Of course, in the EU, once regulation had introduced competition it also had to deal with the substantive conditions of the exercise of the liberalised activity, so that users could benefit from it on generally acceptable terms ([850]). This is where the protection of fundamental rights and the pursuit of other legitimate public interests started to play an increasingly important role in the law of the EU's internal market.

([844]) Judgment of 19 May 1993, *Corbeau*, C-320/91, EU:C:1993:198.

([845]) Judgment of 27 April 1994, *Almelo*, C-393/92, EU:C:1994:171.

([846]) Cf. judgment of 19 May 1993, *Corbeau*, C-320/91, EU:C:1993:198.

([847]) Judgment of 23 October 1997, *Commission* v *France (energy imports and exports)*, C-159/94, EU:C:1997:501.

([848]) Judgment of 27 February 1997, *FFSA*, T-106/95, EU:T:1997:23.

([849]) See Triantafyllou, D., 'Services publics et concurrence, maintien ou déclin des monopoles', *REDP*, Vol. 7, No 4, 1995, p. 1025.

([850]) As regards the imposition of different obligations on the different operators, see Triantafyllou, D., 'Evolution de la notion de concession de service public sous l' influence du droit communautaire', *RMC*, 1997, p. 558 (regarding telecoms).

3. The complete development of the regulation of services of general public interest and its meaning

In the 1990s, the discussion in the EU about the meaning of the term 'regulation' in contrast to 'competition' started; this discussion is still ongoing. From an economic perspective, the former is considered necessary to the extent that market forces cannot achieve alone the results wished for the general interest because of the underlying monopolies. These lead, for example, to an increased risk of abuse of dominance, to prices that do not reflect all externalities or to a lack of information about the services supplied, or more generally they damage the competitive structure of the market ([851]). From this narrower perspective, regulatory law has to be distinguished from competition law. It requires the introduction of competition (notably because of the underlying natural or legal monopolies) in sectors characterised by monopolistic structures, which would be difficult for interested competitors to duplicate because of the huge investment costs involved in constructing the necessary infrastructure. Otherwise, the market would be *de facto* deprived of any reasonable possibility of competition ([852]). Given the cross-border competition and free movement issues at stake, the EU had to determine the appropriate regulation on the basis of its competences regarding the internal market ([853]). By thus regulating such important economic activities, the EU, on the initiative of the Commission, has been regulating some matters, while leaving other matters to the Member States. The EU has chosen a path that is situated midway between the ultra-liberal theory that expects the market to regulate itself and the interventionist state planning of business activities. In several instances, the legislator has made use of the general legal basis of Article 114 TFEU in order to regulate several markets.

The opening of the markets has been achieved through various means.

The opening up of maritime cabotage is an early example: whereas one could infer from the non-discrimination principle the obligation to carry out open tender procedures in order to award public service contracts to maritime carriers ([854]), an obligation was laid down more explicitly for the public service contracts for air carriers ([855]).

([851]) Lanneau, R., 'Régulation (économie)', in Bazex, M., Eckert, G., Lanneau, R., Le Berre, C., du Marais, B. and Sée, A. (eds), *Dictionnaire des Régulations*, LexisNexis, New York, 2016, p. 521, which, however, signals the subjective classification of a regulation, according to its priorities (economic efficiency or social justice); its relative character, depending on the sector; and its not fully foreseeable consequences. This is not the place to elaborate on the concepts of regulation in other sciences.

([852]) Judgment of 13 December 2018, *Slovak Telekom* v *Commission*, T-851/14, EU:T:2018:929, paragraph 117 (upheld by the Court of Justice in judgment of 25 March 2021, *Slovak Telekom* v *Commission*, C-165/19 P, EU:C:2021:239).

([853]) Such as Article 114 TFEU, in the light of the aims set out in the treaty (see 'The internal market' and Articles 3 and 4 TFEU on competition as an integral part of the internal market; cf. Protocol 27 TFEU).

([854]) Article 4 of Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States, OJ L 364, 12.12.1992, p. 7.

([855]) Article 16 of Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community, OJ L 293, 31.10.2008, p. 3 (recast since Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers, OJ L 240, 24.8.1992, p. 1).

The principles of public procurement expanded to all services of economic interest ([856]); they are also applied in different areas, necessitating the award of individual permits for scarce resources ([857]). Thus, for example, spectrum frequencies that are used for telecoms or media services must be awarded through open, non-discriminatory and proportionate procedures and on the basis of proportionate, non-discriminatory and objective criteria: that obligation already followed from the TEC free movement rules, as interpreted in the first decade of the 21st century ([858]), and was expressly set out in the telecoms directives, which provided for liberalisation ([859]). It is worth recalling that the Commission had even first legislated itself in the field of telecoms on the basis of Article 106(3) TFEU, by providing, *inter alia*, for open, non-discriminatory procedures of authorisation according to objective, non-discriminatory and transparent criteria ([860]). Recourse to Article 106(3) TFEU constitutes a legal 'weapon' that has also been used as a threat in order to achieve the adoption of the energy liberalisation directive by the EU legislator ([861]). It is noteworthy in that respect that, besides the EU legislator, the Court of Justice has also played a fundamental role, in particular with regard to the often necessary funding of these services. The Court of Justice promotes open tender procedures with awards to the best bidder, in order to avoid State aid control; in such cases, public funding is recognised as remuneration for the service supplied (*Altmark* case-law) ([862]).

Moreover, the jurisprudence of the Court of Justice required some division of tasks of the vertically integrated monopolies, first by distinguishing the commercial activities from the regulatory activities so that the incumbent operator could not risk abusing its dominant position by imposing its standards on its competitors, for example through the approval of its

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([856]) As regards legislation, see, for example, Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, OJ L 209, 24.7.1992, p. 1; and Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ L 199, 9.8.1993, p. 84. As regards the treaty-based principle of non-discrimination, see, for example, judgments of 7 December 2000, *Teleaustria*, C-324/98, EU:C:2000:669 (regarding telephone directories); of 21 July 2005, *Coname*, C-231/03, EU:C:2005:487; and of 13 October 2005, *Parking Brixen*, C-458/03, EU:C:2005:605.

([857]) A later example can be found in Article 12 of the services directive (Directive 2006/123/EC of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006, p. 36), which, in paragraph 1, provides that selection from several candidates '[w]here the number of authorisations available for a given activity is limited because of the scarcity of available natural resources or technical capacity, Member States shall apply a selection procedure to potential candidates which provides full guarantees of impartiality and transparency, including, in particular, adequate publicity about the launch, conduct and completion of the procedure'; see judgment of 14 July 2016, *Promoimpresa*, C-458/14, EU:C:2016:558 (regarding beach concessions in Italy).

([858]) Judgments of 7 December 2000, *Telaustria*, C-324/98, EU:C:2000:669; and of 31 January 2008, *Centro Europa 7*, C-380/05, EU:C:2008:59.

([859]) Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code, OJ L 321, 17.12.2018, p. 36 (recast since the 2002 directives referring to the Council Directive 90/387/EEC and Commission Directive 90/388/EEC), Articles 45–48.

([860]) See Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunication services through implementation of open network provision, OJ L 192, 24.7.1990, p. 1; and Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services, OJ L 192, 24.7.1990, p. 10.

([861]) This started with Directive 96/92/CE of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, OJ L 27, 30.1.1997, p. 20. The texts on natural gas have followed the same model and will not be referred to here.

([862]) Judgment of 24 July 2003, *Altmark*, C-280/00, EU:C:2003:415.

products: a prohibition that also falls on Member States in relation to undertakings they control or 'privilege' through exclusive or special rights ([863]). The idea of a level playing field underlying this jurisprudence can be traced back to the transparency directive, adopted in 1980 by the Commission on the basis of Article 90(3) TEC (now 106(3) TFEU) ([864]), and first gave rise to the creation of regulatory authorities that are independent of the market operators ([865]) (see the following sections).

Then, under the liberalisation directives, as a first step, the incumbent monopolist had to open its infrastructure to its competitors, for which access to the 'local loop' was the first priority (e.g. for fixed telephony ([866])). As this step was not always sufficient to prevent any abuse of a dominant position by the incumbent monopolists, who could still control the means of access to their facilities and dictate conditions to their own competitors. Therefore, the next step consisted of splitting into two (or more) parts the vertically integrated incumbent operators that were providing services through their well-established networks, for which the costs had already been amortised thanks to state funding and a legal monopoly. The split between the networks and the economic activity conducted within them has thus been introduced in all the sectors that are dependent on the use of some material or even immaterial networks.

These two steps correspond to a legitimate public interest under EU law, such as transparency and openness in the use of the networks, and prevent distortions of competition, in order to ensure undistorted competition in the market. The splitting between the network and the liberalised economic activity could be effected at the level of accounting, with the separation of the accounts leading to transparency in two regards: (i) by showing through revenues and expenses how the networks and the liberalised economic activity were funded and (ii) by giving information about pricing policies. Going a step further, separation took place at the level of legal personality, with different entities being responsible for the network and for the service supply of the liberalised economic activity. In addition, special guarantees (in particular, rules prohibiting the concomitant exercise of two incompatible activities) have been laid down to prevent one entity from influencing another in the interest of its own services, so that all operators receive the same treatment and have the same chances on a given market. The best solution would therefore have been the splitting of the vertically integrated ex-monopolist undertakings. This separation of the legal personality paved the way for a patrimonial one, that is the separation of the ownership of the different entities, which could not always be explicitly planned to not require changes of ownership, as the application of the treaties should not prejudice the rules in Member States governing the system of property ownership pursuant

([863]) Judgment of 13 December 1991, *RTT/GB Inno*, C-18/88, EU:C:1991:474 (demonstrating abuse of a dominant position in conjunction with Article 106(1) TFEU).

([864]) Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings, OJ L 195, 29.7.1980, p. 35.

([865]) For example, Directive (EU) 2018/1972, Article 61 *et seq*.

([866]) See Council Directive 90/387/EEC and Commission Directive 90/388/EEC, which are historic on several accounts; and Directive (EU) 2018/1972, Article 77 (regarding functional splitting).

to Article 345 TFEU ([867]). Accordingly, whereas the separation of the accounting and the legal personalities would bring about independence, patrimonial separation can be furthered in practice by the prohibition of any relevant person, that is the person dealing with generation or supply, from exercising control, whether directly or indirectly, over any other relevant person, for example the person dealing with transport ([868]). This is how the break-up of railway companies has finally led to the opening up of their networks to other operators ([869]).

The resulting model is often as follows: the network entities are owned by the state (although not formally controlled by it), which bears a special responsibility for such a practically monopolistic onerous infrastructure, with several public or private operators providing the services of general economic interest through the use of this infrastructure. Competition has thus been introduced in all these sectors. Given the links that still exist between the state and these companies, however, the risks of abuse and other issues remain tangible. Indeed, the risks ensuing from the fact that the state is at the same time both a market regulator and a market player underlie precisely provisions such as Article 106 TFEU ([870]). Thus, despite the split of legal personality many issues have remained open in practice and can, depending on the case, lead to the application of competition law ([871]) and/or the refinement of legislation ([872]).

Of course, competition is not equally developed in all of these sectors, and depends on several factors, including the characteristics and availability of natural resources. Where the network is rather 'immaterial', for example consisting of a spectrum of frequencies (or even of cables) for

([867]) See, for example, *Essent*, C-206/06, EU:C:2008:413, paragraph 28 *et seq*.

([868]) See Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU, OL 158, 14.6.2019, Article 43(11). On these developments, see Triantafyllou, D., 'De la libéralisation à la régulation des marchés', *RDUE*, 2007, p. 653.

([869]) See Article 77 of Directive (EU) 2018/1972 (regarding telecoms), Article 35 (regarding the separate distribution network); Directive (EU) 2019/944 (recast since Directive 2003/54/EC of the European Parliament and of the Council of 26 June 3003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, OJ L 176, 15.7.2003, p. 125, Articles 43 and 45 (regarding the patrimonial separation of the transport networks) and Article 56 (regarding accounts); and Directive 2012/34/EU of the European Parliament and of the Council establishing a single European railway area (recast since Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways, OJ L 237, 24.8.1991, p. 25), OJ L 343, 14.12.2012, p. 32, Articles 6 and 7 (regarding legally independent management).

([870]) Wilms, G., *Das Europäische Gemeinschaftsrecht und die öffentlichen Unternehmen*, Duncker & Humblot, Berlin, 1996, p. 102.

([871]) See, for example, judgment of 18 June 2015, *Deutsche Bahn*, C-583/13 P, EU:C:2015:404, regarding abuse of dominance by Deutsche Bahn, which, by leveraging the *de facto* monopoly of its company, which sells upstream, imposed discriminatory prices on its competitors downstream in the retail market and thus committed an abuse of its dominant position in the form of margin squeeze. The case was closed against the commitments offered by Deutsche Bahn (Commission Decision of 18 December 2013, COMP/AT.39678 (Deutsche Bahn I), COMP/AT.39731 (Deutsche Bahn II) and COMP/AT.39915 (Deutsche Bahn III) (https://ec.europa.eu/competition/antitrust/cases/dec_docs/39678/39678_2514_15.pdf). See also, for example, Commission Decision C(2014) 7465 final of 15 October 2014 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case AT.39523 – *Slovak Telekom*); decision by the Italian Competition Authority of 25 July 2012, *Trenitalia*, A436; and judgment of 12 May 2022, *Servizio Elettrico Nazionale*, C-377, EU:C:2022:379, paragraphs 41–43.

([872]) Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area, OJ L 343, 14.12.2012, p. 32; Directive (EU) 2016/2370 of the European Parliament and of the Council of 14 December 2016 amending Directive 2012/34/EU as regards the opening of the market for domestic passenger transport services by rail and the governance of the railway infrastructure, OJ L 352, 23.12.2016, p. 1.

the transmission of electronic messages, competition can in theory be developed quickly and radically; however, in practice many legal and practical hindrances persist. Hence, the telecoms liberalisation directives provide for a market power analysis that is in substance similar to the one practised in competition law, with the additional possibility of imposing heavier public service obligations on the more powerful operators, through a sort of proportionate or asymmetrical treatment.

In other fields, where the network depends on the sources and stocks of the relevant supplies, as in the case of electricity and natural gas, competition is still imperfect and the incumbent (ex)monopolists still maintain very significant market power, regardless of the splitting between network and supply operators; the users' inertia also plays an important role ([873]). In that regard, the focus of the regulators is thus still on effectively emancipating the supply providers from the network operators that have their (own) operating companies ([874]). The recent geopolitical developments are now shifting that focus towards building up 'strategic reserves' of energy supplies ([875]), which is also part of the regulation, as it directly influences the continuity of supply and, hence, the prices applied. Even more challenging are cases in which the network presents obvious physical obstacles to the genuine coexistence of several operators, such as in the railways sector; these circumstances pose natural restrictions on the development of competition on the same lines, even if some progress has been made there, too.

The various EU liberalisation directives in these fields constitute an important regulatory framework that, beyond mere institutional splitting, lays down several provisions aimed at ensuring non-discriminatory, fair and proportionate use with regard to access to infrastructure, requiring transparency and objectivity; it also provides for open, transparent, non-discriminatory and proportionate tendering procedures, for example for the creation of new production capacities ([876]). Furthermore, it provides for conditions protecting the users. The tariffs practised must therefore be, for example, transparent, not discriminatory ([877]) and proportionate to the infrastructure costs, taking account of the maintenance and modernisation costs. These obligations protect not only the operators but also the final consumers from unfair practices on the part of their suppliers, which, for example, should not overburden their customers with inflated prices ([878]) and must inform them about their pricing ([879]).

([873]) See also the part of this chapter regarding the Digital Markets Act.

([874]) Cf. judgment of 17 July 2014, *Commission* v *DEI*, C-553/12P, EU:C:2014:2083.

([875]) Cf. Council Directive 2009/119/EC imposing an obligation to Member States to maintain minimum stocks of crude oil and/or petroleum products, OJ L 265, 9.10.2009, p. 9; and Directive (EU) 2019/944, Article 54 (regarding the ownership of energy stocking facilities).

([876]) See Directive (EU) 2019/944, Article 51 (regarding electricity). See also, for example, judgment of 7 June 2005, *VEMW*, C-17/03, EU:C:2008:376.

([877]) See Directive (EU) 2018/1972 (regarding telecoms), Articles 70 and 99; Directive (EU) 2019/944 (regarding electricity), Article 3, paragraphs 4 and 5; and Directive 2012/34/EU (regarding railways), Article 29.

([878]) Cf. judgment of 10 February 2000, *Deutsche Post*, C-147/97, EU:C:2000:74.

([879]) See, for example, Directive (EU) 2018/1972 (regarding telecoms), Article 103.

These rules were developed hand in hand with the Court of Justice, before which the Commission plays essentially the role of amicus curiae: the EU case-law preceded or accompanied the different regulatory provisions, albeit on a case-by-case basis.

The European Court of Human Rights also played a role because market access is in some cases a precondition for the effective exercise of fundamental rights.

For example, in the case regarding the distribution of TV frequencies in Italy, the European Court of Human Rights held that it is necessary for providers to have effective access to that market to guarantee diversity of the overall programme content, reflecting as far as possible the different opinions in society ([880]). The court also underlined that in a sensitive sector such as audiovisual media, in addition to its duty of non-interference, the state has a positive obligation to put in place appropriate legislative and administrative frameworks to guarantee effective pluralism ([881]). That is, of course, relevant to the EU legislator, which must not only comply with the fundamental rights when regulating the internal market ([882]), but also reconcile several competing fundamental rights with each other ([883]).

While the prevention of anti-competitive practices inspired regulation within the EU to some extent, regulation is also aimed at achieving fairness and the cross-border integration of the market, and at further general interests such as quality of services and consumer protection. Regulation *stricto sensu* is thus complemented by several obligations of the operators that go well beyond non-discrimination against network users. Thus, the additional regulatory obligations concern the protection of the general interest objectives, such as the protection of service recipients and consumers in particular, which should be able to benefit from the supplies in a satisfactory, safe and affordable manner. Whole directives or parts thereof are dedicated to providing the correct servicing to the public, in the telecoms sector (with the obligation to grant access to the network and its infrastructure at affordable prices, and special obligations for the stronger suppliers ([884])), in the postal services (with minimum service requirements) ([885]),

([880]) Judgment of 7 June 2012, *Centro Europa 7 S.r.l. and Di Stefano* v *Italy*, Application No 38433/09, paragraph 130.

([881]) Judgment of 7 June 2012, *Centro Europa 7 S.r.l. and Di Stefano* v *Italy*, Application No 38433/09, paragraph 134

([882]) Judgments of 13 December 1979, *Hauer*, 44/79, EU:C:1979:290, paragraphs 14–16; of 20 May 2003, *Österreichischer Rundfunk*, Joined Cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 68 *et seq.*; and of 9 November 2010, *Schecke*, Joined Cases C-92/09 and C-93/09, EU:C:2010:662, paragraph 46.

([883]) Judgments of 26 April 2022, *Poland* v *Parliament and Council (copyright directive)*, C-401/19, EU:C:2022:29, paragraph 66; and of 15 September 2016, *Mc Fadden*, C-484/14, EU:C:2016:170, paragraph 68 *et seq.*

([884]) See Directive (EU) 2018/1972, Article 84 *et seq.* (and Article 68, regarding the operators with significant market powers in the telecoms sector); cf. judgment of 19 June 2014, *TDC*, C-556/12, EU:C:2014:2009 (regarding cable connection) and Directive (EU) 2018/1972, Article 63 *et seq.* (regarding market analysis).

([885]) See Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of the quality of the service, OJ L 15, 21.1.1998, p. 14, Article 3 *et seq.*

in the energy sector, where the supply should remain affordable and continuous ([886]), and in the railway sector ([887]).

An example is the roaming regulation, which imposes maximum charges without extra fees for roaming on public mobile communication networks within the EU ([888]), to the benefit of the free provision of services as well as of the free circulation of citizens, workers and students in the EU's internal market. Another example is the net neutrality regulation, which is aimed at safeguarding the equal and non-discriminatory treatment of traffic in the provision of internet access services and related end user rights ([889]).

These special or general obligations that have been recognised at EU level, along with the liberalisation, emphasise the more social dimension of utilities, which goes beyond the mere competitive perspective.

Their detailed regulation, as well as the derogations from obligatory access to the network, renders less frequent the recourse to Article 106(2) TFEU, which allows derogations from the treaty's rules, when required, as regards the services of general economic interest; the regulation contains *leges speciales*, which do not leave much room for applying the general clause of the treaty ([890]), even if the legislator and the Court sometimes still refer to it as a source of inspiration when interpreting secondary law ([891]). In the energy sector in particular, the Court of Justice has also recently underlined the duty of the EU institutions and the Member States to consider the principle of energy solidarity (see Article 122(1) TFEU) when adopting acts relating to the internal market in natural gas, ensuring in particular the security of energy supply in the EU. This entails the adoption of measures to deal with emergencies and of preventive measures; it also emphasises the need to balance the energy interests involved, avoiding the adoption of measures that may affect the interests of stakeholders liable to be influenced, as regards the security of supply, its economic and political viability, and the diversification of sources of supply, and do so in order to take into account their interdependence and *de facto* solidarity ([892]).

This holistic approach is not surprising: the competition rules of the treaty are aimed at ensuring unfettered competition (the competitive structure of the market), equality of opportunity

([886]) Directive (EU) 2019/944, Articles 9 and 27 (regarding electricity); cf. Article 10 (regarding consumer rights).

([887]) Regulation (EU) 2016/2338 of the European Parliament and of the Council of 14 December 2016 amending Regulation (EC) No 1370/2007 concerning the opening of the market for domestic passengers transport services by rail, OJ L 354, 23.12.2016, p. 22 (public service regulation).

([888]) Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks, OJ L 172, 30.6.2012, p. 10.

([889]) Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union, OJ L 310, 26.11.2015, p. 1. See judgment of 15 September 2020, *Telenor Magyarország*, C-807/18, EU:C:2020:708.

([890]) See, for example, judgment of 7 June 2005, *VEMW*, C-17/03, EU:C:2008:376.

([891]) Judgment of 30 April 2020, *Overgas Mrezhi*, C-5/19, EU:C:2021:230, paragraph 53 *et seq.*

([892]) Judgment of 15 July 2021, *Germany* v *Poland*, C-848/19 P, EU:C:2021:598, paragraph 37 *et seq.*

(including market access) and the cross-border integration of national markets ([893]); the competition rules thus constitute a homogeneous entity alongside the free movement rules of the treaty and contribute, together with them, to the establishment of a truly integrated EU common market characterised by openness, fairness, meritocracy and quality. At the same time, the more markets are opened up and integrated across borders (through regulation), the greater the need to ensure the pursuit of other public interest objectives at European level, in order to avoid further legislative and administrative divergences in that regard at national level and to ensure a proper and well-balanced reconciliation of the market paradigm with other legitimate public interests ([894]).

4. Regulation versus competition law

This whole regulatory arsenal has, of course, raised the question of its relationship to classic competition law. The scheme and the wording of the TFEU indicate that regulation and competition are two sides of the same coin: they are both aimed at ensuring an integrated internal market, characterised by unfettered and fair competition, access to the market and equality of opportunity. The fact that they are *vases communicantes*, communicating with each other, is confirmed in several Court of Justice judgments ([895]) and in some legislation ([896]).

It can be said that the difference between competition law and regulatory law depends roughly on the type of regulation.

For example, the liberalisation mentioned above operates in a different manner and has always been aimed at creating the conditions for competition, that is, at opening the market, by setting out the 'rules of the game' for the sectors. In other words, it is an *ex ante* intervention, tending towards market creation through the abolition of monopolistic structures and the organised introduction of competition into their respective sectors. By contrast, classic competition law presupposes the free market with several

([893]) Judgment of 1 July 2008, *MOTOE*, C-49/07, EU:C:2008:376, paragraph 51. See also judgment of 15 January 2002, *Commission* v *Italy (trade fairs)*, C-439/99, EU:C:2002:14, paragraphs 39–40, in which the Court of Justice reached an analogous result on the basis of the free movement rules of the TFEU.

([894]) Pescatore, P., 'La notion du marché commun dans les traités instituant l'Union économique belgo-luxembourgeoise, le Benelux et les Communautés européennes', in University of Liège (ed.), *En hommage à Victor Gohot*, Presse universitaire de Liège, 1962, pp. 521, 523 and 534 (reprinted in Picot, F. (ed.), *Le droit de l'intégration*, Bruylant, Brussels, 2005).

([895]) Judgments of 1 July 2008, *MOTOE*, C-49/07, EU:C:2008:376, paragraphs 41 and 51; of 23 April 1991, *Höfner and Elser,* C-41/90, EU:C:1991:161, paragraphs 30 and 35 *et seq.*; of 4 October 2011, *Premier League,* Joined Cases C-403/08 and C-429/08, EU:C:2011:631; and of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas*, C-1/12, EU:C:2013:127, paragraph 88.

([896]) See, for example, Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186, 11.7.2019, p. 57; see, in particular, recitals 7 and 8). See also Maxian Rusche, T., *EU Renewable Electricity Law and Policy*, Cambridge University Press, Cambridge, 2015, pp. 11–12.

competitors and is aimed at ensuring that competition will remain free, by penalising anti-competitive behaviour (*ex post* intervention) ([897]).

A further broad difference is that the market is regulated through specific sectoral rules formulated *ex ante* in a more general and abstract manner despite still being evidence-based, whereas competition law usually deals with individual cases, even if regulations can also be found in competition law, for example the EU vertical block exemption regulation and the motor vehicle block exemption regulation ([898]).

As a result of its scope of application, regulation is often sectoral, tailored to the often previously monopolistically organised sectors, which relate to natural or legal monopolies, and is particularly dense as regards the network industries. By contrast, competition law has general application and concerns all economic activities ([899]).

Finally, it can be said that competition law imposes more negative obligations in order to protect the competitive structure of the market against anti-competitive agreements and concerted practices and the abuse of dominant positions.

By contrast, regulation in the present sense obviously goes beyond the competitive perspective.

Regulation aims to set the conditions under which each regulated activity has to be exercised in the pursuit of all the general interests, by imposing positive obligations that the operators have to fulfil, so that, among other things, the activity does not threaten the health and safety of its users or the environment and complies with fundamental rights ([900]). From that perspective, sectoral regulation interacts more directly with the general regulatory activity of the EU and its Member States. At the same time, competition law is also concerned, in one way or another, with the wider framework in which economic activities are carried out and considering the relevant economic and legal contexts, for example, in the market definition (e.g. in highly regulated markets such as financial services) or in the analysis of the abusiveness of conduct ([901]).

The Commission plays several roles both in the field of regulation and in the area of competition. The Commission **triggers and accompanies the legislative procedure that gives rise to regulation, supervises the application of EU rules** by national authorities in particular through infringement procedures, **contributes to their implementation** through comitology

([897]) Idot, L., 'Règles de concurrence et régulations sectorielles', in Vandamme, J. and Mensbrugghe, F. (eds), *La régulation des services publics en Europe*, ASPE, Paris, 1998, p. 377 *et seq.*

([898]) See also Maxian Rusche, T., 'Regulation and competition', in Blanco, L. O. and Van Houtte, B. (eds), *EU regulation and competition law in the transport sector*, Oxford University Press, Oxford, 2017, pp. 47–48.

([899]) Those linked to defence are excluded (see Article 346 TFEU).

([900]) See, to this effect, judgment of 15 September 2016, *Mc Fadden*, C-484/14, EU:C:2016:170, paragraphs 68 *et seq.*

([901]) See, to this effect, judgment of 25 March 2021, *Deutsche Telekom*, C-152/19, EU:C:2021:238, paragraph 57.

and coordination, and in some instances (for example with regard to the Digital Markets Act (DMA) and the Digital Services Act (DSA)) **enforces them directly**. In short, **the Commission is a true 'clock master' of the EU's internal market.** That role may seem separate from that of 'watchdog' that is assigned to it by competition law, but both are actually integrated.

The differences between these two roles should not be overstressed because some features of the clock master role are also present, *mutatis mutandis*, in the watchdog role and vice versa; thus, the exercise of the one does not exclude the exercise of the other. So, for example, whereas competition law is often geared towards the enforcement against breaches of its provisions in individual cases, regulatory law also provides for enforcement against breaches of specific obligations. Examples can be found in the telecoms sector and the DMA. To ensure compatibility and complementarity between the two roles is not a simple exercise, as even a developed regulatory framework does not exclude the application of competition law altogether ([902]). This is all the more true where competition is still imperfect, that is, where the opening of the market is recent or difficult in practice. In these cases, competition law can achieve the aims of regulating the market too, for example ensuring access to the market under fair conditions ([903]), and pursues, if not the same, at least similar and complementary aims. For example, in the *DEI* case ([904]) although the regulatory framework for opening the energy market was already in force along with the distinction between network operators and service providers, it was finally competition law in combination with Article 106 TFEU that imposed on the incumbent public monopolist the sale of its coal mines. These coal mines gave it a competitive advantage over its competitors, rendering their profitability impossible because of the low prices that those mines allowed it to provide. It was thus competition law that secured the opening of the market, independently from any concrete abusive behaviour: the risk deriving from the reservation, by the state, of the cheapest energy source to DEI's advantage was considered sufficient to constitute a breach of Article 102 TFEU (in conjunction with Article 106(1) TFEU, as the undertaking was public); thus, competition law complemented the regulatory activity of the legislator and was guided or inspired by it. The regulatory scope and implications of some competition decisions become even more obvious when one analyses the conditions imposed or the commitments undertaken *ex ante* (for abuse prevention ([905])), whereas any fears about the politicisation of the competition supervisor to the detriment of its direct decision-making role have proven exaggerated, probably thanks to the independence of the Commission as the competition authority and its main focus on the principles of competition.

([902]) See judgment of 10 July 2014, *Telefónica*, C-295/12 P, EU:C:2014:2062, paragraph 128.

([903]) Cf. judgment of 10 April 2008, *Deutsche Telecom*, T-271/03, EU:T:2008:101 (regarding the gross access tariffs for squeezing competitors out of the market).

([904]) Judgment of 17 July 2014, *European Commission* v *DEI*, C-553/12P, EU:C:2014:2083; cf. Triantafyllou, D., 'Der Staat als Garant der Wettbewerbsstruktur', *EuZW*, 2014, p. 734.

([905]) See judgment of 2 February 2022, *Polskie Gortctwo Naftowe*, T-616/18, EU:T:2022:43, with conditions securing the supply of natural gas to the states of central and eastern Europe.

Conversely, in cases in which the market needs structural changes and continuous supervision, the approach of competition law may prove too fragmented, too infrequent and insufficient, meaning that it needs to be complemented by specific and detailed regulatory action.

Regulatory action can, of course, also be inspired by the principles of competition law, as competition law is also generally aimed at maintaining the competitive structure of the market and the good functioning of the internal market, ensuring fairness, equality of opportunity and market access ([906]). This has been made clear since the first cases in the field of telecoms that concerned the prohibition on the incumbent operator approving the telephones of its competitors and the prevention of conflicts of interest ([907]), even before the relevant legislation entered into force; it is still obvious and present in the legislative proposal about the regulation of digital markets, which have been for some years the focus of competition policy.

5. The challenge of regulating the major digital platforms

The EU has adopted a number of legislative acts to regulate digital markets. One of them is the DMA ([908]) which regulates undertakings providing core platform services ('gatekeepers') that are so big and powerful that they own and control something that is tantamount to indispensable digital infrastructure. By way of background, the core digital services are technologically complex and fast-changing services in network industries that are characterised by enormous economies of scale and scope. They benefit from collecting a vast amount of data from the services they provide and build on automatic and ubiquitous data mining, which enables them to predict users' needs and preferences and to mould these needs and preferences ([909]). Whereas data can in theory be used by several entities in parallel, unfair practices or accessibility/usability technology can make the data excludable ([910]). Whereas data protection law provides for a number of guarantees, data subjects are prone to give their consent to undertakings in exchange for the opportunity to use their services without fees, and they are also prone to accept conditions and terms of use without careful thought ([911]). Furthermore, given the conglomerate and vertical integration of core digital services, the user lock-in is particularly strong; equally, the market access opportunities for alternative providers or users of vertically integrated businesses are in practice very limited. In view of these issues,

([906]) Judgments of 1 July 2008, *MOTOE*, C-49/07, EU:C:2008:376, paragraphs 41 and 51; and of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas*, C-1/12, EU:C:2013:127, paragraph 88.

([907]) Cf. judgment of 13 December 1991, *RTT/GB Inno*, C-18/88, EU:C:1991:474.

([908]) OJ 12.10.2022, L 265, p. 1.

([909]) Zuboff, S., *The Age of Surveillance Capitalism*, Profile Books, London, 2019, pp. 63 *et seq.*

([910]) Streinz, T., 'The evolution of European data law', in Craig, P. and de Búrca, G. (eds), *The Evolution of EU Law*, 3rd edn, Oxford University Press, Oxford, 2021, pp. 902–936 (p. 24 of the online version).

([911]) Cf. Zuboff, S., *The Age of Surveillance Capitalism*, Profile Books, London, 2019, pp. 63 *et seq.*

national legislators have acted or intend to act. In order to avoid the fragmentation of the internal market, the EU legislator has enacted a comprehensive regulatory instrument (the DMA), which is complemented by the DSA ([912]). The internal market rationale also stems from the risk that gatekeepers would partition the markets along national lines in the EU.

The DMA applies to a number of digital services (termed 'core platform services'): online intermediation services (including marketplaces and app stores), online search engines, operating systems, cloud computing services, video-sharing platform services, number-independent interpersonal electronic communication services, social networking services, advertising services, web browsers and virtual assistants (Article 2(2)) ([913]). Undertakings will be designated as gatekeepers if they fulfil the following criteria: they have a significant impact on the internal market; they operate a core platform service that serves as an important gateway for business users to reach end users; and they enjoy an entrenched and durable position in the operations or the enjoyment of such a position in the near future is foreseeable ('emerging gatekeeper') (Article 3). The obligations imposed on gatekeepers are varied; for purposes of categorisation, they can (broadly speaking) be grouped into several clusters: data-related practices, tying, mobile ecosystems, commercial relations, unfair conditions of access and transparency. They comprise, for example, the prohibition of self-preferencing; fair, reasonable and non-discriminatory obligations; transparency obligations regarding advertising services; interoperability obligations; 'most-favoured nation' obligations; and the portability of data.

Firstly, the gatekeepers are designated, on their notification or at the initiative of the regulator, which is exclusively the Commission, according to a system of rebuttable presumption based on quantitative thresholds (Article 3(2)); below the thresholds, designation based on a dedicated analysis based on the factors set out in Article 3(6) is also possible (e.g. of emerging gatekeepers).

The DMA is in several regards a flexible and sophisticated regulatory instrument.

Secondly, the DMA regulatory obligations are set out equally and regardless of the existence of dominance; that makes sense also in view of the constantly changing characters of the markets concerned. Whereas the content of these obligations is detailed and tailored to specific services (e.g. the obligation on interoperability of number-independent interpersonal communications services pursuant to Article 7), the obligations set out in Article 6 may be further specified by the Commission. On the other hand, single obligations can be exceptionally suspended (Article 9) or can even be the object of an exemption if justified on grounds of public health or public security (Article 10). Precisely in view of the fast-changing character of the digital services concerned and their technological complexity, the regulation can be adapted in some regards in the future ('future-proofing'): for example, the obligations can be updated through

([912]) Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector (Digital Markets Act) OJ L 265, 12.10.2022, p. 1.

([913]) Cf. also Manzini, P., 'Il Digital Markets Act decodificato', in Manzini, P. and Vellano, M. (eds), *Unione europea 2020 – I dodici mesi che hanno segnato l'integrazione europea*, Wolters Kluwer CEDAM, Milan, 2021, pp. 317–344.

delegated acts (Article 12) and the list of the services that are defined as core platform services can be updated following a market investigation (Article 19). Finally, ancillary obligations are also set out: for example, when collecting, processing or sharing personal data the gatekeepers should comply with further pieces of EU legislation and the gatekeeper should be prevented from punishing business users where they act to seek compliance with the DMA.

Thirdly, the DMA introduces maximum harmonisation but only vis-à-vis national measures that impose further obligations on gatekeepers to ensure contestable and fair markets (Article 1(5)). The implementation of competition rules of the Member States is by contrast not prevented by the DMA, under the conditions laid down in Article 1(6). In any case, no national measure may run counter to a decision adopted by the Commission under the DMA.

Fourthly, the enforcement of the DMA is designed in order to be effective and adaptable: the DMA provides for legal tools well known in other fields, such as interim measures, cease-and-desist orders, fines and commitments. Furthermore, it provides for regulatory enforcement tools such as a dialogue procedure (Article 8), the obligation to be audited as regards reports on consumer profiling techniques (Article 15), reporting obligations, the obligation to report on concentrations, stronger remedies in the event of systematic non-compliance (such as a merger moratorium, under certain conditions), a compliance function of the gatekeepers (Article 28), the opportunity to use the provisions enacted in the transposition of the whistleblower directive (Article 43) and the collective redress action directive (Article 42), and the opportunity for the Commission to mandate the European standardisation bodies to set standards in order to facilitate the implementation of the DMA obligations (Article 48). Furthermore, given that the gatekeepers are designated, they must provide details of how they comply with the relevant obligations (Article 8). Several anti-circumvention clauses are also set out in the DMA. Whereas structural remedies are not expressly provided for, the tools illustrated above seem to provide sufficient ways to avoid the risk that those who control not only the business strategy and conduct but also the details of technology will modify them to counter the aims of the DMA ([914]).

Fifthly, the Commission is the sole regulatory enforcer but it and the national authorities should work in close cooperation and coordinate their enforcement actions pursuant to the DMA (Article 37). So judges are responsible for the correct application of the DMA and in that context can ask the Commission questions regarding the application of the DMA (Article 39). Furthermore, Member States are involved in the adoption of the implementing acts and the delegated acts. Member States may also investigate gatekeepers' practices. In addition, three or more Member States may ask the Commission to carry out an investigation regarding matters such as gatekeeper designation and the list of services to be added (Article 41).

In sum, the DMA is a regulatory tool that is partly inspired by considerations that are drawn from the experience in the enforcement of other sectoral legislation (such as data protection;

([914]) See, by analogy, Streinz, T., 'The evolution of European data law', in Craig, P. and de Búrca, G. (eds), *The Evolution of EU Law*, 3rd edn, Oxford University Press, Oxford, 2021, p. 13.

consumer protection; business to business; registration, evaluation, authorisation and restriction of chemicals; and net neutrality) as well as competition law, but takes a broader and different angle, as it aims to ensure the contestability and the fairness of the market. The highly sophisticated data-driven digitalisation of the economy and life is overwhelming the boundaries of nation states and putting conventional legal categories to the test ([915]). The DMA aims to make a significant, innovative and forward-looking contribution to reining in the overwhelming dominance of major internet platforms in the economy and in society. Whereas the effectiveness of the DMA is yet to be proved in practice, it fits into the pattern of the EU as a front runner in the regulation of the digital economy, by striking a balance between innovation, efficiency, meritocracy and fundamental rights ([916]).

6. Regulation and competition overlaps

Despite the initial distinction between regulation and competition law, both approaches meet and partially overlap, one being inspired by the other, contributing thereby to the proper functioning of the market. They can therefore be considered complementary forms of regulatory intervention in a wider sense, the emphasis on one or the other approach varying depending on the case being dealt with. Competition law can complement the loopholes of the regulatory framework ([917]), in particular where competition is imperfect or has been recently introduced or where monopolistic behaviours are almost customary. In some cases, perfect coordination between competition law and regulatory law could be advantageous to the dominant undertakings ([918]). On the other hand, the existence of specific structural provisions regulating a sector should be taken into account by the Commission as competition authority, when it defines markets, qualifies a behaviour as abusive or imposes fines ([919]). The telecoms sector, for example, may appear to be intensely marked by competition policy, the regulation in question referring explicitly to market power ([920]). At the same time, other legitimate public interests are also taken into account in pieces of legislation such as the roaming regulation, the universal services directive and the net neutrality regulation ([921]).

The two legal fields (competition and regulation) are expected to be applied to different extents in different cases, although the same problems can, to a certain extent, be tackled by both

([915]) Sales, P., 'Algorithms, artificial intelligence and the law', *Judicial Review*, Vol. 25, No 1, 2020, pp. 46–66, paragraph 82.

([916]) Cf. Streinz, T., 'The evolution of European data law', in Craig, P. and de Búrca, G. (eds), The Evolution of EU Law, 3rd edn, Oxford University Press, Oxford, 2021, p. 48.

([917]) Monti, G., 'Managing the intersection of utilities regulation and EC competition law', *Competition Law Review*, Vol. 4, No 2, 2008, p. 123.

([918]) See judgment of 14 October 2010, *Deutsche Telecom*, C-280/08 P, EU:C:2010:603; for a critical stance, compare Dunne, N., *Competition Law and Economic Regulation*, 2015, Cambridge University Press, Liège, p. 232.

([919]) Cf. judgment of 22 March 2022, *BPost*, C-117/20, EU:C:2022:202, paragraph 44 *et seq*.

([920]) Directive (EU) 2018/1972, Article 63 *et seq*.

([921]) See footnotes 887–889.

sets of rules, so one could say that the rules are concurrent. The antitrust sanction that was imposed on Google because it algorithmically favoured its own sale service to the detriment of competitors, thereby maximising its profits and foreclosing competitors ([922]), is coherent with the adoption of regulatory rules on digital markets. Another example of the same issue being subject to both sets of rules is (abusively) discriminatory pricing practices. The *ne bis in idem* principle is only relevant to sanctions of a criminal nature, if the general interest protected by both sets of rules is the same in two parallel procedures regarding the same acts. However, the jurisprudence regards the protected interests of liberalisation and abuse prevention as separate, so that a dual sanction remains possible, under some coordination conditions, in order to avoid excessive penalties ([923]). One may wonder about the efficiency of such coordination. It may also be asked whether one instrument should not be given primacy over the other, although such an instance could also affect the coordination required. In any event, effective and efficient coordination is a challenge that is to be tackled by the Commission together with national authorities.

In sum, the EU jurisprudence upholds the relative independence of regulation from competition policy and plays a fundamental role in the understanding and the application of both sets of rules (see, for example *Deutsche Telekom*). More generally, the Court of Justice has always played a fundamental role in balancing the general interests at stake against other rules of the TFEU, not only those of unfettered competition but also, importantly, fundamental freedoms and rights. It does so even independently from the existence of a detailed regulatory framework and often paves the way, therefore, to regulatory law balancing the different interests at stake, as has already been shown. It is not an exaggeration to state that the **judges, together with the Commission**, which acts not only as the initiator and enforcer of the rules but also as amicus curiae in preliminary reference procedures, also **carry out a fundamental quasi-regulatory function** by tackling issues that arise in practice, in view of the technological, economic and social changes of modern times.

7. The institutional challenge: regulatory authorities

The incompatibility between regulatory and operational functions has led regulation to set up regulatory authorities first at national level, with the aim of ensuring and organising competition through access to the networks and infrastructures. For example, these authorities control the tariffs in the telecoms, energy and railway sectors, which must be non-discriminatory and have to remain reasonable with regard to certain criteria; ensure transparency; carry out tender processes; and ensure cross-border connectivity. The same or other authorities are entrusted with assessing the complaints of competing operators or their customers, but also with securing the sufficiency of the supply (e.g. in the energy sector ([924])).

([922]) Judgment of 10 November 2021, *Google* v *European Commission*, T-612/17, EU:T:2021:763.

([923]) Judgment of 22 March 2022, *Bpost*, C-117/20, EU:C:2022:202.

([924]) Directive 2019/944 (regarding electricity), Article 57 *et seq.*; Directive 2012/34/EU (regarding railways), Article 55 *et seq.*; Directive (EU) 2018/1972 (regarding telecoms), Article 61 *et seq.*

That cooperation goes beyond the mere exchange of information and consultation or coordination obligations; it leads to the establishment of cooperation networks in groups/committees composed of representatives of the national regulatory authorities, which have in some instances evolved into European agencies ([925]). The Commission is always represented in the boards of those bodies, thereby ensuring the consistency of their actions with regard to the regulatory framework and the general interest of the EU. This confirms that it also acts as 'regulator of the regulators' (clock master) from an institutional point of view.

In addition, the gradual integration of the different sectors in question within a single internal market has made cooperation between national regulatory authorities necessary.

8. The regulation of financial services

The present chapter would appear incomplete if, along with the regulation of network industries, it kept silent on the regulation of financial services. This chapter will not refer to European regulation of the money supply by the European Central Bank (ECB) since the introduction of the euro following the implementation of the Maastricht Treaty, because monetary policy lies in the hands of the ECB alone. However, since the financial crisis that started in 2007 the regulation of financial services has undergone an impressive overhaul and expansion, with detailed regulation aimed at preventing new crises in the future following the implementation of the relevant Basel agreements.

On the one hand, the number of respective legislative (and regulatory) texts exploded, with extensive regulation on prudential requirements for credit institutions and investment firms ([926]) – let alone the regulation of the financial markets ([927]) – accompanied by the directive on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms.

([925]) See Regulation (EU) 2016/796 of the European Parliament and of the Council of 11 May 2016 on the European Agency for Railways, OJ L 138, 26.5.2016, p. 1 (regarding railways); Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of European Regulators for Electronic Communication (BEREC) and the Agency of support for BEREC, OJ L 321, 17.12.2018, p. 1 (regarding telecoms); and Regulation (EU) 2019/942 of the European Parliament and of the Council establishing a European Union Agency for the Cooperation of Energy Regulators, OJ L 158, 14.6.2019, p. 22 (regarding electricity).

([926]) Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms, OJ L 176, 27.6.2013, p. 1; cf. Regulation (EU) 2019/2033 of the European Parliament and of the Council of 27 November 2019 on the prudential requirements of investment firms, OJ L 314, 5.12.2019, p. 1; Directive (EU) 2019/2034 of the European Parliament and of the Council of 27 November 2019 on the prudential supervision of investment firms, OJ L 314, 5.12.2019, p. 64.

([927]) Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments, OJ L 173, 12.6.2014, p. 349; and Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, CCPs and trade repositories, OJ L 201, 27.7.2012, p. 1.

These texts form the bulk of rules about prudential supervision and capital requirements, the risk weighting of different assets and the capital buffers, which are subject to complicated formulas and calculations.

Having been proposed by the Commission in the light of the international standards, they have then been supplemented and further implemented by multiple delegated and implementing regulations of the Commission, which thereby plays a central role in the regulation of banking in a wider sense.

On the other hand, besides the ECB, which has been entrusted with the prudential supervision of significant credit institutions ([928]), important regulatory tasks have been assigned to the new European agencies created for that purpose, which have been entrusted since 2010 by the legislator with drawing up regulatory and implementing technical standards serving as a basis for the delegated and implementing acts of the Commission. Reference is made to the European Banking Authority ([929]), the European Insurance and Occupational Pensions Authority ([930]) and the European Securities and Markets Authority ([931]), the creation of which on the basis of Article 114 TFEU has been validated by the Court of Justice as an indispensable means for ensuring the correct implementation of harmonisation rules ([932]), in a judgment that broadly interprets the old *Meroni* jurisprudence. This jurisprudence restricted the delegation of powers to authorities other than the Commission. Nevertheless, it is true that the authorities in question not only deal – within their legal powers ([933]) – with very technical issues that require great expertise, but also refer to the Commission in order to have the 'standards' they develop adopted, thereby acquiring binding force as Commission delegated or implementing acts ([934]). Moreover, beyond issuing opinions and guidelines or recommendations ([935]) the EU agencies cannot interpret EU law themselves; any answers to interpretative questions raised in their work have to be provided by the Commission ([936]).

([928]) Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287, 29.10.2013, p. 63.

([929]) Regulation (EU) No 1093/2010 of the European Parliament and of the Council establishing a European Supervisory Authority (European Banking Authority), OJ L 331, 15.12.2010, p. 12.

([930]) Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), OJ L 331, 15.12.2010, p. 48.

([931]) Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), OJ L 331, 15.12.2010, p. 84; all three European supervisory authorities are under the 'umbrella' of the European Systemic Risk Board, established through Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board, OJ L 331, 15.12.2010, p. 1.

([932]) Judgment of 22 January 2014, *UK* v *European Parliament and Council (short selling)*, C-270/12, EU:C:2014:18.

([933]) Judgment of 15 July 2021, *FBF*, C-911/19, EU:C:2021:599.

([934]) See Regulation (EU) No 1093/2010, Articles 10 and 15.

([935]) Regulation (EU) No 1093/2010, Articles 16 and 16a.

([936]) Regulation (EU) No 1093/2010, Article 16b.

This prevents the agencies from issuing new rules or binding interpretations alone. In respect of these financial agencies, too, which promote coordination, including cross-border cooperation between national supervisors (or the ECB), and a common supervisory culture, the Commission has the tools to be the clock master.

In other words, the Commission, which is represented on the boards of supervisors of the agencies, is in a position to hold some control over the agencies' activities.

The focus of the supervisory regulation being on the prevention of problems from an *ex ante* perspective, as encountered in the other regulatory fields (telecoms, energy, transport, etc.), one should not forget the aspect of crisis resolution, in which the Commission also reserves an important role. The Commission has to approve any resolution schemes adopted by the Single Resolution Board for the more significant failing credit institutions ([937]); more importantly, if some funding by the Single Resolution Fund is involved, State aid authorisation is required ([938]). Again, the Commission plays a regulatory role, although from an *ex post* perspective, by ensuring consistency with its State aid framework when a credit institution, in order to be resolved, has to be financed either by a Member State, in which case that credit institution is usually considered 'failing or likely to fail' and is thus liable to resolution, if this is in the public interest, or by the Single Resolution Fund. However, as such an action is geared towards crisis resolution, with possible links to the State aid doctrine under Article 107 TFEU, giving rise to a different sort of direct regulation of the public funding of the economic activities by the Commission, this is not the right place to elaborate further on that aspect.

9. Conclusion

For several years, the internal market has been perceived by some as a purely welfare-maximising and ordo-liberal project. However, on closer inspection it appears that all the regulatory activity of the EU legislator, the Commission and the Court of Justice is not exhausted in maximising economic efficiency. In particular, the financial crisis, the societal and economic challenges posed by digitisation, the COVID-19 pandemic and the war in Ukraine have given us cause to revisit the models through which we understand market regulation and its relationship with competition law, other legitimate public interests and fundamental rights. Both regulatory law and competition law are part of public powers in the EU that aim to pursue the values shared by the EU and its Member States. Whereas the values enshrined in Article 2 TEU are formulated in broad terms, they have a legal significance that must be preserved and propagated (cf. Article 3 TEU). All actors at EU, national, regional and local levels should keep

([937]) Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Mechanism and a Single Resolution Fund, OJ L 225, 30.7.2014, p. 1 (in particular Article 18).

([938]) Regulation (EU) No 806/2014, Article 19.

that in mind when devising or applying technical and regulatory solutions for the further development and deepening of the EU's internal market.

The EU's values, including equality, solidarity and fundamental rights, must be pursued in the regulation of the market.

There is no direct contradiction between the EU's economic efficiency (in particular through the opening of the markets and free competition) and its values, because the reconciliation of all those public objectives is the cement that keeps individuals and society together in a regionally, culturally and socially diverse and sometimes divergent Europe. There is continuity in the regulation of the internal market, but also adaptation to changed circumstances and challenges, the internal market being a living instrument characterised by dynamism ([939]). In that regard, the Commission fulfils a special and very delicate clock master role; in looking for solutions for detailed technical questions, it must keep in sight the bigger picture, ensuring that those solutions respect, reflect and reinforce the EU's values.

([939]) Opinion of Advocate General Szpunar of 18 May 2022, *X and Visser*, Joined Cases C-360/15 and C-31/16, EU:C:2017:397, paragraphs 1 and 2.

THE EUROPEAN COMMISSION'S CONTRIBUTION TO THE QUALITY OF EUROPEAN UNION LEGISLATION

THE PRACTICE OF THE LEGAL SERVICE

Levent Pamukcu and Dionysios Kelesidis

1. Introduction

> *As are the words, such is the law. Laws can only be made with words.*
>
> *[...]*
>
> *In all cases of want of precision, the fault arises either from the choice made of the words, or from the manner in which they are put together* ([940]).

This is how Jeremy Bentham, in his book *A general view of a complete code of laws*, addressed the issue of the 'style' of laws, namely what present-day legal literature describes as the 'formal quality' of legislation. In contrast to the substantial quality, which relates to the content of rules of law, formal quality concerns their drafting quality ([941]).

In the EU legal system particular attention is paid to the drafting of legal acts adopted by the European Commission, as is the case for acts adopted by the other EU institutions. The aim of careful drafting is to provide for legal rules allowing EU citizens to benefit from effective rights and the protection of those rights. The Court of Justice has recently reiterated the reasons for this concern, which is present throughout the variety of acts by which the Commission intervenes day by day, within its broad sphere of competence.

([940]) Bentham, J., 'A general view of a complete code of laws', in Browning, J. (ed.), *The Works of Jeremy Bentham*, Vol. III, William Tait, Edinburgh, 1843, pp. 207–208.

([941]) Marinese, V., 'Légistique et effectivité', in Champeil-Desplats, V. and Lochak, D. (eds), *À la recherche de l'effectivité des droits de l'homme*, Presses universitaires de Paris Nanterre, Paris, 2008, p. 89. For more details on the concept of formal quality, see Section 2 below.

In its judgment of 16 February 2022 ([942]), the Court confirmed that:

> *the principle of legal certainty requires, on the one hand, that the rules of law be clear and precise and, on the other, that their application be foreseeable for those subject to the law.*

It went on to confirm that:

> *that principle requires, inter alia, that legislation must enable those concerned to know precisely the extent of the obligations imposed on them, and those persons must be able to ascertain unequivocally their rights and obligations and take steps accordingly.*

If this transversal concern with ensuring a high formal quality of EU rules – irrespective of their author, their legal basis, the procedure for their adoption or even the legal instrument containing them – is particularly acute, it is because the requirement of legal certainty is nothing less than a general principle of law ([943]). It is also due to the specific place of multilingualism within EU law, which leads to the equal treatment of each language in which EU law is officially published. As all language versions of EU legislation are equally authentic, the Court concludes that ([944]):

> *one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision or be made to override the other language versions. Provisions of EU law must be interpreted and applied uniformly in the light of the versions existing in all languages of the European Union.*

The logical consequence of this is that each language version must say exactly the same, legally speaking: although each EU legal rule is multilingual, it nevertheless has a single meaning.

Moreover, the combination of those qualitative and linguistic requirements that EU law must satisfy means that the Commission must formulate the acts that it adopts, or proposes to the EU legislator to adopt, in such a way that their content is the same, clear, simple and precise in each of the 24 official languages of the European Union.

The way in which the Commission seeks to achieve this objective is the result of many years of experience, and is therefore difficult to describe exhaustively in a few pages. This chapter therefore intends to provide an overview of the current practice whereby the Commission, and in particular its Legal Service, aims to achieve legislation that meets these high standards of quality.

([942]) Judgment of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, EU:C:2022:97, paragraph 223; this judgment of the Full Court confirms the settled case-law of the Court on this point. See for a detailed analysis of this judgment the chapter 'Fundamental values, constitutional identity and the protection of the European Union budget against breaches of the rule of law'.

([943]) Judgment of 25 January 2022, *VYSOČINA WIND*, C-181/20, EU:C:2022:51, paragraph 47.

([944]) Judgment of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi*, C-561/19, EU:C:2021:799, paragraphs 42 and 43.

2. Legislative technique and multilingualism: a constantly evolving context

2.1. Framework and tools of the Commission Legal Service's intervention

Before possibly being called on to take a position before the Court of Justice on acts of EU law that are the subject of disputes, the Commission Legal Service is most often consulted on those acts before they are adopted. When these acts are still at the draft stage within the Commission, the author directorate-general consults other directorates-general to obtain their views on the first version. This is what is known as interservice consultation. Within the Commission Legal Service, which is systematically consulted, the Directorate 'Quality of Legislation Team' (hereinafter the 'Quality Team') is responsible for the analysis of those texts from the perspective of formal legislative technique.

Talking about the form of EU acts involves referring to elements of different nature. For instance, the form of acts concerns the choice of a particular term used in an article, the wording of entire sentences in a recital, or the choice of elements to be included in the title of an act; the form is also about the division of an article into several paragraphs, or even the grouping of provisions into sections, chapters or other higher subdivisions. Form also encompasses, for example, the choice of the type of act used to regulate a particular area. Form may therefore relate to terminology, structure or the type of act chosen in order to lay down rules for a given situation.

As will be seen below, to ensure that the acts submitted in interservice consultation take the appropriate form, the Commission bases its practice on rules of legislative technique resulting from the various texts specific to the matter and on the case-law of the Court of Justice. The Treaty on the Functioning of the European Union (TFEU) also provides a framework for the matter. It should also be borne in mind that the Commission's practice concerning legislative drafting, far from being static, has evolved significantly over time, as it is dependent on two factors. First, there have been developments in the abovementioned rules on legislative technique, which currently cover the many and varied aspects of legislative activity. These include guides or manuals specific to the Commission or common to different institutions, and interinstitutional agreements ([945]). Second, the development of the practice in question is also

([945]) In particular, European Commission, *Legislative Drafting – A Commission manual*, 1997 (a large part of which was subsequently adapted and integrated into the Commission's Drafter's assistance package (DAP)); *Joint practical guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation*, Luxembourg, Publications Office of the European Union (Publications Office), 2015 (hereinafter 'Joint practical guide'); *Interinstitutional style guide of the Publications Office of the European Union*, Luxembourg, Publications Office, 2022; Interinstitutional agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation, OJ C 73, 17.3.1999, p. 1; European Parliament, Council of the European Union and European Commission, *Joint handbook for the presentation and drafting of acts subject to the ordinary legislative procedure*, 2022; and the Interinstitutional agreement between the European Parliament, the Council of the European Union and the European Commission of 13 April 2016 on better law-making, OJ L 123, 12.05.2016, p. 1 (hereinafter 'interinstitutional agreement on better law-making'), which replaces the Interinstitutional agreement of 16 December 2003 on better law-making, OJ C 321, 31.12.2003, p. 1. For the rest of this chapter, in order to avoid excess footnotes, we will avoid making systematic reference to the elements of these documents in connection with the points discussed.

linked to that of the official languages of the EU, which have become more and more numerous as a result of the successive accessions of new Member States.

2.2. Law and languages

When the Commission Legal Service is consulted on draft legal acts, the work on the wording of the text is carried out in two stages.

First, before being translated, the draft act is analysed by the Quality Team in a single language version ([946]). After that analysis, the text is sent back to the author directorate-general, after which it is translated into all the official languages of the EU by the Directorate-General for Translation.

It may happen that, after the translation, some differences remain between certain language versions of the acts concerned. There is longstanding case-law of the Court of Justice on how to interpret EU legislation in cases of discrepancies between language versions of the same text. That case-law clearly shows that interpretation cannot be based on one language version of a text alone, and that it must be interpreted in particular through reference to the general scheme and purpose of the legislation concerned ([947]).

In order to avoid such discrepancies between language versions as much as possible, the Quality Team intervenes a second time for some drafts acts, that is, after translation. During that legal-linguistic revision, the consistency of all the language versions is examined in the light of the wording of the source language version, which was revised before translation, so that all language versions convey the same legal rules.

This second stage of drafting in relation to the linguistic aspect of the texts takes account of, among others, Council Regulation No 1 determining the languages to be used by the European Economic Community ([948]). Dating back to 1958, this is the very first regulation adopted by that Community. The regulation is amended each time a new Member State accedes to the EU, as it lists the official languages of the EU, and lays down the obligation for regulations and other texts of general application to be drawn up in those languages, and for the *Official Journal of the European Union* to be published in those languages. The date of publication of an act is considered the date on which the Official Journal in which the act is published is made available to the public in all the languages by the Publications Office. Likewise, a regulation imposing

([946]) As described in detail in Section 3.

([947]) Lenaerts, K. and Gutierrez-Fons, J. A., *Les méthodes d'interprétation de la Cour de justice de l'Union européenne*, Bruylant, Belgium, 2020, p. 19.

([948]) Regulation No 1 determining the languages to be used by the European Economic Community, OJ 17, 6.10.1958, p. 385/58; see, in particular, Articles 1, 4 and 5.

obligations on individuals is not enforceable against them in a Member State if the regulation has not been published in the Member State's official language ([949]).

Although the first stage of the drafting work precedes translation, this does not prevent this work from anticipating the second stage directly linked with languages. For instance, drafting in accordance with grammar and punctuation rules makes it easier to understand the text in the drafting language and to translate it into the other official languages. Likewise, the terms, expressions and phrasing of sentences must not be too closely linked to a particular national language. Furthermore, the concepts of EU law are independent from those of national legal systems and of international law. Thus, in the light of the requirements of the abovementioned Council Regulation No 1, it is even more important to ensure that the original text is particularly simple and clear, as any unnecessary complexity or ambiguity, even if slight, could lead to inaccuracies or, worse, genuine translation errors in one or more of the other languages of the EU.

Therefore, the first stage of work on legislative technique, which the Quality Team conducts on the single language version of the submitted text, facilitates and paves the way for both the translation work and the second stage, which relates directly to the linguistic aspects of the text. This shows that, within the practice of the Commission Legal Service, the multilingual nature of the texts being drafted is present before they are even translated ([950]).

The subsequent section will address that first stage of work on the single language version of the draft in more detail.

3. Ensuring the quality of legislation to be adopted

3.1. Legislative technique rules applied to the act as a whole

3.1.1. Clear, simple and precise acts

Before discussing the Quality Team's practice in relation to the formulation of specific parts of legal acts, this section will address the practice in relation to the act as a whole. The first example of a general rule, and around which many other rules of legislative technique are built, is that the drafting of EU legal acts must be **clear** and therefore easy to understand, without ambiguity; **simple** and therefore concise, without unnecessary information or detail; and **precise**, thus leaving no uncertainty in the reader's mind. That requirement, in conjunction

([949]) Judgment of 11 December 2007, *Skoma-Lux*, C-161/06, EU:C:2007:773, paragraph 51; and Joint practical guide, guideline 20.5, respectively.

([950]) Lautissier, G., 'La législation de l'Union européenne: une règle unique en vingt-trois langues', in Cornu, M. and Moreau, M. (eds), *Traduction du Droit et Droit de la Traduction*, Dalloz, Paris, 2011, p. 89.

with the principle of legal certainty ([951]), not only enables those concerned to know their rights and obligations and to take steps accordingly, but also contributes to avoiding disputes arising from acts that are difficult to understand.

On the one hand, simple wording may sometimes lack precision and vice versa; therefore, care must be taken to find wording that ensures a satisfactory balance between those characteristics, which may vary according to the addressees of the measure. On the other hand, the ambiguous wording of provisions is not always due to negligence. Indeed, it may sometimes result from the desire to enshrine the conflicting positions of the negotiators in a single rule. However, such wording, which is the result of a compromise, will be strictly interpreted by the Court of Justice, meaning that only one of those positions will be upheld ([952]).

3.1.2. Choice of type of act

When revising the draft acts submitted to it, the Quality Team takes into account the type of act to be adopted. The first paragraph of Article 288 TFEU provides that, to exercise the competences of the EU, the institutions must adopt regulations, directives, decisions, recommendations and opinions. Sometimes, the legal basis of the act does not leave a great deal of choice to the author, because it expressly indicates what kind of act is to be adopted. When this is not the case, and having regard to the first paragraph of Article 296 TFEU in particular, it is necessary to decide on the type of act to be adopted on a case-by-case basis, in accordance with the applicable procedures and the principle of proportionality, provided that, in the case of proposals for legislative acts, the Commission justifies its choice to the European Parliament and the Council in the explanatory memorandum ([953]).

For example, as a regulation is directly applicable, care is taken that its wording leaves its addressees in no doubt as to the rights and obligations arising from it. On the other hand, as directives leave the Member States a choice as to the form and means of achieving the desired result ([954]), they may be formulated in less detail. Thus, the aim of the act is also an element considered when choosing the type of act and, depending on those various elements, there is a relatively greater margin for choosing the type of act in certain cases.

For instance, when it comes to modifying rules that already exist, in principle, the same type of act will be chosen as the one that is to be amended. This is not the case when a new act sets out new rules in a field, even if a different type of act previously governed that area. For example, in the field of plant health, a **regulation** replaced a **directive** which governed

([951]) See judgments of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, EU:C:2022:97; and of 25 January 2022, *VYSOČINA WIND*, C-181/20, EU:C:2022:51. See also Joint practical guide, guideline 1.1; and interinstitutional agreement on better law-making, recital 2.

([952]) Judgment of 28 October 1999, *ARD* v *PRO Sieben Media AG*, C-6/98, EU:C:1999:532, paragraphs 26–33.

([953]) Interinstitutional agreement on better law-making, point 25.

([954]) Second and third paragraphs of Article 288 TFEU.

that area previously: Regulation (EU) 2016/2031 of the European Parliament of the Council of 26 October 2016 on protective measures against pests of plants ([955]), which replaced Council Directive 2000/29/EC of 8 May 2000 on protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community ([956]).

3.1.3. Binding law and soft law

A third example of the Quality Team's practice, when considering the act as a whole, concerns the binding or non-binding nature of the acts being drafted. Article 288 TFEU enumerates three types of acts that are binding (regulations, directives and decisions) and two that are non-binding (recommendations and opinions). Other types of acts, such as communications or guidelines, are not intended to be binding either. Non-binding acts are referred to as soft law. If the draft act being checked does not aim to be binding, this has various consequences for its wording, the main purpose of which is to avoid confusion with a binding act.

For example, non-binding acts should avoid using mandatory verbal forms and structures similar to those used in binding acts, but should also avoid including dates of entry into force or application. Similarly, it is more appropriate to adopt a new act instead of amending a non-binding act using another non-binding act.

The choice of the type of act may here also be derived from the applicable legal basis, either directly or from the framework that basis provides, and must be decided on a case-by-case basis, in particular on the basis of the first paragraph of Article 296 TFEU and depending in particular on the aim pursued. Finally, when drafting non-binding acts, it should be kept in mind that the Court of Justice has made it clear that their non-binding nature does not prevent them from producing certain legal effects, or even from being binding on their authors ([957]).

([955]) Regulation (EU) 2016/2031 of the European Parliament of the Council of 26 October 2016 on protective measures against pests of plants, amending Regulations (EU) No 228/2013, (EU) No 652/2014 and (EU) No 1143/2014 of the European Parliament and of the Council and repealing Council Directives 69/464/EEC, 74/647/EEC, 93/85/EEC, 98/57/EC, 2000/29/EC, 2006/91/EC and 2007/33/EC, OJ L 317, 23.11.2016, p. 4.

([956]) Council Directive 2000/29/EC of 8 May 2000 on protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community, OJ L 169, 10.7.2000, p. 1.

([957]) Judgments of 25 February 2021, *VodafoneZiggo Group* v *Commission*, C-689/19 P, EU:C:2021:142, paragraph 51, recalling the case-law resulting from the judgments of 13 December 1989, *Grimaldi* v *Fonds des maladies professionnelles*, C-322/88, EU:C:1989:646; and of 15 June 2005, *Regione autonoma della Sardegna* v *Commission*, T-171/02, EU:T:2005:219, paragraph 95.

3.2. Legislative technique rules applied to specific elements of legal acts

3.2.1. The preamble: importance of the statement of reasons

We can now discuss the Quality Team's practice in relation to the formulation of specific parts of binding legal acts of the EU. Such acts contain, successively, a title, a preamble and enacting terms ([958]). Only the enacting terms are supposed to have normative content.

The title needs to be worded in a way that makes it possible to identify the subject matter of the act in a succinct and precise manner. The wording of that specific part of the act must also find a balance between those requirements, which may be contradictory.

Within the preamble – which is the part of the act between the title and the enacting terms – two elements are particularly relevant here. First, reference needs to be explicitly made within the preamble to the legal basis of the act, which is the provisions empowering the author to adopt the act. The reference makes it possible to ensure that its author is acting within the powers conferred on it. Second, the preamble also contains the recitals, whose essential function is to fulfil the requirement for the act to state the reasons for its provisions, as laid down in the second paragraph of Article 296 TFEU.

It is in the light of the wording of the measures to be adopted, in particular, that their statement of reasons is assessed. This statement must clearly and unequivocally show the author's reasoning for those measures so that the persons concerned can ascertain the reasons for the measures and so that the Court of Justice can exercise its power of review ([959]). Therefore, the recitals cannot repeat the obligations of the enacting terms, conceal any obligation or even use terms of a normative nature. The statement of reasons for the adopted measures, which also derives from the indication of the legal basis ([960]), enables a better interpretation of those measures, especially as the enacting terms follow the recitals and as both are part of the same act, which distinguishes EU legal acts from their equivalents in certain national legal systems.

It should be noted that the Quality Team systematically checks both the presence of a statement of reasons in the text and whether it is well founded, as these are two distinct and cumulative requirements ([961]). The extent of the statement of reasons may vary according to whether it concerns measures of general application or individual measures, the latter requiring a more precise justification. For example, certain competition or State aid decisions may contain hundreds of recitals, whereas their enacting terms may consist of only a single article.

([958]) The enacting terms may be accompanied by annexes.

([959]) Judgment of 11 December 2018, *Weiss and Others*, C-493/17, EU:C:2018:1000, paragraphs 31 and 33.

([960]) Judgment of 25 October 2017, *Commission* v *Council (WRC-15)*, C-687/15, EU:C:2017:803, paragraph 52.

([961]) Judgment of 5 March 2009, *France* v *Council*, C-479/07, EU:C:2009:131, paragraph 50.

3.2.2. The enacting terms: normative focus

It is in the enacting terms that the legal rules laid down by the act – whether substantive, procedural or conferring powers to adopt other acts – must be formulated. As a kind of reverse mirror of the recitals, the enacting terms should, in principle, not set out anything other than rules; therefore, they should not contain the purposes of the rules, or statements or wishes of any kind.

To avoid any doubt in this regard ([962]), attention should be paid to the use of normative terminology. In French, for instance, the verbs are used in the present tense, whereas English normally uses the auxiliary 'shall'; in both those languages, the wording should avoid the use of the future tense as much as possible. Moreover, it is here that the abovementioned question of the balance between the precision and the simplicity of the provisions arises. In terms of the structure of the enacting terms, the articles that lay down the rules and their lower subdivisions may, depending on the text's degree of complexity, be grouped into higher subdivisions such as sections, chapters, titles and parts.

When the purpose of one act is to amend another, it is necessary to ensure that the wording of the text received in draft follows certain rules of presentation that leave no doubt as to the amendment in question. This is particularly the case if it is necessary to modify only part of an act, by inserting new provisions, or by replacing or deleting those it already contains. As a principle ([963]), the amendment must be *textual*, thus being formal and not substantial. In other words, the amending act must change the text of the original act by indicating the specific part of that act that is affected and why.

For instance, if a new article is to be added to the original act, the enacting terms of the amending act need to do three things: first, refer to the original act and to the precise location of the subdivision affected; second, state that a new provision is added; third, present the text of that new provision in quotation marks.

In this way, the new rule is incorporated into the text of the original act. This way of wording amendments prevents an act from being able, implicitly, to provide for the same factual situation as another act by applying different rules to it, which would be contrary to the principle of legal certainty and would also create serious obstacles to the effectiveness of codification, recasting or consolidation.

For the same reasons, amending acts need to be worded in a way that does not contain, in principle, any autonomous provisions, which are rules that are not being incorporated into the act to be amended. Finally, as the amending act exhausts its effects once the amendment is made, leaving only the act that has been amended, the amending act cannot itself be amended.

([962]) Judgment of 25 October 2017, *Commission* v *Council (WRC-15)*, C-687/15, EU:C:2017:803, paragraph 45.

([963]) Derogations, in particular, constitute an exception to this principle: Joint practical guide, guideline 18.15.

3.2.3. Norms and time

Entry into force and taking effect

In determining when binding legal acts of the EU enter into force or take effect, the TFEU makes a distinction as to whether they are published or notified. Pursuant to Article 297(1) and (2) TFEU ([964]), legislative acts enter into force on the date specified in them or, in the absence of such a date, on the twentieth day following their publication. The same applies to non-legislative acts adopted in the form of regulations, directives addressed to all Member States and decisions that do not specify to whom they are addressed. Other directives, and decisions that specify to whom they are addressed, are notified to the addressees and take effect upon this notification.

Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 ([965]) lays down, among others, rules for calculating the periods or dates laid down in Council and Commission acts.

Deferred or retroactive application

When drafting legal acts, the choice of the date of entry into force or of taking effect may depend on a specific deadline mentioned in the basic act that provides for their legal basis ([966]). Although an act is not to enter into force before its publication, sometimes the temporal application of the provisions of the act is adjusted when the act is drafted. This may involve deferred application, which requires that the act clearly indicates the date from which it applies and whether this concerns all or only part of its provisions.

Retroactive application is completely different: in the light of the principle of legal certainty, an exception to the principle of the non-retroactivity of legal acts can only be made in exceptional cases in which it is in the public interest to do so and where the legitimate expectations of those concerned are duly respected ([967]).

Therefore, in such cases, the recitals must set out the reasons for retroactive application with particular care, and a paragraph clearly indicating the date of application must follow the provision on the act's date of entry into force. Acts that do not have binding force do not have dates for entry into force or application.

([964]) See the third subparagraph of Article 297(1) and the second and third subparagraphs of Article 297(2) TFEU.

([965]) Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits, OJ L 124, 8.6.1971, p. 1.

([966]) Furthermore, it should be noted that, according to Article 290(2)(b) TFEU, a delegated act may enter into force only if, within the period set by the legislative act, the European Parliament or the Council does not object; see also point 24 of the common understanding annexed to the interinstitutional agreement on better law-making.

([967]) Judgment of 25 January 2022, *VYSOČINA WIND*, C-181/20, EU:C:2022:51, paragraphs 37, 48, 49 and 58.

Transposition period and transitional measures

The enacting terms of legal acts sometimes establish other kinds of links between the rules they lay down and dates or periods. For instance, this is the case for the deadlines for transposing directives, the wording of which must ensure that the date is not too close to that of entry into force or taking effect so that Member States can take measures to implement the directive.

This is also the case for transitional measures, which provide for the transition between the situation prior to the application of the new rules and the moment of their application: they determine, for instance, the fate of certain products already on the market that do not meet the new production conditions. These measures are drafted in a way that leaves no doubt as to the period during which the old rules remain applicable in a residual manner.

Repeal and obsolescence

When an act being drafted governs a particular area, the Quality Team systematically checks whether previous acts that it is to replace should be repealed. As the repealed acts will be removed entirely from the date of repeal and therefore legally no longer exist, some additional steps may then be required. For example, an empowerment contained in the repealed act may need to be maintained by being incorporated into the new act. Otherwise, acts adopted on the basis of the act being repealed may need to be examined, on the basis of various criteria, to decide whether they should also be repealed.

Likewise, a provision of the new act often indicates that references made by other acts to the provisions of the repealed act are to be construed as references to those of the corresponding new act. A table indicating the correlation between the provisions in the new act and those in the repealed act is often incorporated into the new act.

Sometimes certain acts are declared obsolete instead of being formally repealed, such as those listed in the Commission communication, published on 19 February 2016, recognising the obsolescence of certain EU acts in the field of agriculture ([968]).

Whether they are repealed or declared obsolete, these steps in relation to obsolete acts are useful in several respects. Although identifying rules that should no longer have effect is of direct concern to legal certainty, it is also useful, more indirectly, when drawing up the list of the EU *acquis*. That list, which the Quality Team is actively involved in establishing, is referred to by candidate countries for accession to the EU in order to translate the acts listed. That list

([968]) European Commission, Communication from the Commission establishing formal recognition that a certain number of acts of Union law in the field of agriculture have become obsolete (C/2016/0905), OJ C 64, 19.2.2016, p. 1. See also European Commission, Communication updating and simplifying the Community *acquis* (SEC (2003) 165), COM(2003) 71 final, p. 16.

does not necessarily correspond to the EU *acquis* in the general sense of the term ([969]), partly because it excludes certain acts, such as those whose period of application will end before the estimated period of accession.

3.3. Treaty of Lisbon and legislative technique

The typology of legal acts resulting from the Treaty of Lisbon is addressed here not only because that treaty has consequences for the requirements for the drafting of legal acts, but also because this makes it possible to provide further illustration of certain elements of legislative drafting mentioned above.

The first example concerns legislative acts and the non-legislative acts that implement them: delegated acts and implementing acts.

At the stage of drafting the basic legislative act, the provisions empowering the Commission to adopt delegated acts and those setting out the conditions for that empowerment, and their respective recitals, should, as far as possible, be worded in accordance with the standard clauses agreed between the European Parliament, the Council and the Commission ([970]). This empowerment should clearly state whether it is necessary for the Commission to **supplement** or **amend** the legislative act ([971]).

At the stage of drafting the acts implementing the legislative act, the titles of delegated and implementing acts must contain the term 'delegated' or 'implementing', respectively ([972]). In addition, each delegated act should make it clear – not only in its title, but also in its recitals and its enacting terms – whether it supplements or amends the basic legislative act, echoing the empowerment contained therein.

Furthermore, in addition to the rules on the choice and possible cumulation of legal bases, which are applicable to all acts, there are specific rules for the drafting of implementing and delegated acts regarding their legal basis. For instance, as regards the issue of the multiple empowerments on which delegated acts are sometimes based, the interinstitutional agreement on better law-making should be referred to in particular. According to that agreement, a delegated act may indeed have more than one empowerment resulting from the same legislative act as its legal bases, provided that certain conditions are met ([973]).

([969]) The description of the EU *acquis* varies depending on the approach and purpose concerned; see, for instance, European Commission, Communication updating and simplifying the Community *acquis* (SEC (2003) 165), COM(2003) 71 final, pp. 5 and 13.

([970]) Point 3 of the common understanding annexed to the interinstitutional agreement on better law-making, and the appendix to that common understanding.

([971]) Judgment of 17 March 2016, *Parliament* v *Commission*, C-286/14, EU:C:2016:183, paragraph 46; first subparagraph of Article 290(1) TFEU.

([972]) See Article 290(3) and Article 291(4) TFEU.

([973]) Interinstitutional agreement on better law-making, point 31.

Finally, it may be necessary to ensure coordination between certain implementing and delegated acts if the legislative act has provided for them in a way that means they should be adopted in parallel. In these cases, it is particularly important that their respective wording ensure the appropriate combination of their provisions; that some of those acts refer, where necessary, to the others; or, where appropriate, that their dates of adoption, entry into force or application are synchronised. This allows those interdependent acts to apply in a consistent manner. An example of this is Commission Implementing Regulation (EU) 2017/39 and Commission Delegated Regulation (EU) 2017/40: among other things, both acts contain cross-references to each other, were adopted and published on the same days, and contain parallel provisions on their entry into force and application ([974]).

Another example from the Treaty of Lisbon concerns the drafting consequences of the fact that decisions may or may not have addressees. Pursuant to the fourth paragraph of Article 288 TFEU, a decision is binding in its entirety and, when it specifies those to whom it is addressed, it is binding only on them. This obviously affects not only the choice of the type of act, but also its wording: the act should not impose obligations on persons other than those formally referred to as addressees at the end of the act.

The same reasoning can be applied to other types of acts, given the general need to strike a balance between simple yet precise wording of the text, and the fact that the balance may vary depending on the subjects of law to whom the obligations concerned are to apply in practice. 'Addressees', in this sense, are those, even though not formally referred to as such in the legal act, but whose intervention is in some way indirectly implied by it, ranging from the general public to experts in specific matters, and all are entitled to expect the wording to be understandable to them.

As a consequence, both the statement of reasons and the enacting terms must, where appropriate, be drafted in such a way that the addressees are clearly bound by the rules. Furthermore, the transposition of directives will be easier if their wording makes it possible to identify the addressees concerned.

The discussion may even be extended to the issue of the subjects of law for whom an act's wording creates not only obligations, but also rights. For instance, in order to ensure that the provisions of an act have direct effect, particular care must be taken to draft them in a sufficiently clear and precise manner, and without leaving Member States any margin of discretion for implementation. Likewise, sometimes one should avoid providing for rules in a certain area through a directive, as this category of act does not entail horizontal direct effect. ([975])

([974]) Commission Implementing Regulation (EU) 2017/39 of 3 November 2016 on rules for the application of Regulation (EU) No 1308/2013 of the European Parliament and of the Council with regard to Union aid for the supply of fruit and vegetables, bananas and milk in educational establishments, OJ L 5, 10.1.2017, p. 1; and Commission Delegated Regulation (EU) 2017/40 of 3 November 2016 supplementing Regulation (EU) No 1308/2013 of the European Parliament and of the Council with regard to Union aid for the supply of fruit and vegetables, bananas and milk in educational establishments and amending Commission Delegated Regulation (EU) No 907/2014, OJ L 5, 10.1.2017, p. 11.

([975]) See Lenaerts, K., Van Nuffel, P. and Corthaut, T., *EU Constitutional Law*, Oxford University Press, Oxford, 2021, p. 722.

4. Ensuring the quality of legislation already in force

4.1. Codification and recasting

The accessibility of EU law is not merely a matter of the quality of drafting. It is also dependent on other factors, such as the number of amendments made to a legal act and the relationship between legal instruments governing the same subject. To guarantee clear rules and ensure a high degree of accessibility, the EU institutions drew inspiration from the concept of codification, which is embedded in the legal systems of several Member States, and have developed legislative techniques that are specific to EU law. 'Official codification' and 'recasting' are the main tools that form part of the broader agenda for the simplification of the regulatory environment ([976]).

4.1.1. Distinct concepts

Official codification is a working method dating back to the 1970s and is now governed by an interinstitutional agreement concluded on 20 December 1994 by the European Parliament, the Council of the European Union and the European Commission (hereafter 'the 1994 agreement') ([977]). Point 1 of the 1994 agreement defines codification as 'the procedure for repealing the acts to be codified and replacing them with a single act containing no substantive change to those acts'.

This definition entails a number of consequences as regards the form, scope and limits of that working method.

First, bringing an act already in force and all its amendments together into a single text is achieved through the adoption of a new legal act, which therefore repeals the earlier one. Normally, the word 'code' does not form part of the title of the new act ([978]); the only requirement is that the word 'codification' is added in brackets after the title. The new legal act has the same legal form as the one repealed (e.g. a regulation or a directive). Therefore, it is adopted in full compliance with the EU's normal legislative process ([979]). This is why the 1994 agreement describes codification as 'official'. Codification is distinct from the informal compilation of legal provisions, which is commonly known as 'consolidation'. Consolidation is carried out for

([976]) See, in particular, European Commission, Implementing the Community Lisbon programme: a strategy for the simplification of the regulatory environment, COM(2005) 535 final.

([977]) Interinstitutional agreement of 20 December 1994, Accelerated working method for official codification of legislative texts, OJ C 102, 4.4.1996, p. 2.

([978]) Some legal acts use the term 'code' in their title. See, for example, Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, OJ L 311, 28.11.2001, p. 67; or Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), OJ L 243, 15.9.2009, p. 1. However, those legal acts are not the outcome of an official codification as defined in point 1 of the 1994 agreement.

([979]) Point 5 of the 1994 agreement.

information purposes only, by the Publications Office, and consists of bringing together a basic legal act and all its amendments (and any corrigenda thereto) into a single text that is made available to the public via the website EUR-Lex ([980]). Consolidated texts are not subject to formal decision-making and therefore do not have legal status.

Second, as set out in point 1 of the 1994 agreement, the purpose of codification is to bring together 'acts', a term that gives rise to two observations. On the one hand, the use of the term in its plural form implies that the codification process may cover not only one act and its successive amendments, but also several acts relating to the same subject matter and their amendments. The first scenario, which is the more common, is known as 'vertical' codification ([981]). The second scenario is called 'horizontal' codification ([982]) and calls to mind the practice in some Member States, without however striving for exhaustive codification of whole areas of law. On the other hand, although the term 'act' may seem to have a relatively broad meaning, both the title of the 1994 agreement, which uses the expression 'legislative texts', and its content suggest that only 'legislative acts' within the meaning of Article 289(3) TFEU may be the subject of an official codification. By contrast, acts that the Commission adopts alone, even directly in application of the Treaties, do not fall within the scope of the 1994 agreement ([983]). It should, however, be noted that Commission directorates-general have been required since 1987 to codify Commission acts after their 10th amendment at the latest ([984]), following the same principles as those laid down in the 1994 agreement.

Third, the codification proposal must not contain any substantive changes to the acts to be codified. To use an expression reflecting the approach taken in France ([985]), codification of EU law is a 'codification à droit constant', that is a codification in which the substance of the law remains unaltered. This principle applies to both the Commission, which is the author of the codification proposal ([986]), and the co-legislators. More specifically, the 1994 agreement stipulates that 'the purpose of the Commission proposal, namely the straightforward codification of existing texts, constitutes a legal limit, prohibiting any substantive change by the European Parliament

([980]) EUR-Lex has a special section in which one can find consolidated versions of EU acts that give the act as applicable at a specific point in time (https://eur-lex.europa.eu/collection/eu-law/consleg.html).

([981]) See, for instance, Regulation (EU) 2021/1230 of the European Parliament and of the Council of 14 July 2021 on cross-border payments in the Union (codification), OJ L 274, 30.7.2021, p. 20.

([982]) See, for instance, Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification), OJ L 169, 30.6.2017, p. 46. This directive codifies six directives and their successive amendments.

([983]) See, in this respect, European Commission, Codification of the acquis communautaire, COM(2001) 645 final, paragraph 3.2.

([984]) See European Commission, Minutes of the 868th Commission Meeting, COM(1987) PV 868 final, point X.

([985]) See Article 3 of *Loi No 2000-321 du 12 avril 2000 relative aux droits des citoyens dans leurs relations avec les administrations* [Act No 2000-321 of 12 April 2000 on citizens' rights in their relations with administrations], Journal officiel de la République française No 88, 13 April 2000; see also Secrétariat général du Gouvernement and Conseil d'État, *Guide de légistique,* 3rd edn, La documentation française, Paris, 2017, p. 109.

([986]) Point 3 of the 1994 agreement.

or Council' ([987]). This prohibition is, however, offset by a certain degree of procedural flexibility: although subject to the normal legislative process, the codification proposal is to be studied under an accelerated procedure within the Parliament and the Council ([988]).

Most importantly, the prohibition on introducing substantive changes serves to distinguish official codification from recasting.

Recasting has been used informally over a long period ([989]) and is now enshrined in an interinstitutional agreement concluded on 28 November 2001 (hereafter 'the 2001 agreement') ([990]). Recasting is similar to codification in that it aims to bring the provisions of an earlier act and its successive amendments together into a single text. However, unlike codification, recasting makes it possible to introduce changes in the new text that go beyond purely formal or editorial adaptations and affect the very substance of the earlier act. The first type of provisions is referred to by the 2001 agreement as 'unchanged provisions', and the second type as 'substantive amendments' ([991]). Recasting can therefore be considered a hybrid working method or, to use an expert's expression, a 'codification à droit non constant' ([992]).

The main reason for creating this distinct legislative technique is to remedy the problems arising from the codification process. As pointed out in the 2001 agreement, experience has shown that ([993]):

> *the Commission's submission of official codification proposals and the legislature's adoption of official codification acts are often delayed, in particular because new amendments to the legal act in question have been adopted in the meanwhile, which leads to the codification work having to start all over again.*

([987]) Point 6 of the 1994 agreement.

([988]) Point 7 of the 1994 agreement. For further information on the course of this procedure, see Petite, M., Caeiros, A. and Cimaglia, L., 'L'accessibilité du droit, la méthode communautaire', *L'Actualité Juridique Droit Administratif*, No. 34, October 2004, p. 1862.

([989]) See, in this respect, Beslier, S. and Lavaggi, P., 'Les procédures de codification et de refonte en droit communautaire: une contribution à l'effort de simplification de l'environnement réglementaire', *Revue du droit de l'Union européenne*, No 2, 2006, p. 313.

([990]) Interinstitutional agreement of 28 November 2001 on a more structured use of the recasting technique for legal acts, OJ C 77, 28.3.2002, p. 1.

([991]) Point 4 of the 2001 agreement. It should be noted that, as far as codification is concerned, the 1994 agreement does not lay down a definition for 'substantive changes'. The meaning of that term has been discussed by Stéfania Dragone (Dragone, S., 'La codification communautaire: techniques et procédures', *Revue du marché unique européen*, 1998, No 1, p. 77).

([992]) Cimaglia, L., 'La codification du droit de l'Union européenne', in Guyomar, M. (ed.), *Les 25 ans de la relance de la codification*, Librairie générale de droit et de jurisprudence (LGDJ), Paris, 2017, p. 33.

([993]) See recital 3 of the 2001 agreement.

With that in mind, recasting appears to be the most appropriate tool to permanently and comprehensively ensure the readability of legal acts that are subject to frequent amendments and can thus be said to resemble a 'continuous codification' ([994]). Just like official codification, a recast proposal may be vertical ([995]) or horizontal ([996]). However, unlike codification, a recast proposal cannot be adopted following an accelerated examination; rather, given the hybrid nature of the recast technique, it must be subject to the legislative process defined by the TFEU.

Despite those differences in nature, the drafting of an official codification proposal and the preparation of a recast proposal follow similar logic. However, the role of the Commission Legal Service is somewhat different in each case.

4.1.2. Comparable work processes

As regards codification, the Commission Legal Service has a lead role (*chef de file*). More specifically, it is in charge of 'the legal examination and reworking of the legal texts to be submitted and proposed for codification, in conjunction with the relevant Directorate General' ([997]), which, in practice, means that the Legal Service has primary responsibility for drawing up codification proposals. The starting point of this process is the consolidated text of the act to be codified, which has been prepared by the Publications Office. That text is reworked into a single coherent and comprehensible act intended to replace the earlier act as amended. This step includes deleting provisions and recitals that have become obsolete or redundant, harmonising the terminology used in the new act and redrafting the recitals, which together make it possible to reduce the volume of legislation while retaining its substance ([998]). Once prepared in the drafting language, the proposal is drawn up in the other official languages, and those other language versions are then revised by the members of the Quality Team. From that perspective, the codification exercise can be regarded as a convergence point between the rules on legislative technique and the task of multilingual revision. Since the codification proposal does not contain any substantive changes, it is not subject to interservice consultation within the Commission but it is directly submitted to the College of Commissioners for approval and then forwarded to the co-legislators.

([994]) Petite, M., Caeiros, A. and Cimaglia, L., 'L'accessibilité du droit, la méthode communautaire', *L'Actualité Juridique Droit Administratif*, No. 34, October 2004, p. 1862.

([995]) See, for instance, Directive (EU) 2020/2184 of the European Parliament and of the Council of 16 December 2020 on the quality of water intended for human consumption (recast), OJ L 435, 23.12.2020, p. 1.

([996]) See, for instance, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, p. 23.

([997]) European Commission, Codification of the acquis communautaire, COM(2001) 645 final, explanatory memorandum, paragraph 5.

([998]) Cimaglia, L., 'La codification du droit de l'Union européenne', in Guyomar, M. (ed.), *Les 25 ans de la relance de la codification*, Librairie générale de droit et de jurisprudence (LGDJ), Paris, 2017, p. 33.

As far as recasting is concerned, it is the directorate-general responsible for the act to be recast that drafts the proposal, and the Commission Legal Service is consulted before the process begins. However, it is common practice for the Commission Legal Service to provide its expertise in the preparation of the recast proposal, particularly as a consequence of the 2001 agreement, which lays down detailed rules on formal presentation with which all recast proposals must comply ([999]). The 2001 agreement requires that the proposed legislative text clearly distinguish substantive changes and new recitals from the provisions and recitals that remain unchanged by using grey-shaded characters ([1000]). Once drawn up in the drafting language, the recast proposal is subject to interservice consultation within the Commission, including the Legal Service. The finalised version is then sent to the Directorate-General for Translation to be translated into all official languages. The Quality Team does not perform multilingual revision of the translated versions. However, the translation service sometimes informally contacts the Team to ask for advice in the preparation of those versions.

With regard to both codification and recasting, the role of the Commission Legal Service does not end once the proposal has left the Commission's remit.

Each interinstitutional agreement provides for the establishment of a consultative working party composed of the legal services of the three signatory institutions. The working party's task is to check that the inherent limits of each legislative technique have been respected. More specifically, the working party shall ensure, before the text moves on to the legislative process, that a codification proposal does not contain any substantive changes and that a recast proposal does not include substantive changes other than those identified as such in the text. This is a fundamental procedural step designed to circumscribe the subject matter of the proposal and to have the latter 'certified' by the legal experts of the three institutions ([1001]).

On the whole, the implementation of the two interinstitutional agreements has achieved the desired results, although there are a number of aspects that could be improved.

With regard to codification in particular, the pace of work has largely been dictated by the successive enlargements of 2004–2013. In 2001, the Commission set the objective of codifying the entire *acquis communautaire* ([1002]). Given its scale and the resulting administrative and technical burden, this very ambitious project was adjusted downwards and finally completed in 2009 ([1003]). However, the experience gained from this project enabled the Commission to adopt

([999]) See point 6 of the 2001 agreement.

([1000]) See 'Declaration by the European Parliament and the Council on point 6(b)' in the 2001 agreement.

([1001]) Cimaglia, L., 'La codification du droit de l'Union européenne', in Guyomar, M. (ed.), *Les 25 ans de la relance de la codification*, Librairie générale de droit et de jurisprudence (LGDJ), Paris, 2017, p. 33.

([1002]) European Commission, Codification of the acquis communautaire, COM(2001) 645 final, point 3.

([1003]) For further information, see, in particular, European Commission, 'Better Regulation and the Codification of the acquis communautaire', Information note, SEC(2010) 113.

a more targeted approach. As a result, codification has become an annual exercise included in the Commission's annual work programme.

Since the conclusion of the 1994 agreement, some 1 900 acts have been replaced by approximately 340 codification texts. This figure is all the more significant if one takes into account the fact that the codification process has often been delayed by the EU legislator's changes to the texts being codified. This is why the interinstitutional agreement on better law-making now gives priority to recasting when it comes to amending existing legislation ([1004]). Recasting has made it possible to adopt more than 100 texts so far, and it is considered better suited than other methods to safeguarding both the Commission's right of initiative and the legislator's right of amendment ([1005]).

The question of whether and to what extent it is possible to affect the substance of an act is not specific to the distinction between official codification and recasting. It also arises in connection with the correction of errors found in EU legal acts.

4.2. Correction of errors in legal acts

Errors that can creep into a legal act range from simple typing errors or omissions during the publication process to drafting deficiencies that are likely to affect the very meaning of the act. This situation is more acute in EU legislation, mainly owing to its multilingual nature, a characteristic that involves a considerable translation effort.

To deal with these issues, the EU institutions have developed a practice that is broadly similar to that used in several Member States ([1006]).

4.2.1. A practice confined by case-law

The correction of errors typically takes the form of a corrigendum issued by the institution that has adopted the affected act, with a view to restoring the real will of the author. Although communicated in the same way as the initial act (namely, depending on the nature of the act, through publication in the *Official Journal of the European Union* or by notification), a corrigendum does not have an independent legal existence; it derives its authority from the text it corrects in the sense that it is 'merged' with the wording of the original act and thereby applies retroactively from the act's date of entry into force.

([1004]) Point 46 of the 2016 agreement.

([1005]) Cimaglia, L., 'La codification du droit de l'Union européenne', in Guyomar, M. (ed.), *Les 25 ans de la relance de la codification*, Librairie générale de droit et de jurisprudence (LGDJ), Paris, 2017, p. 33.

([1006]) See, in this respect, Bobek, M., 'Corrigenda in the Official Journal of the European Union: Community law as quicksand', *European Law Review*, 2009, p. 950.

However, the EU courts carefully delimit the possibility of adopting corrigenda, imposing as a fundamental criterion the nature of the error to be corrected. According to case-law, the error must not be such that its correction results in a text that is substantially different from that initially adopted, that is, a correction cannot alter the content of the original text. A correction of this kind would be regarded as 'constituting a particularly serious and manifest infringement of the principle of the inalterability of the measure adopted, which constitutes one of the foundations of legal certainty in the [EU's] legal order' ([1007]). Such a violation would undermine both the protection of interests that individuals may be granted under a EU legal act, and the powers and decision-making procedures within the institution that has adopted the act in question. On that basis, the EU courts consider that, as a matter of principle, corrigenda must have a very limited scope ([1008]). They therefore annul ([1009]) (or, in preliminary ruling proceedings, declare invalid ([1010])) acts that have been unduly rectified through a corrigendum, thus pointing towards the appropriate solution, which is the adoption of an amending act.

As regards acts adopted by the Commission, the above principles are reflected in internal practice, compliance with which is ensured by the Commission Legal Service. The fundamental rule is that substantive errors, namely those affecting the substance of the text, must be corrected by a 'correcting act', whereas non-substantive errors may be rectified through a simple corrigendum that applies retroactively.

A correcting act is a legal act within the meaning of the Treaties, of the same category as the act it corrects (regulation, directive, decision, etc.). Although it has a very specific subject, namely the correction of errors, it is structured as an amending act, with citations, recitals and enacting terms. Therefore, a correcting act has no retroactive effect, unless otherwise stated. Being a legal act itself, it can only be adopted for legally binding acts and not for instruments with no legal status, such as recommendations, communications or guidelines. It is drafted in all language versions, but only the version(s) affected by the errors produces legal effects ([1011]). As a matter of principle, a correcting act is adopted in accordance with the same procedure (and, consequently, by the same body) as the one followed for the adoption of the initial act.

Corrigenda are also adopted in accordance with the same procedure as the one applied for the initial act. However, for the sake of simplification, special procedural arrangements apply with regard to the correction of certain categories of errors.

([1007]) Judgment of 27 February 1992, *BASF and Others* v *Commission*, T-79/89, EU:T:1992:26, paragraph 49.

([1008]) See, in particular, judgment of 15 June 1994, *Commission* v *BASF and Others*, C-137/92 P, EU:C:1994:247, paragraph 68 ('only simple corrections of spelling and grammar may be made to the text of an act after its formal adoption by the college of Commissioners, any further alteration being the exclusive province of the college').

([1009]) See, for instance, judgment of 23 February 1988, *United Kingdom* v *Council*, 131/86, EU:C:1988:86.

([1010]) See, for instance, judgment of 22 December 2010, *Premis Medical*, C-273/09, EU:C:2010:809.

([1011]) The non-affected language versions simply state in the enacting terms that the act 'does not concern the [language] version.'

In particular, the power to correct 'obvious' errors in any language version of an act, thus including the drafting version (technically referred to as the 'original' version), is delegated to the Secretary-General of the European Commission ([1012]). 'Obvious' errors should be taken to mean 'easily recognisable errors in the text (e.g. spelling, typing or printing errors, mathematical errors or the omission of one or more words or of part of the text)' ([1013]).

Moreover, as regards errors, including minor omissions, discovered in one or more translated versions of an act (thus excluding the original version), the power to adopt corrigenda is conferred on the Commission member responsible for multilingualism ([1014]). Since 2010, this function has been subdelegated to the Director-General for Translation ([1015]). The empowerment is subject to two further conditions. First, 'the error is easily recognisable in the text concerned or can be identified beyond serious doubt when a comparison is made with the version in the original language'; and, second, 'the error is caused by the mistranslation or omission of one or more elements of the text without, however, affecting the substance of the text as a whole' ([1016]).

Apart from those procedural differences, the key issue remains the distinction between substantive and non-substantive errors, a question on which the Commission Legal Service must always be consulted before a correction text is adopted.

4.2.2. Substantive and non-substantive errors

The rationale emerging from the case-law of the Court of Justice, which underlies the delineation criteria applied by the Commission, can be summarised as follows: 'the greater the deviation from the intended meaning of the original text, the more substantial and serious the potential impact' of the error and its correction ([1017]). To determine the 'intended meaning' of the author and, thus, to assess to what extent the error found and the correction envisaged deviate from one another, it is necessary to interpret the provision concerned in accordance with the established methodology applied by the EU courts. According to settled case-law ([1018]):

([1012]) European Commission, Commission decision of 12 July 2017 on delegation of the power to correct obvious errors in Commission acts, C(2017) 4898. This decision repeals a previous Commission decision dating back to 1977.

([1013]) European Commission, Commission decision of 12 July 2017 on delegation of the power to correct obvious errors in Commission acts, C(2017) 4898, recital 5.

([1014]) European Commission President (in agreement with Mr Orban), 'Empowerment to correct errors, including minor errors, in translations of acts adopted by the Commission', memorandum to the Commission, SEC(2008) 2397. The main reason behind the adoption of this distinct empowerment seems to be that 'translation errors that are easily recognisable in the text concerned and thus "obvious" to the reader are relatively rare' (point 2 of the memorandum).

([1015]) European Commission, Commission decision of 5 May 2010 subdelegating the power to correct errors, including minor omissions, in translated versions of acts adopted by the Commission, C(2010) 3031.

([1016]) European Commission President (in agreement with Mr Orban), 'Empowerment to correct errors, including minor errors, in translations of acts adopted by the Commission', memorandum to the Commission, SEC(2008) 2397, point 3.

([1017]) Prieto Ramos, F., 'Facing translation errors at international organizations: what corrigenda reveal about correction processes and their implications for translation quality', *Comparative Legilinguistics,* Vol. 41, No 1, 2020, p. 97.

([1018]) See, for instance, judgment of 19 October 2017, *Raimund*, C-425/16, EU:C:2017:776, paragraph 22.

> *[T]he interpretation of provisions of EU law requires account to be taken not only of their wording but also of the context in which they occur and the objectives of the rules of which they form part.*

The outcome of this interpretative exercise, namely the detection of or failure to detect the real intention of the author, makes it possible to conclude whether the proposed correction 'constitutes a simple correction of a clerical error not affecting the content' of the act concerned ([1019]) or, on the contrary, a change affecting the very substance of the text and requiring the adoption of a correcting act.

By way of illustration, in two Court cases it was possible to identify the real intention of the author through interpretation. They both concern acts containing incorrect references to the Combined Nomenclature (CN) ([1020]). Such errors are often due to the technical nature of the CN, its complex structure (which includes subdivisions consisting of a number known as 'CN code', a product description and a duty rate) and its constant updates. The first case concerned an anti-dumping regulation wrongly referring to an outdated CN code while reproducing the correct description of the product concerned ([1021]). The Court of Justice found that this error could be corrected by a simple corrigendum ([1022]). As Advocate General Lenz stated, 'the true meaning of the text in question could, notwithstanding the oversight, be clearly established by interpretation' ([1023]).

The second case concerned a safeguarding measures regulation, the German version of which contained an incorrect description of the product concerned (*Suesskirschen*, sweet cherries, rather than *Sauerkirschen*, sour cherries), while reproducing the correct CN code ([1024]). The Court of Justice similarly held that the error could be rectified lawfully by a corrigendum. In particular, it ruled that 'that ambiguity could perfectly well have been resolved by reference to the other language versions of the regulation', and also took into account the factual context, namely that 'the competent German authorities were informed of that error and were therefore in a position to apply the regulation correctly from the outset' ([1025]). Moreover, as Advocate General Elmer noted, the regulation at issue had been adopted at the same time as a parallel text relating to the same products ([1026]):

([1019]) Opinion of Advocate General Wahl delivered on 4 June 2015 in *Jakutis and Kretingalės kooperatinė ŽŪB*, C-103/14, EU:C:2015:368, paragraphs 125 and 131.

([1020]) Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, OJ L 256, 7.9.1987, p. 1.

([1021]) Judgment of 2 June 1994, *AC-ATEL Electronics* v *Hauptzollamt München-Mitte*, C-30/93, EU:C:1994:224.

([1022]) Judgment of 2 June 1994, *AC-ATEL Electronics* v *Hauptzollamt München-Mitte*, C-30/93, EU:C:1994:224, paragraph 24.

([1023]) Opinion of Advocate General Lenz delivered on 14 April 1994 in *AC-ATEL Electronics* v *Hauptzollamt München-Mitte,* C-30/93, EU:C:1994:138, paragraph 38.

([1024]) Judgment of 17 October 1996, *Konservenfabrik Lubella* v *Hauptzollamt Cottbus*, C-64/95, EU:C:1996:388.

([1025]) Judgment of 17 October 1996, *Konservenfabrik Lubella* v *Hauptzollamt Cottbus*, C-64/95, EU:C:1996:388, paragraph 18.

([1026]) Opinion of Advocate General Elmer delivered on 4 July 1996 in *Konservenfabrik Lubella* v *Hauptzollamt Cottbus*, C-64/95, EU:C:1996:272, paragraph 24.

> *From the context and aims pursued by the series of rules of which [the] Regulation [concerned] form[ed] a part there thus could not have been any doubt that it concerned exclusively sour cherries.*

On the other hand, when the nature of the error is such that the real will of the author cannot be established by interpretation, the correction cannot take the form of a simple corrigendum. The Court of Justice thus declared a tariff classification regulation invalid in the version resulting from a corrigendum that replaced the products mentioned in the original text with products 'of an entirely different nature' ([1027]). The discrepancy between the scope of the initial text and that of the rectified version was such that the author of the original act 'cannot have had in mind' the tariff classification of the products mentioned in the rectified text of the regulation ([1028]). Similarly, an apparently 'obvious' error within the meaning of the Commission decision delegating the power to correct this type of error to its secretary-general may not be eligible for correction through a corrigendum. This can be the case if a text incorrectly defines the maximum weight of an animal by reference to an unrealistic figure and it is not possible to identify, through contextual analysis or other interpretation tools, the figure that the author of the text actually intended to define.

Admittedly, the above examples represent only a minor proportion of the variety of questions with which the Commission Legal Service is confronted. In most circumstances, the answer requires a case-by-case assessment, which excludes a standardised method. The approach appears all the more delicate because 'most corrections leading to corrigenda [are expected] to have some degree of semantic impact' ([1029]), which risks blurring the boundary between substantive and non-substantive errors.

However, it should not be overlooked that, despite the many errors found ([1030]), very few disputes are brought before the Court of Justice concerning the scope of corrigenda. Therefore, it is clear that Member State authorities are aware of the specific features of EU legislation, most importantly of its multilingual nature, while maintaining the high level of vigilance they are required to exercise when interpreting that legislation. The low number of disputes can also be seen as a quality indicator of the approach taken by the EU institutions, especially the Commission. The intervention of its Legal Service before a correction is formally issued makes it possible, in the vast majority of cases, to avoid situations where legal certainty would be compromised.

([1027]) Judgment of 22 December 2010, *Premis Medical*, C-273/09, EU:C:2010:809, paragraph 32.

([1028]) Judgment of 22 December 2010, *Premis Medical*, C-273/09, EU:C:2010:809, paragraph 35.

([1029]) Prieto Ramos, F., 'Facing translation errors at international organizations: what corrigenda reveal about correction processes and their implications for translation quality', *Comparative Legilinguistics*, Vol. 41, No 1, 2020, p. 109.

([1030]) See, in particular, European Commission, *Quantifying quality costs and the cost of poor quality in translation*, Studies on Translation and Multilingualism No 1/2012, Luxembourg, Publications Office, 2012.

5. Conclusion

This overview of the practice of the Commission Legal Service with regard to the formal quality of EU legislation shows that the form of the rules laid down by draft EU acts submitted to the Commission cannot be viewed in isolation from their substance, as those are two sides of the same coin. There is a real interdependence between the content of the rules and their wording: it is, in the first place, the precise and concrete content of the rules that shapes their form, whether this relates to terminology, structure or type of acts. The reverse is also true, as the form of an act itself sets a framework for the rules and determines various aspects of their substance. The rationale behind this dialectic between substance and form is above all to serve EU citizens by providing them with high-quality legislation and legal certainty.

THE EUROPEAN UNION JUDGES' ROLE IN SELECTED FIELDS OF EUROPEAN UNION CIVIL SERVICE LAW

Sebastian Bohr, Bernard Mongin and Inês Melo Sampaio

1. Introduction

The European Communities were created in the late 1950s, hand in hand with the setting up of the European Civil Service. The founding treaties set up various institutions, such as what are now the European Commission, the European Parliament, the Council of the EU, the Court of Justice, the Court of Auditors and the Economic and Social Committee. All these institutions need staff members in order to execute the multiple tasks that the treaties confer on them.

The European Civil Service is unusual insofar as most of the EU staff members are recruited based on a general or specialized competition and become officials for life, after having passed a probationary period of 9 months. This stability of employment distinguishes the European Civil Service from international organisations that employ their staff under temporary contracts. Other staff members can be recruited on mainly temporary contracts.

They must neither seek nor take instructions from any government, authority, organisation or person outside their institution. This independence is another important element of the European Civil Service.

All staff members of the European institutions are obliged to carry out their duties solely in the interests of the EU.

The rights and obligations of EU staff members are set out in the Staff Regulations (SR) and the Conditions of Employment of Other Servants, which date back to 1962 ([1031]) and were modified in 2004 and 2013. They regulate the staff members' general rights and obligations; recruitment and careers; working conditions, such as working time and annual leave; remuneration and allowances; the social security scheme; the pension scheme; the disciplinary regime; and the means of redress. The SR and Conditions of Employment of Other Servants apply to most of the EU institutions, bodies and agencies, except the European Central Bank and the European Investment Bank, which have specific staff regulations.

([1031]) Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, OJ 45, 14.6.1962, p. 1385/62.

Staff members may submit a request to the administration to take a decision relating to them. They can also file a complaint in order to contest the legality of a decision adversely affecting them. They can then lodge an appeal to the General Court asking for the annulment of that decision and/or a request for damages. This administrative complaint procedure allows communication between the staff member and the administration and as such is another peculiarity of the European Civil Service.

All these elements taken together provide the basis for a strong and independent European Civil Service.

EU judges play an important role when disputes arise between staff members and their institutions. When the EU courts assess the legality of individual decisions, they need to consider the interests of the staff member alongside those of the administration. In some fields, they do so by recognising that the administration has a margin of discretion and that this has an impact on the power of the judges to verify the legality of the decision. At the same time, the judges in Luxembourg contribute to protecting the independence of EU staff members.

The Court of Justice has repeatedly maintained that the EU is based on the rule of law ([1032]) and rests on the establishment of a complete system of legal remedies and procedures designed to confer on the EU courts jurisdiction to review the legality of acts of EU institutions, bodies, offices and agencies ([1033]).

The European Civil Service law covers a variety of fields, including holding competitions in order to recruit new staff members, assessing staff members' performance in annual reports, promotion decisions, medical questions, disciplinary decisions and situations of partiality or conflicts of interest. This specific branch of EU law makes it possible to study the varying extents to which the EU courts can control decisions concerning staff members.

The intensity of judicial review in this area is extremely diverse, and varies according to the subject matter or the nature of the legal action at issue. The types of judicial review vary from limited jurisdiction (*contrôle restreint*) to unlimited jurisdiction (*contrôle de pleine juridiction*).

The extent of the judicial review of an alleged unlawful act depends on the discretion available to the administration.

In certain fields, the administration has a wide margin of discretion. This is the case, in particular, when its assessment of a situation involves value judgements, which, by their very nature, are not capable of providing objective proof. In such a case, the EU judge is limited to checking 'any irregularities of form, manifest errors of fact vitiating the assessments made

([1032]) Judgment of 23 April 1986, *Les Verts* v *European Parliament*, C-294/83, EU:C:1986:166, paragraph 23.

([1033]) See, for example, judgment of 14 June 2012, *CIVAD*, C-533/10, EU:C:2012:347, paragraph 32, and case-law cited.

by the administration and any misuse of power' ([1034]). No discretion exists when the applicable legal framework requires that the administration act in a predetermined manner.

Likewise, the plea of illegality of a provision of the SR is subject to limited control ([1035]).

The existence of wide discretion does not exempt the administration from its obligation to examine, with care and impartiality, all the relevant elements of the case ([1036]).

The Court of Justice has 'unlimited jurisdiction' in disputes of a financial character, as a result of Article 91(1) SR. This provision applies to decisions affecting the administrative status of staff members. In *Gogos* v *Commission*, the Court adopted a broad interpretation of this provision ([1037]):

> *an action by which an official seeks a judicial review of his classification likewise gives rise to a dispute of a financial character. The logic behind this is that the decision of the appointing authority on the classification of an official not only has an impact on the career of the person concerned and his personal position within the hierarchy of the authority, but also has direct effects on his pecuniary rights, in particular the level of his remuneration under the Staff Regulations.*

Under Article 22 SR, the administration can decide to require an official to make good, in whole or in part, any damage the EU has suffered as a result of serious misconduct by the official in the course of or in connection with the performance of their duties. In this case, the Court of Justice also has unlimited jurisdiction in disputes concerning this provision ([1038]).

Staff members can bring an action for damages against an institution, body, office or agency when they consider that a decision or a behaviour is illegal and has caused them damage. If the administration has a wide margin of discretion, only a manifest error of assessment leads to illegality. When the administration must adopt a particular form of conduct pursuant to legislation in force, general principles or fundamental rights, or the rules that it has imposed on itself, the standard is stricter: in such a case, it is sufficient not to fulfil such an obligation to give rise to liability on the part of the institution concerned ([1039]).

The present chapter will examine the extent of the judicial review in selected fields of European Civil Service law. These fields have been chosen as the most relevant ([1040]). The chapter will

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([1034]) See judgment of 24 January 1991, *Latham* v *Commission*, T-63/89, EU:T:1991:4, paragraph 19; see also judgment of 17 January 1992, *Hochbaum* v *Commission*, C-107/90 P, EU:C:1992:22, paragraph 8.

([1035]) See judgment of 25 March 2021, *Alvarez y Bejarano and Others* v *Commission*, C-517/19 P, EU:C:2021:240, paragraph 53.

([1036]) Judgment of 13 January 2011, *Nijs* v *Court of Auditors*, F-77/09, EU:F:2009:131, paragraph 102.

([1037]) See judgment of 20 May 2010, *Gogos* v *Commission*, C-583/08 P, EU:C:2010:287, paragraph 47.

([1038]) See judgment of 15 December 2021, *HG* v *Commission*, T-693/16 P RENV-RX, EU:T:2021:895, paragraph 318.

([1039]) See judgment of 13 December 2017, *CJ* v *ECDC*, T-703/16 RENV, EU:T:2017:892, paragraph 31.

([1040]) The chapter only provides an overview and is not exhaustive, given the space available.

discuss this issue as regards disciplinary measures (Section 2) and decisions based on medical assessments (Section 3). A detailed review of judicial control in the field of competitions (Section 4) will follow. The chapter will then discuss annual reports and promotion decisions (Section 5) and decisions on professional activities after leaving the service (Section 6). Finally, this chapter will detail the EU judges' role when lack of impartiality (which is a cross-cutting issue) is alleged (Section 7).

2. The judicial control of decisions imposing a disciplinary measure

The SR do not specify any fixed relationship between the disciplinary measures listed in Article 9 of its Annex IX and the various types of misconduct on the part of officials. According to Article 10 of Annex IX, the penalty imposed must be proportionate to the seriousness of the misconduct. This provision mentions various criteria that the appointing authority ([1041]) has to consider when determining the seriousness of the misconduct and deciding on the penalty to impose. One element is the nature of the misconduct and the circumstances in which it has been committed.

2.1. The choice of the appropriate penalty is subject to limited judicial control

The lawfulness of every disciplinary measure requires that the truth of the facts alleged against the staff member concerned be established ([1042]).

Since its first judgments in disciplinary matters, the Court of Justice has established the following principle ([1043]):

> *Once the truth of the allegations against the official has been established, it is for the appointing authority to choose the appropriate penalty. The Court cannot substitute its own judgment for that of the appointing authority except in the case of a manifest error or misuse of powers.*

The EU courts have further developed the aforementioned principle as regards the review of the proportionality of the penalty imposed.

([1041]) This term refers to the person in the institution that employs the staff member concerned who has the authority to take a decision in a specific area. For example, it could be the member of the Commission in charge of human resources, the Director-General in charge of human resources or other persons to whom this power has been subdelegated.

([1042]) Judgment of 17 May 2000, *Tzikis* v *Commission*, T-203/98, EU:T:2000:130, paragraph 51.

([1043]) Judgment of 29 January 1985, *F* v *Commission*, C-228/83, EU:C:1985:28, paragraph 34; see also judgment of 30 May 1973, *De Greef* v *Commission*, C-46/72, EU:C:1973:57, paragraphs 44–46.

In *EH* v *Commission*, the applicant argued, *inter alia*, that demoting him by three grades was disproportionate, as the Commission did not take into account several mitigating circumstances. The Civil Service Tribunal (CST) indicated the scope of its assessment as follows ([1044]):

> *The assessment of the seriousness of the shortcomings of which the Disciplinary Board found the official to be guilty and the choice of the disciplinary measure which appears, in view of those shortcomings, to be the most appropriate lie in principle within the broad discretionary power of the appointing authority, unless the measure imposed is disproportionate in relation to the facts as found in the decision. Thus, according to established case-law, the appointing authority has the power, distinct from that exercised by the Disciplinary Board, to assess the official's responsibility and subsequently to choose the disciplinary measure which it considers appropriate for the disciplinary offences found against him.*
>
> *Once the facts have been properly established, in view of the broad discretion enjoyed by the appointing authority in disciplinary matters, judicial review must be limited to ascertaining that there has been no manifest error of assessment and that there has been no misuse of powers.*
>
> *With regard, in particular, to the proportionality of a disciplinary measure in relation to the seriousness of the facts held against the official, the Tribunal must take into consideration the fact that the penalty to be imposed is to be determined on the basis of an overall assessment by the appointing authority of all the concrete facts and matters appertaining to each individual case, bearing in mind that the Staff Regulations do not specify any fixed relationship between the disciplinary measures listed by them and the various types of misconduct on the part of officials, and do not state the extent to which aggravating or mitigating circumstances are to be taken into account in the choice of penalty. Consequently, the examination by the Tribunal is limited to a consideration of the question whether the weight attached by the appointing authority to such aggravating or mitigating circumstances is proportionate, given that during that examination it cannot substitute its own assessment for that of the appointing authority as regards that authority's value judgments in this matter.*

After assessing the facts of this case, the CST found that the appointing authority had disregarded certain mitigating circumstances and had not weighed up the circumstances in the applicant's case in a disproportionate manner when deciding on the penalty.

The EU courts have therefore recognised that the appointing authority enjoys a wide margin of appreciation in disciplinary matters and that EU judges have limited powers in reviewing the proportionality of the penalties imposed ([1045]).

([1044]) Judgment of 19 November 2014, *EH* v *Commission*, F-42/14, EU:F:2014:250, paragraphs 91–93, and case-law cited.

([1045]) See also judgment of 5 June 2019, *Bernaldo de Quiros* v *Commission*, T-273/18, EU:T:2019:371, paragraphs 125 and 126.

2.2. The EU judge has the power to control the accuracy of the facts, the legality of the procedure and the motivation of the disciplinary decision

As a corollary to the limited review of proportionality, the EU courts are entitled to check the accuracy of the facts ([1046]), to review the legality of the procedure leading to the adoption of the disciplinary decision and to check whether or not the disciplinary decision is sufficiently motivated.

The obligation to state the reasons for taking decisions applies to all decisions of the EU institutions adversely affecting individuals and is of fundamental importance. It has two objectives: to enable the EU courts to review the legality of the decision and to provide the person concerned with sufficient information to know whether the decision is well founded or it is vitiated by a defect, enabling its legality to be challenged ([1047]).

A missing or inadequate statement of reasons constitutes an infringement of essential procedural requirements for the purposes of Article 263 of the Treaty on the Functioning of the European Union (TFEU) and is a plea involving a matter of public policy that the EU courts may, or even must, raise of their own motion ([1048]).

A disciplinary decision needs to specify the acts that the official is found to have committed and the considerations that have led the appointing authority to impose the particular penalty. As part of this, the authority is obliged to give reasons for the proportionality of the penalty imposed in view of the misconduct ([1049]). If the penalty imposed by the appointing authority is more severe than that suggested by the Disciplinary Board, the decision must set out in detail the grounds that have led the appointing authority to disregard the board's opinion ([1050]).

The Court of Justice annulled, for example, a decision to remove an individual from their post because it did not contain such detailed reasoning ([1051]).

([1046]) For example, in the judgment of 16 October 1998, *V* v *Commission*, T-40/95, EU:T:1998:243, the EU judge annulled the disciplinary decision, as the facts on which it was founded were not established. Other examples are the judgments of 16 December 2004, *De Nicola* v *EIB*, T-120/01, EU:T:2004:367; and of 16 December 2004, *De Nicola* v *EIB*, T-300/01, EU:T:2004:367, paragraph 219.

([1047]) See judgments of 28 May 1980, *Kuhner* v *Commission*, Joined Cases C-75/79 and C-33/79, EU:C:1980:139, paragraph 15; and of 11 June 2020, *Commission* v *Di Bernardo*, C-114/19 P, EU:C:2020:457, paragraph 51.

([1048]) Judgment of 2 December 2009, *Commission* v *Ireland*, C-89/08 P, EU:C:2009:742, paragraph 34.

([1049]) See judgment of 10 September 2019, *DK* v *EEAS*, T-217/18, EU:T:2019:571, paragraph 149.

([1050]) Judgment of 29 January 1985, *F* v *Commission*, C-228/83, EU:C:1985:28, paragraph 35.

([1051]) See judgment of 29 January 1985, *F* v *Commission*, C-228/83, EU:C:1985:28.

2.3. The compatibility of the limited review with the European Convention on Human Rights

In *Andreasen* v *Commission*, the applicant questioned the legality of the EU judge's limited review of a disciplinary penalty in view of her right to an effective remedy under Article 13 of the European Convention on Human Rights (ECHR) and Articles 41 and 47 of the EU Charter of Fundamental Rights (the Charter). She argued that the EU judge would need to have the power to review the disciplinary procedure to grant an effective remedy under the said provisions.

The General Court rejected this argument. It first stated that the judicial review that the EU judicature conducts in the context of an action for annulment under Articles 263 and 270 TFEU constitutes a sufficient and effective remedy before an independent and impartial tribunal under Article 6(1) ECHR. This review makes it possible, in any event, to rectify failures and inadequacies in a disciplinary procedure that preceded its referral to the CST. The court then added that the action for annulment enables the CST to correct errors, in fact and law, and to control the proportionality between the alleged misconduct and the contested penalty. The General Court noted that in the judgment under appeal the CST had also reviewed whether or not the penalty imposed was proportionate. On that basis, it concluded that such a judicial review is entirely in conformity with the settled case-law of the EU courts and respects the requirements of the ECHR ([1052]).

Mrs Andreasen brought her case to the European Court of Human Rights (ECtHR), where she argued that the scope of the reviews by the CST and the General Court was insufficient. The ECtHR declared the application inadmissible in its decision of 31 March 2015 ([1053]). It considered that the disciplinary decision was subject to judicial scrutiny of the scope required by Article 6(1) ECHR. In Section 73, it stated that both the CST and the General Court 'addressed all grounds raised by the applicant and gave full reasons for rejecting each in turn. As such, there was a sufficiency of review and, more importantly, there could not be said to have been any "manifestly deficiency" in the protection of the applicant's Convention rights in the disciplinary proceedings before the EU courts.'

The same issue was brought up in *Nijs* v *Court of Auditors*. The General Court rejected that argument. It held that Article 47 of the Charter does not prevent a 'penalty' from being imposed by the administrative authority in the first instance. For this to be possible, however, decisions taken by administrative authorities that do not themselves satisfy the requirements set out in that provision must be subject to subsequent review by a 'judicial body with full jurisdiction'. The court then added that 'In order to be classified as a judicial body with full jurisdiction, a judicial

([1052]) Judgment of 9 September 2010, *Andreasen* v *Commission*, T-17/08 P, EU:T:2010:374, paragraphs 146–147.

([1053]) Judgment of 31 March 2015, *Andreasen* v *United Kingdom and 26 other Member States of the EU*, CE:ECHR:2015:0331DEC002882711.

body must amongst other things have power to consider all questions of fact and law relevant to the proceedings before it, which includes, in the case of a disciplinary measure, power to consider whether the sanction was proportionate to the misconduct' ([1054]).

2.4. The most recent case-law

Most recently, in its judgment of 9 June 2021 in *DI* v *ECB*, the General Court took the view that the EU judicature 'has the power to assess fully the proportionality between the misconduct and the penalty' ([1055]). The argument is that compliance with Article 47 of the Charter presupposes that a 'penalty' imposed by an administrative authority must be subject to the subsequent review of a judicial body with such powers. To support this argument, the judgment refers to *Nijs* v *Court of Auditors, Andreasen* v *Commission* and *Andreasen* v *United Kingdom and 26 other Member States of the EU*. The pertinent paragraph in *Nijs* v *Court of Auditors*, however, does not clearly state that point. The same is true of the other two judgments.

The General Court has repeated this reasoning in two other cases ([1056]), in both of which it annulled the disciplinary decision. In *OT* v *Parliament*, it held that the decision to impose a disciplinary measure was disproportionate in the light of all circumstances; it even alludes to the possibility that, given the specific circumstances of the case, the Parliament would have had to consider whether or not a penalty had to be imposed at all ([1057]). The second case, *Cristescu* v *Commission*, also concerns the application of a disciplinary measure. In this case, the EU judge criticises the appointing authority, stating that it did not explain why it chose to apply a disciplinary measure when it had alternatives. It explicitly recognises that the applicant's behaviour violated his obligations under the SR ([1058]).

In all three cases, the General Court refers to the case-law according to which the EU judicature ascertains whether or not the weight attached by the disciplinary authority to aggravating and extenuating circumstances is proportionate ([1059]). In *OT* v *Parliament*, the judgment also refers to the case-law according to which the disciplinary decision must describe the aggravating and extenuating circumstances ([1060]).

([1054]) Judgment of 15 May 2012, *Nijs* v *Court of Auditors*, T-184/11 P, EU:T:2012:236, paragraph 85; see also paragraph 87, which refers to the CST's statement in the judgment under appeal that the contested penalty was not manifestly disproportionate.

([1055]) Judgment of 9 June 2021, *DI* v *ECB*, T-514/19, EU:T:2021:332, paragraph 197.

([1056]) See judgments of 23 March 2022, *OT* v *European Parliament*, T-757/20, EU:T:2022:156, paragraph 173; and of 1 June 2022, *Cristescu* v *Commission*, T-754/20, EU:T:2022:316, paragraph 223.

([1057]) Judgment of 23 March 2022, *OT* v *European Parliament*, T-757/20, EU:T:2022:156, paragraph 190.

([1058]) Judgment of 1 June 2022, *Cristescu* v *Commission*, T-754/20, EU:T:2022:316, paragraphs 229–232 and 237–239.

([1059]) See judgment of 16 March 2004, *Afari* v *ECB*, T-11/03, EU:T:2004:77, paragraph 203.

([1060]) Judgment of 23 March 2022, *OT* v *European Parliament*, T-757/20, EU:T:2022:156, paragraph 189, and case-law cited.

In another recent judgment, the General Court, when examining the proportionality of a penalty, employed the formula used so far, which considers the wide margin of appreciation in disciplinary matters and the limited review ([1061]).

This requires, in line with previous case-law, that such a decision state in sufficient detail the reasons for which a particular penalty was chosen in the light of all aggravating and extenuating circumstances and that all relevant circumstances, aggravating and/or extenuating, are described and taken into account when deciding on the penalty.

The EU judge must apply high standards as regards the motivation of any disciplinary decision.

It is not yet clear what a 'full' assessment of the proportionality between the misconduct and the penalty would mean in practice. Future cases are likely to provide more clarity on this question.

3. Judicial control of decisions based on medical assessments

Medical experts intervene in various situations. For example, when a staff member is on medical leave the administration can proceed by arranging a medical examination. The staff member can contest the institution's doctor's assessment and request 'arbitration' from an independent doctor (Article 59(1)(5) SR). A medical committee ('invalidity committee') composed of three doctors (one representing the staff member, one representing the institution and a third doctor) decides whether or not a person should be put on invalidity leave (Article 78 SR) because they are not capable of working any more.

Thus, the SR have entrusted medical experts with the task of definitively appraising all medical issues, which no appointing authority, because of its internal administrative composition, could do. In such a situation, a judicial review may not extend to medical appraisals properly so called, which must be considered definitive, provided that the conditions in which they are made are not irregular ([1062]).

However, the EU judge has the power to review issues concerning the constitution and proper functioning of the invalidity committee and the regularity of the opinions that it issues. The judge also has jurisdiction to examine whether or not the opinion contains reasons enabling the reader to assess the considerations on which the conclusions that it contains were based and whether or not it has established a comprehensible link between the medical findings that it contains and the conclusions reached by the invalidity committee concerned ([1063]).

([1061]) Judgment of 24 November 2021, *CX* v *Commission*, T-743/16 RENV II, EU:T:2021:824, paragraph 356; see also Order of 31 March 2022, *AL* v *Council*, T-22/22 R, EU:T:2022:200, paragraph 50.

([1062]) Judgment of 25 October 2017, *Lucaccioni* v *Commission*, T-551/16, EU:T:2017:751, paragraph 78, and case-law cited.

([1063]) Judgment of 23 October 2018, *McCoy* v *Committee of the Regions*, T-567/16, EU:T:2018:708, paragraph 67.

The judicial review of the proper constitution and functioning of those committees and of the regularity of the opinions that they issue is a corollary of the absence of a judicial review of medical appraisals properly so called ([1064]).

It can be noted that in recent years the EU courts have become stricter in respect of procedural requirements and the motivation of medical opinions. The General Court annulled, for example, a decision to put an official on invalidlity because neither the opinion of the invalidity committee nor the decision rejecting the complaint contained sufficient reasons ([1065]).

4. Judicial control in the field of competitions

The SR establish the principle that the great majority of officials are recruited on the basis of general competitions (Article 29(1)). Each competition is based on a notice that sets out, *inter alia,* the nature of the competition, its modalities, the nature of the job and its grade/function group, the type of exams and the way scores are attributed. The notice of general competitions is published in the *Official Journal of the European Union* (see Article 1 of Annex III SR). In addition, according to the same provision, institutions may, in certain circumstances, organise internal competitions, whereby other categories of staff (mainly temporary agents, but sometimes also contract agents) can become officials.

In the field of competitions, selection boards play a central role and enjoy, in principle, a large margin of discretion.

This is consistent with the fact that competitions aim to identify the people best suited to the specific needs of the service. It is not for the EU courts to decide who those people may be, but rather for the competent appointing authority to exercise its discretionary powers in this regard. The EU judge cannot substitute its own judgment for that of the recruiting institutions.

More specifically, a distinction should be drawn between two phases of the competition as regards the level of scrutiny the EU courts exercise in this field and therefore the margin of discretion they actually confer on the administration.

Firstly, the administration verifies whether or not applicants meet the eligibility criteria set forth in the competition notice. These criteria comprise general and linguistic criteria as well as qualifications and work experience.

The second phase of the competition is where the core of the comparison of the candidates' merits is carried out, through tests and interviews performed at an assessment centre. At the beginning of this phase, the administration often uses a talent screener, which is essentially

([1064]) Judgment of 8 June 2011, *Commission* v *Marcuccio*, T-20/09 P, EU:T:2011:257, paragraph 54.

([1065]) Judgment of 9 June 2021, *Lianopoulou* v *Commission*, T-880/19, EU:T:2021:325, paragraphs 46–60.

a questionnaire about candidates' academic achievements and professional experience. Candidates' responses are awarded a numeric score by the selection board, and only the candidates with the highest scores are invited to the next phase of the competition.

As regards the control of eligibility, the general principle is that the selection board enjoys a large margin of appreciation in the context of the provisions on selection procedures of the SR as regards the previous professional experience of candidates, both in terms of its nature and length and in terms of their more or less closer connection with the requirements of the post to be filled. Therefore, in reviewing the legality of such an assessment, the General Court must restrict itself to verifying whether the exercise of that power was not vitiated by a manifest error of assessment ([1066]).

Article 5(3) of Annex III to the SR states that in the case of competitions on the basis of qualifications, the selection board shall determine how candidates' qualifications are to be assessed. This entails a certain margin of discretion.

This margin of discretion is significantly curtailed by the fact that the EU judge highlights that the selection board is nevertheless bound by the competition notice, which constitutes both the legal framework of the competition and the framework of the selection board's assessment ([1067]). The General Court recently highlighted, in *Spisto* v *Commission*, that the essential role of the competition notice is to inform interested parties, as accurately as possible, of the nature of the conditions required to occupy the post in question, so that they are in a position to assess, in particular, whether or not they should apply ([1068]).

The General Court then reviewed whether or not the terms of the competition notice were strictly adhered to and whether or not the selection board followed criteria that were predictable for candidates. Therefore, it must be concluded that by adopting the evaluation criteria the selection board must not only not contradict the competition notice but also interpret it in the spirit of the text and according to the legitimate expectations of candidates. According to the case-law, it is not only contradiction between the evaluation criteria and the competition notice that is forbidden, but also the restriction or broadening of the selection criteria determined by the competition notice, under penalty of not respecting the text of the competition notice ([1069]).

Therefore, in reality the selection board's margin of discretion is limited, as it is not allowed to restrict or broaden the selection criteria set forth in the competition notice, and must interpret the competition notice according to its spirit and the legitimate expectations of candidates. Arguably, the selection board may only interpret and clarify the selection criteria in the

([1066]) Judgment of 10 November 2021, *Spisto* v *Commission*, T-572/20, EU:T:2021:766, paragraph 30, and case-law cited.

([1067]) Judgment of 10 November 2021, *Spisto* v *Commission*, T-572/20, EU:T:2021:766, paragraph 31, and case-law cited.

([1068]) Judgment of 10 November 2021, *Spisto* v *Commission*, T-572/20, EU:T:2021:766, paragraph 42, and case-law cited.

([1069]) Judgment of 10 November 2021, *Spisto* v *Commission*, T-572/20, EU:T:2021:766, paragraph 43, and case-law cited.

competition notice, and possibly even only specify the meaning of such selection criteria, by quantifying, for example, the number of years of professional experience or the number of publications required.

This approach was followed in a series of other judgments ([1070]) and seems to have become established case-law of the General Court. The Court of Justice has thus far not taken a position on this issue.

As far as the second phase is concerned, the margin of discretion of the selection board seems to be much broader. The second phase is in fact where the core of the comparison of merits of the candidates takes place, as it involves candidates taking a series of tests and participating in several exercises and interviews at an assessment centre.

According to settled case-law, the appointing authority has a wide discretion in assessing the interests of the service and, in particular, in defining the specific requirements of a post to be filled.

Review by the EU Courts is confined to determining whether the appointing authority has remained within reasonable bounds and has not used its power in a manifestly incorrect way ([1071]).

It also stems from the case-law that the selection board enjoys a large margin of discretion as regards the modalities and the detailed content of the written tests in the context of a selection procedure. The EU courts may criticise the modalities of a test only insofar as it is necessary to ensure the equal treatment of candidates and the objectivity of the choice operated among them. It is not for the EU Courts to criticise the detailed content of a test, except where it departs from the framework indicated in the competition notice or is not in line with the objectives of the test or of the selection procedure ([1072]).

This margin of discretion therefore encompasses both the definition of the content of the tests and the evaluation of candidates, that is, the comparison of merits. It should also be highlighted that this margin of discretion is even broader in the context of oral tests, where the case-law recognises the broadest margin of discretion of the selection board ([1073]).

However, the EU judge exercises a rather strict control of the statement of reasons of the decisions taken by selection boards, and requires that certain elements be given to candidates, so that they can understand their results.

([1070]) Judgments of 9 March 2022, *LA* v *Commission*, T-456/20, EU:T:2022:120; *LD* v *Commission*, T-474/20, EU:T:2022:121; and *Zardini* v *Commission*, T-511/20, EU:T:2022:122.

([1071]) Judgment of 15 April 2010, *Angelidis* v *Parliament*, F-104/08, EU:F:2010:23, paragraph 58, and case-law cited.

([1072]) Judgment of 19 February 2004, *Konstantopoulou* v *Court of Justice*, T-19/03, EU:T:2004:49, paragraph 48, and case-law cited.

([1073]) Order of 25 May 2011, *Meierhofer* v *Commission*, F-74/07 RENV, EU:F:2011:63, paragraph 63, and case-law cited.

Initially, these requirements were rather limited, on account of the need to balance the duty to state reasons and the secrecy of selection boards' proceedings, provided for in Article 6 SR. According to the case-law, that secrecy was introduced with a view to guaranteeing the independence of selection boards and the objectivity of their proceedings, by protecting them from all external interference and pressures, whether these come from the administration itself or the candidates concerned or third parties ([1074]).

The *Innamorati* judgment ([1075]) emphasises that the communication of the marks obtained in the various tests constitutes an adequate statement of the reasons on which the selection board's decisions are based. Such a statement of reasons is not prejudicial to the candidates' rights. It enables them to know the value set on their performance and to ascertain, if such is the case, that they have not in fact obtained the number of marks required by the competition notice in order to be admitted to certain tests or to all the tests ([1076]). Observance of this secrecy therefore precludes both disclosure of the attitudes adopted by individual members of selection boards and disclosure of any factors relating to individual or comparative assessments of candidates ([1077]).

The duty to state reasons is therefore deemed to have been respected if selection boards communicated to candidates their final scores and the threshold for being admitted to the next phase of the competition or included in the reserve list, as the case may be.

Nevertheless, more recently the case-law has required that additional elements be given to candidates in order to comply with the administration's duty to state reasons.

While the correction criteria adopted by selection boards and the positions of individual members remain protected by the secrecy of the board' proceedings ([1078]), the case-law now seems to require that candidates be given their intermediate scores as well as their final scores ([1079]), the rounding-up method followed by the selection board and the relative weight of the different tests in the final score obtained ([1080]).

It must be noted that the importance of such additional elements in the *JR v Commission* judgment resulted from the fact that that information was, *in concreto*, crucial for candidates to be able to understand the qualitative assessment they had obtained for each test, as there was an apparent mismatch between their qualitative verbal assessment results and their final

([1074]) Judgment of 4 July 1996, *Parliament* v *Innamorati*, C-254/95 P, EU:C:1996:276, paragraph 24.

([1075]) Judgment of 4 July 1996, *Parliament* v *Innamorati*, C-254/95 P, EU:C:1996:276.

([1076]) Judgment of 4 July 1996, *Parliament* v *Innamorati*, C-254/95 P, EU:C:1996:276, paragraphs 31–32.

([1077]) Judgment of 4 July 1996, *Parliament* v *Innamorati*, C-254/95 P, EU:C:1996:276, paragraphs 23–24.

([1078]) Judgment of 22 September 2021, *JR* v *Commission*, T-435/20, EU:T:2021:608, paragraphs 55 and 71.

([1079]) Judgment of 22 September 2021, *JR* v *Commission*, T-435/20, EU:T:2021:608, paragraphs 74–75.

([1080]) Judgment of 22 September 2021, *JR* v *Commission*, T-435/20, EU:T:2021:608, paragraphs 72–73.

numeric scores. It cannot be excluded that, where such qualitative assessment is absent or is clear and devoid of doubt, the elements required by the *Innamorati* case-law are deemed sufficient to comply with the administration's duty to state reasons.

In any case, the tendency of the case-law is clear: in the context of the second phase of competitions, the broad discretion of boards is counterbalanced by the strict control of the statement of reasons.

5. Judicial control of annual reports and promotion decisions

5.1. Annual reports

Each official is the subject of an annual report that assesses their ability, efficiency and conduct in the service. The report states whether or not their performance level has been satisfactory (Article 43(1) SR). This annual report is an important element for the appointing authority in examining the career prospects of the official concerned.

The EU courts exercise only limited control as regards the annual report. Indeed, as far as the appraisal of the official's qualities is concerned, it is not for the EU judges to substitute themselves for the assessors or for the appeal assessors ([1081]). In other words, while evaluations or assessments that are capable of providing an objective review fall within the ambit of the review, this does not extend to value judgements, which, owing to their very nature and purpose, the EU judges cannot review. The EU courts can, however, assess whether or not any irregularities in form, manifest factual errors or misuse of powers exist ([1082]).

The particularly broad margin of discretion that assessors enjoy needs to be counterbalanced with the particularly rigorous consideration of the provisions on the organisation of the assessment and the implementation of the procedure in that regard ([1083]).

5.2. Promotion decisions

Another example of a situation where EU courts exercise a limited review concerns decisions not to promote an official. The promotion is based on a comparison of the merits of all officials eligible for promotion (Article 45(1) SR).

As regards the motivation, the appointing authority is not obliged to state the reasons for decisions not to promote candidates. It must, however, state the reasons for decisions rejecting

([1081]) Judgment of 28 October 1982, *Oberthür* v *Commission*, C-105/81, EU:C:1982:370, paragraph 26.

([1082]) Judgments of 5 May 1983, *Ditterich* v *Commission*, C-207/81, EU:C:1983:123, paragraphs 13 and 15; and of 15 June 2022, *QI* v *Commission*, T-122/21, EU:T:2022:361, paragraph 96.

([1083]) Judgment of 15 June 2022, *QI* v *Commission*, T-122/21, EU:T:2022:361, paragraph 144.

complaints submitted under Article 90(2) SR by candidates who have not been promoted, the statement of reasons for those rejection decisions being deemed to be the same as the statement of reasons for the decisions against which the complaints were directed.

As promotions involve choices, the statement of reasons for the rejection of the complaint need only deal with the existence of the legal conditions set out by the SR for the procedure to be lawful. In particular, the appointing authority is not required to disclose to the unsuccessful candidate details of its comparison of their merits with those of the candidate who is promoted. It is sufficient that, in its decision rejecting the complaint, the appointing authority inform the official concerned of the relevant individual ground or grounds justifying the rejection of their candidature ([1084]).

The appointing authority enjoys wide discretion when deciding on the merits to consider. As a consequence, the control of the EU judge is limited to assessing whether or not the appointing authority, with regard to the various considerations that have influenced its decision, has kept within proper bounds (*dans des limites non critiquables*) and has not used its power manifestly incorrectly. The EU judge can therefore not substitute their assessment of the qualifications and merits of the candidates for that of the appointing authority ([1085]).

6. Judicial control of decisions related to professional activities after leaving the service

The SR require that former officials have to inform their former institution within 2 years after leaving it of any professional activity, whether paid or unpaid, that they plan to take up. The appointing authority may prohibit the exercise of such an activity or subject it to restrictions under two cumulative conditions: the activity has a link to the official's functions in their last 3 years of service and there is a risk that it is incompatible with the legitimate interests of the institution (Article 16(2) SR).

The second condition requires that there be a risk that the proposed activity is incompatible with the legitimate interests of the institution. It is therefore sufficient that the activity planned is likely to be perceived as giving rise to a potential or real conflict of interest with the function they performed in in their last 3 years of service ([1086]).

In *Teixera*, the applicant had been head of the Delegation of the European Union to Cape Verde during the last 3 years of his service. He intended to become a representative of the Order of Malta in Cape Verde for 4 years, first as a non-resident and then as a resident. The appointing

([1084]) Order of 16 September 2013, *Bouillez* v *Council*, T-31/13 P, EU:T:2013:521, paragraph 26.

([1085]) Judgment of 15 September 2005, *Casini* v *Commission*, T-132/03, EU:T:2005:324, paragraph 52.

([1086]) Judgment of 28 November 2019, *Pinto Teixeira* v *EEAS*, T-667/18, EU:T:2019:821, paragraph 44.

authority considered that there was a potential risk of conflicts of interest, insofar as, according to the rules of conduct for heads of EU delegations provided for in point 2.5 of the note on the rules of ethics and code of conduct of European External Action Service staff, former heads of EU delegations are required to avoid carrying out high-profile activities, in particular those of an official nature, at the place of their previous assignment and to avoid returning there for a period of at least 6 months. Even after that, they are required to avoid having high-profile meetings with local authorities. However, according to the appointing authority, the applicant would become a member of the diplomatic corps accredited to Cape Verde and would therefore be invited to all diplomatic and official functions, especially since he would have the intention to reside in that state for a significant part of the year.

The appointing authority has a wide discretion in assessing whether or not the second condition is fulfilled and whether or not it requires either the prohibition of the activity or the implementation of certain restrictions ([1087]). This condition is fulfilled when there exists a risk that the planned activity is incompatible with the legitimate interests of the institution ([1088]). In reviewing the legality of a decision taken under Article 16 SR, the EU judge is therefore limited to verifying whether or not the appointing authority kept within reasonable limits and did not use its discretion manifestly erroneously ([1089]).

The General Court considered that the appointing authority had not committed a manifest error of assessment. It annulled the decision on the ground that it had not been adopted within the prescribed deadline of 30 working days since the declaration.

7. The EU judges' role when lack of impartiality is alleged

Allegations of lack of impartiality and/or conflicts of interest are commonly raised in any area of EU civil service law. Such allegations are made against the appointing authority that refuses an individual a promotion or refuses to renew an individual's contract of employment, against the selection board that refuses an individual access to the next stage of the competition because of the behaviour of one of its members or against the appointing authority that implements a disciplinary penalty. In other words, it is a cross-cutting issue, and it is examined separately in this section.

([1087]) Judgment of 28 November 2019, *Pinto Teixeira* v *EEAS*, T-667/18, EU:T:2019:821, paragraph 49.

([1088]) Judgment of 28 November 2019, *Pinto Teixeira* v *EEAS*, T-667/18, EU:T:2019:821, paragraph 51.

([1089]) Judgment of 28 November 2019, *Pinto Teixeira* v *EEAS*, T-667/18, EU:T:2019:821, paragraph 50.

7.1. The concepts of impartiality and conflicts of interest

Under Article 41(1) of the Charter, everyone has the right, *inter alia*, to have his or her affairs handled impartially by the EU institutions ([1090]). The principle of sound administration means, *inter alia,* the competent institution is obliged to examine all the relevant aspects of the case concerned, with care and impartiality ([1091]). This concept applies whenever the different interests at stake are not on an equal footing. For instance, candidates for posts in the European Civil Service must be on an equal footing as regards the tests in such competitions ([1092]).

According to Article 11 SR, officials should carry out their duties and conduct themselves solely with the interests of the EU in mind. They should neither seek instructions nor take instructions from any government, authority, organisation or person outside their institution. In addition, they should carry out the duties they are assigned objectively, impartially and in keeping with their duty of loyalty to the EU. Officials in service should defend the interest of their institution and first and foremost the interests of the EU.

Article 11a SR states that officials should not, in the performance of their duties, deal with any matter in which, directly or indirectly, they have any personal interest such as to impair their independence, in particular family or financial interests.

According to the General Court, conflict of interest within the meaning of the SR 'concerns only the situation in which an official is required, in the performance of his duties, to rule on a case in the handling or outcome of which he has a personal interest such as to impair his independence' ([1093]).

Article 11a SR has a wide scope of application, 'covering any circumstance which the official who is called upon to rule on a matter must reasonably understand is likely to appear, in the eyes of third parties, as being likely to affect his impartiality in the matter' ([1094]).

7.2. The EU judges' role when lack of impartiality is alleged

The EU courts distinguish between two types of impartiality ([1095]). On the one hand, subjective impartiality means that no member of the institution concerned who is responsible for the matter may show bias or personal prejudice. On the other hand, objective impartiality means

([1090]) Judgment of 27 March 2019, *Wolff and Remedia* v *Commission*, C-680/16 P, EU:C:2019:257, paragraph 25.

([1091]) Judgment of 8 June 2017, *Schniga* v *CPVO*, C-625/15 P, EU:C:2017:435, paragraph 47.

([1092]) Judgment of 20 November 1997, *Commission* v *V*, C-188/96 P, EU:C:1997:554, p. 6580.

([1093]) Judgment of 12 March 2008, *Giannini* v *Commission*, T-100/04, EU:T:2008:68, paragraph 225.

([1094]) Judgment of 4 May 2010, *Fries Guggenheim* v *Cedefop*, F-47/09, EU:F:2010:36, paragraph 73.

([1095]) See judgment of 18 September 2012, *Allgeier* v *FRA*, F-58/10, EU:F:2012:130, paragraph 66.

that there must be sufficient guarantees to exclude any legitimate doubt as to bias on the part of the institution concerned ([1096]).

In examining a plea based on a lack of impartiality, the EU courts examine possible breaches of subjective and objective impartiality separately. The EU judges use different standards for the two types.

7.2.1. Subjective impartiality

A lack of impartiality presupposes a set of objective and proven circumstances, but above all specific and extraordinary circumstances, clearly distinct from situations relating to the day-to-day management of staff ([1097]).

For instance, a person who is the subject of disciplinary proceedings may question the subjective impartiality of the person conducting the disciplinary proceedings if the latter manifests personal bias when taking the decision. Subjective impartiality is presumed in the absence of proof to the contrary ([1098]). A lack of subjective impartiality is established only where evidence of a concrete breach of the duty of impartiality is adduced ([1099]). The EU courts assess whether or not there has been a concrete breach of subjective impartiality.

Even though the possibility cannot be excluded that differences between an official and their immediate superior may cause a degree of irritation on the part of that immediate superior, that possibility does not, as such, imply that the immediate superior is no longer in a position to assess objectively the merits of the person concerned.

Moreover, it has been held that even the fact that a staff member has lodged a complaint of harassment against the official who is to assess their professional performance cannot of itself, without any other factors, call into question the impartiality of the person against whom the complaint has been lodged ([1100]).

([1096]) Judgment of 27 March 2019, *Wolff and Remedia* v *Commission*, C-680/16 P, EU:C:2019:257, paragraph 27. See also judgment of 11 July 2013, *Ziegler* v *Commission*, C-439/11 P, EU:C:2013:513, paragraph 155, and case-law cited. The distinction between objective impartiality and subjective impartiality is not limited to the case-law concerning the SR. See, for instance, the case-law concerning Commission decisions based on Articles 101 and 102 TFEU. See, for example, judgment of 18 March 2021, *Pometon* v *Commission*, C-440/19P, EU:C:2021:214, paragraph 58.

([1097]) Judgment of 4 May 2010, *Fries Guggenheim* v *Cedefop*, F-47/09, EU:F:2010:36, paragraph 54; see also judgments of 11 September 2002, *Willeme* v *Commission*, T-89/01, EU:T:2002:212, paragraphs 47 and 58; of 3 February 2005, *Mancini* v *Commission*, T-137/03, EU:T:2005:33, paragraphs 29, 31 and 33; of 30 April 2008, *Dragoman* v *Commission*, F-16/07, EU:F:2008:51, paragraph 41; and of 23 October 2012, *Strack* v *Commission*, F-44/05, EU:F:2012:144, paragraphs 131–135.

([1098]) See, with regard to a selection panel, judgment of 5 December 2017, *Spadafora* v *Commission*, T-250/16 P, EU:T:2017:866, paragraph 75. See also judgment of 13 December 2012, *Commission* v *Strack*, Joined Cases T-197/11 P and T-198/11 P, EU:T:2012:690, paragraph 113. Most recently, see judgment of 20 October 2021, *Kerstens* v *Commission*, T-220/20, EU:T:2021:716, paragraph 35.

([1099]) See judgment of 28 September 2017, *Hristov* v *Commission and EMA*, T-495/16 RENV, EU:T:2017:676, paragraph 85.

([1100]) Judgment of 8 November 2018, *QB* v *ECB*, T-827/16, EU:T:2018:756, paragraph 94, and case-law cited.

In order to assess if there has been a concrete breach of subjective impartiality, the EU courts will examine all the relevant aspects of the case concerned, and check whether or not the interests at stake were on an equal footing ([1101]).

In the *Fries Guggenheim* case ([1102]), the Director of the European Centre for the Development of Vocational Training (Cedefop) decided not to renew the contract of a temporary agent who was, at the same time, chairman of the Staff Committee. A lack of impartiality was alleged based on a situation of particularly tense conflict and a series of disputes between the Staff Committee and the trade unions on the one side and the Director on the other side. The CST rejected that plea by stating that even though 'profound differences of opinion between Cedefop's management and the staff representation on issues falling within the sphere of social dialogue' existed, this was not sufficient 'to justify the legitimate fear … that the Director of Cedefop could, in this case, and outside this social dialogue, harbour unfavourable prejudices towards the applicant, or be motivated by a personal interest in the non-renewal of the latter's contract, to the point of losing her impartiality in the exercise of her functions' ([1103]).

In a case of non-renewal of a contract of employment, the judicial review is, in principle, limited to verifying the absence of a manifest error in the assessment of the interests of the service and the absence of abuse of power ([1104]). However, considering the claim of conflicts of interest and breach of Article 11a SR, the CST examined in *Fries-Guggenheim* all the relevant aspects of the case and did not limit itself to ascertaining whether or not there was a manifest error ([1105]).

In *De Bry*, the applicant challenged an assessment report because the head of unit, the author of the report, had the same grade as he, and was a competitor for future promotions. The EU judge held that a purely abstract risk of conflicts of interest is not sufficient to characterise a breach of Article 11a SR ([1106]). The case was dismissed, as no concrete indication of a lack of impartiality was demonstrated.

In Case T-220/20 ([1107]), the applicant argued that someone was not impartial in the course of an investigation that led to a disciplinary sanction. The General Court rejected that plea in the absence of evidence that cast doubt on the subjective impartiality of the decision-maker (*éléments de preuve conduisant à douter de l'impartialité*).

([1101]) See, for instance, judgment of 27 November 2018, *Mouvement pour une Europe des nations et des libertés* v *European Parliament*, T-829/16, EU:T:2018:840, paragraph 49.

([1102]) Judgment of 4 May 2010, *Fries Guggenheim* v *Cedefop*, F-47/09, EU:F:2010:36.

([1103]) Judgment of 4 May 2010, *Fries Guggenheim* v *Cedefop*, F-47/09, EU:F:2010:36, paragraph 78.

([1104]) Judgment of 4 May 2010, *Fries Guggenheim* v *Cedefop*, F-47/09, EU:F:2010:36, paragraph 65.

([1105]) Judgment of 4 May 2010, *Fries Guggenheim* v *Cedefop*, F-47/09, EU:F:2010:36, paragraph 74.

([1106]) Judgment of 12 July 2005, *De Bry* v *Commission*, T-157/04, paragraph 38 *et seq*.

([1107]) Judgment of 20 October 2021, *Kerstens* v *Commission*, T-220/20, EU:T:2021:716, paragraph 36.

7.2.2. Objective impartiality

In order to comply with the requirement of objective impartiality, an institution must offer sufficient guarantees to exclude any legitimate doubt as to possible bias. Consequently, it is sufficient that a legitimate doubt exists and cannot be dispelled ([1108]).

A disciplinary procedure involves several steps: an administrative enquiry, which is run by the Commission's Investigation and Disciplinary Office, establishes the facts. On that basis, it is decided whether or not a formal disciplinary procedure is opened. As regards the objective impartiality of an investigation, the General Court has already recognised that such impartiality was lacking, as it had been demonstrated that prior to the opening of the investigation one of the investigators had knowledge of the facts covered by the investigation, having been personally consulted by a complainant. The institution concerned could have appointed as investigator a person who had no prior knowledge of the facts and thus raised no legitimate doubt as to his impartiality with regard to the other party ([1109]).

Recently, the General Court identified a breach of objective impartiality in a case where the person responsible for conducting the investigation opened into three disciplinary procedures was the one who reported the facts that were the subject of one of these procedures to the Investigation and Disciplinary Office. The General Court considered that it had sufficient evidence that the person who reported the facts ('whistleblower') may have had a subsequent active role in the case because she was the person responsible for the investigation common to the three procedures. This person informed the applicant that she had received a mandate to lead the investigation and appointed two investigators for this purpose. In addition, the final investigation report was signed by her, which demonstrates her effective participation in the investigation, with the possibility that she intervened on receipt of the draft investigation report. The court ruled that:

> *the situation in question, characterised by the identity of the persons, presented the objective risk that the person responsible for carrying out the unique investigation could have had a preconceived idea or prejudice about the applicant's involvement in the acts with which he was charged in the context of one of the disciplinary procedures even before the investigation took place.*

The General Court added that such a situation is likely to give rise to legitimate doubts in the applicant's mind as to the objective impartiality of the investigation. In this respect, according to the case-law, the EU judge is not required to verify whether or not the person responsible for conducting the investigation actually had a prejudice against the applicant. It is sufficient

([1108]) Judgment of 27 March 2019, *August Wolff and Remedia* v *Commission*, C-680/16 P, EU:C:2019:257, paragraphs 27 and 37.

([1109]) Judgment of 20 September 2019, *UZ* v *Parliament*, T-47/18, EU:T:2019:650, paragraphs 51–56; appeal dismissed by judgment of 21 October 2021, *Parliament* v *UZ*, C-894/19 P, EU:C:2021:863.

that a legitimate doubt exists that cannot be dispelled ([1110]). The General Court observed that 'the administrative inquiry has an important role and is likely to influence the disciplinary procedure. Indeed, it is on the basis of this investigation and the hearing of the official concerned that the appointing authority assesses [the official's conduct]'. The General Court concluded that 'it cannot be ruled out that, if the administrative inquiry had been conducted with all guarantees of impartiality, it could have led to a different assessment of the facts and, thus, led to different consequences' ([1111]).

Another question is whether or not a staff member can claim a lack of objective impartiality for the sole reason that the Director-General of the Directorate-General for Human Resources and Security has been involved in two successive disciplinary proceedings concerning them.

In a recent case, the applicant alleged that the head of the administrative inquiry, the Director-General of the Directorate-General for Human Resources and Security, was not impartial because she would have already formed an opinion in the context of a previous procedure in which she had participated. The applicant called into question the procedure's objective impartiality; in line with this concept, any institution must offer sufficient guarantees to exclude any legitimate doubt as to possible bias ([1112]).

It is for the General Court to decide whether or not the existence of strict rules on the composition of the appointing authority responsible for imposing penalties sufficiently protects the persons concerned from arbitrariness. The question is *sub judice* ([1113]).

In *Willeme* v *Commission* ([1114]), the applicant was demoted a grade because he had awarded a contract to an external service provider who simultaneously recruited his wife as an assistant. The General Court examined the professional and private contacts between the applicant and the external service provider and concluded that these contacts did not affect his independence ([1115]).

In another case, the General Court had to assess the impartiality of the selection board. It held that the principle that the selection board must be impartial requires a member of the board to refrain from taking part in the assessment of a candidate where there is a direct link between the board member and the candidate ([1116]). It considered that such a direct link did not exist

([1110]) See judgment of 20 October 2021, *Kerstens* v *Commission*, T-220/20, EU:T:2021:716, paragraph 40, citing judgment of 27 March 2019, *August Wolff and Remedia* v *Commission*, C-680/16 P, EU:C:2019:257, paragraph 37.

([1111]) Judgment of 20 October 2021, *Kerstens* v *Commission*, T-220/20, EU:T:2021:716, paragraph 48.

([1112]) See judgment of 5 October 2020, *Brougton* v *Eurojust*, T-87/19, EU:T:2020:464, paragraph 66.

([1113]) See *PV* v *Commission*, T-89/20, case ongoing.

([1114]) Judgment of 11 September 2002, *Willeme* v *Commission*, T-89/01, EU:T:2002:212.

([1115]) Judgment of 11 September 2002, *Willeme* v *Commission*, T-89/01, EU:T:2002:212, paragraphs 58 and 59.

([1116]) Judgment of 12 March 2008, *Giannini* v *Commission*, T-100/04, EU:T:2008:68, paragraph 229.

when several candidates in the competition appeared as 'friends' on the Facebook account of two members of the selection board ([1117]).

Therefore, the EU judge assesses objective impartiality and subjective impartiality by different standards. In the first case, a legitimate doubt as to possible bias is sufficient to characterise a breach of the principle of impartiality. In the second case, the standard is stricter: concrete elements that indicate a lack of impartiality are necessary.

8. Conclusion

The case-law of the EU courts on European civil service law has developed in the last 60 years and has established a number of principles that remain valid. As demonstrated in this chapter, one of those principles is that, when the administration has a margin of discretion, the EU judge cannot substitute the administration's assessment with their own assessment ([1118]) and can only identify a manifest error of assessment or a misuse of power. This limited control is counterbalanced by a strict review of the 'external' legality, such as respect for the legal framework and procedural requirements and the obligation to state the reasons.

As this chapter shows, while referring to the identification of a manifest error of assessment, the EU judges in recent cases sometimes actually went further in their assessments. This emerging trend towards the strengthening of judicial control is understandable and may be influenced by the entry into force of the Charter. Yet it is too early to detect a clear development in that direction.

([1117]) Order of 25 February 2014, *Garcia Dominguez* v *Commission*, F-155/12, EU:T:2014:24, paragraph 37.

([1118]) Vandersanden warns against the abuse of power by the appointing authority in such a situation; see Vandersanden, G., 'La procédure et les voies de recours', in Govaere, I. and Vandersanden, G. (eds), *La fonction publique communautaire – Nouvelles règles et développements contentieux*, Bruylant, Brussels, 2008, p. 127.

THE FUTURE OF EUROPEAN UNION LAW

Daniel Calleja and Clemens Ladenburger

1. Introduction

Looking back at 70 years of EU law, it is widely admitted that the 'community method' ([1119]) has worked and paved the way for a transformation from a purely economic organisation towards a 'Union for its citizens', of which this books describes the main achievements.

Since 2009, the Treaty of Lisbon, following the European Convention, has shown that it is fit for purpose, in particular when the Union is confronted with unprecedented crises. The most recent developments of the Union, in particular its responses to the COVID-19 crisis, NextGenerationEU, and to Russia's war of aggression against Ukraine, were possible because of a strong political will to use the full potential of the current institutional setting. The joint procurement of vaccines and the issuance of debt by the Union are significant innovations, and the comprehensive set of economic sanctions on Russia and the procurement of arms for Ukraine have pushed the common foreign and security policy into new territory.

Will the Treaty of Lisbon mark the final state of European integration? Or will it be necessary to transform the Union further, to create different institutions or to create different instruments to ensure its future? Only time will tell. This concluding chapter addresses the debate about the future of EU law, including some reflections on how that future could look like.

2. The Treaty of Lisbon: the citizen at the heart of the democratic life of the European Union

One of the significant innovations of the Treaty of Lisbon is undoubtedly to put the citizen at the heart of the democratic life of the Union. The Members of the European Parliament are no longer 'representatives of the peoples of the States brought together in the Community' (Articles 189 and 190 of the Treaty establishing the European Community, as it stood after the

([1119]) The 'community method' is characterised by the roles of the Union's supranational institutions: (i) the Commission's right to initiate and execute legislation (ii) the European Parliament and the Council as co-legislators, adopting legislation on an equal footing; and (iii) the use of qualified majority voting in the Council. This method stands in contrast to decision-making based on the intergovernmental method, giving an important role to national governments and relying on unanimity.

Treaty of Nice). Rather, they are 'representatives of the Union's citizens' (Articles 10 and 14 of the Treaty on European Union (TEU)).

Citizens participate in the democratic life of the EU in ways beyond voting in the European elections (representative democracy); the Treaty of Lisbon introduces the concept of participatory democracy.

Article 10(3) TEU gives every citizen the right to participate in the democratic life of the Union. Article 11 TEU defines the tools available to the citizen: the institutions must seek dialogue with the individual citizen (Article 11(1) TEU), with representative associations and with civil society (Article 11(2) TEU). The Commission in particular must carry out broad consultations (Article 11(3) TEU). Citizens have the right of initiative to invite the Commission to present proposals to the Council and the Parliament and to adopt legal acts itself, where it has the power to do so. Article 11(4) TEU allows 1 million EU citizens to ask the Commission to present a proposal, just like the European Parliament and the Council can do pursuant to Articles 225 and 241 of the Treaty on the Functioning of the European Union (TFEU) (using their political right of initiative).

3. The Conference on the Future of Europe

The EU institutions went one step further when they convened the Conference on the Future of Europe in 2021. This conference, with different events at regional, national and European levels, gave citizens the opportunity to make concrete proposals directly to the institutions regarding what the Union should (or should not / no longer) do in the future.

After a year of deliberations, the conference came to an end on 9 May 2022. At the closing ceremony in Strasbourg, the Presidents of the European Parliament, Commission and Council received a final report from the conference, containing 49 wide-ranging, ambitious and forward-looking proposals and consisting of 326 individual measures. These proposals, covering nine broad themes, were based on recommendations made by citizens during the European citizens' panels and the national citizens' panels, who contributed their ideas through the multilingual digital platform.

EU citizens have made very concrete and actionable proposals to make the Union even more of a union for its citizens than it is today. For many of them either corresponding proposals are already before the Parliament and the Council, or the Commission will soon present such proposals. The areas in which the conference proposed new work include:

— improving understanding of mental health issues and proposals to better address them across Europe;

— work on nutrition and food security;

— improving information on the eco-footprint and animal welfare track record of products;

— a coordinated European approach to the monitoring of the darknet;

— stronger focus on cryptocurrency mining.

The Commission has presented a detailed overview of how it intends to implement these proposals ([1120]).

Some of the proposals are far-reaching institutionally and would require more structural change. There is now a debate about whether such structural change would require treaty change. Some proposals consider treaty change to be necessary, particularly to give the Union new competences in areas such as health and defence.

To assess whether and to what extent treaty change is required to implement the proposals of the conference, it is important to recall that, just like constitutional texts of the Member States, the EU treaties ([1121]) are living instruments. The EU institutions and the Member States have agreed throughout this Commission's mandate to make use of their full potential when procuring billions of vaccines for citizens across Europe, or kickstarting the economy of the future through NextGenerationEU. The Union has also set an ambitious and legally binding path towards climate neutrality, redesigned the rules of the game in the digital world and supported small businesses in retaining their staff during the pandemic through the temporary support to mitigate unemployment risks in an emergency (SURE) programme. Based on the current health competence in the TFEU, the EU has created the Health Emergency Preparedness and Response Authority and a new framework that can be activated in times of a health crisis.

All of this work was made possible by the political will of the institutions working together in order to respond to the urgent nature of the challenges.

There is also untapped potential within the existing treaties that could help respond to the conference's proposals, notably by using the 'passerelle clauses' to move to qualified majority voting in certain policy fields, such as energy and taxation, and for important aspects of the common foreign and security policy, such as sanctions and human rights.

([1120]) European Commission, Conference on the Future of Europe: putting vision into concrete action, COM(2022) 404 final.

([1121]) The EU treaties are the Treaty on European Union, the Treaty on Functioning of European Union, and the Euratom treaty. Those treaties go back to the Treaties of Paris (1952) and Rome (1957), creating the three European Communities (Coal and Steel; Economic Community; Euratom). They have been significantly modified by the European Single Act (1986), the Treaty of Maastricht (1992), the Treaty of Amsterdam (1997), the Treaty of Nice (2001) and the Treaty of Lisbon (2009). See, for more detail on their historical evolution, the introduction to this book.

Whether or not to convene a new European convention is a policy choice ([1122]). To inform the political debate about the future of EU law, it is useful to set out the remaining potential of the EU treaties, as they stand after changes introduced by the Treaty of Lisbon.

4. The untapped potential of the EU treaties

The untapped potential of the EU treaties comprises, in particular, the following instruments:

- the passerelle clauses, which allow a shift from unanimity to qualified majority in the Council and, in the legislative domains, from unanimity to the ordinary legislative procedure, which entails co-decision between the Council and the European Parliament;
- changes to certain protocols by legislative procedures;
- targeted changes to internal policies;
- strengthening external action;
- use of Article 352 TFEU (the flexibility clause);
- creation of a common defence;
- evolution of the EU's institutional system through 'constitutional practice'.

4.1. The passerelle clauses allowing qualified majority voting and, in the legislative domains, co-decision

The EU treaties still provide for decision by unanimity for some policy areas and other legal bases. Politically, the most important fields are the common foreign and security policy, taxation, some aspects of social policy and some aspects of environmental policy, notably environmental taxation. Moreover, the multiannual financial framework is currently adopted by unanimity.

In all those areas, it is possible to move to qualified majority voting in the Council and, for legislative measures, to the ordinary legislative procedure without treaty change, either under one of the special passerelle clauses or under the general passerelle clause.

([1122]) See, for the position of the European Parliament, Resolution of 9 June 2022 on the call for a Convention for the revision of the Treaties (2022/2705(RSP)), Strasbourg, 9 June 2022.

4.1.1. Special passerelle clauses

For most of the areas in which the unanimity rules subsist and that are currently under discussion, the EU treaties include special passerelle clauses. These clauses require unanimous approval by the European Council (where the heads of State and government of the Member States sit) or the Council (where the competent national ministers sit), usually ([1123]) based on a proposal from the Commission. National parliaments do not have a veto right. The only exception is the special passerelle clause on family law with cross-border implications.

Those special passerelle clauses are as follows:

— Social policy: Article 153(2) TFEU. This clause has been introduced by the Treaty of Nice.

— Environmental measures still subject to unanimity, notably environmental taxes: Article 192(2)(2) TFEU. This clause has been introduced by the Treaty of Maastricht.

— Common foreign and security policy: Article 31(3) and (4) TEU. This clause has been introduced by the Treaty of Lisbon.

— Family law with cross-border implications: Article 81(3)(2) TFEU. This clause has been introduced by the Treaty of Lisbon.

In addition, there is a 'cross-cutting' special passerelle clause concerning enhanced cooperation, namely Article 333 TFEU, introduced by the Treaty of Lisbon. This is an interesting tool often overlooked in current debates. In certain policy areas still subject to unanimity (e.g. taxation), if one or a few Member States object to the adoption of further measures, the other Member States could first establish enhanced cooperation and then, by unanimity, decide to make qualified majority voting in the Council and co-decision between the Council and the European Parliament applicable for the policy area.

Finally, there is the particular case of the multiannual financial framework. It is excluded from the general passerelle clause, but has a special passerelle clause in Article 312(2) TFEU. This passerelle clause was introduced by the Treaty of Lisbon.

4.1.2. The general passerelle clause in Article 48(7) of the Treaty on European Union

In addition to the special passerelle clauses listed above, Article 48(7) TEU allows the European Council to adopt a decision by unanimity to make qualified majority voting applicable instead of unanimity, or (for legislative matters) to switch to the ordinary legislative procedure (implying qualified majority voting and co-decision with the European Parliament) instead of a special legislative procedure. This general passerelle clause can be applied in all fields of the treaties,

([1123]) Non-legislative Council or European Council decisions are adopted on a Commission proposal only when the treaty specifically says so. The special passerelle clauses for the multiannual financial framework in Article 312(2) TFEU and for the common foreign and security policy in Article 31(3) and (4) TEU do not provide for a Commission proposal.

except for decisions with military implications and in the area of defence, decisions in the area of the Union's own resources, the multiannual financial framework, the flexibility clause of Article 352 TFEU and the procedure on violations of fundamental values in Article 7 TEU. Contrary to the special passerelle clauses, the general passerelle clause in Article 48(7) TEU gives each national parliament a veto right that can be exercised within 6 months of the adoption of the European Council decision.

For several areas currently discussed, the move from unanimity to qualified majority voting can be achieved by using one of the special passerelle clauses. This is in particular the case for decisions in the area of the common foreign and security policy.

In practice, important fields in which only the general passerelle can be used to move from unanimity to qualified majority voting are taxation (other than environmental taxes) and non-discrimination legislation (Article 19(1) TFEU). Another alternative for those areas is the 'enhanced cooperation' avenue pursuant to Article 333 TFEU set out in the previous section.

4.1.3. Earlier proposals made by the Commission to use the passerelle clauses

In 2018 and 2019, the Commission issued several communications suggesting the use of passerelle clauses. None of them has been taken yet by the European Council (for proposals to use the general passerelle clause) or the Council (for proposals using the special passerelle clause).

The first communication suggests activating the special passerelle clause of Article 31(3) TEU in order to make qualified majority voting applicable to three types of decisions in the area of the common foreign and security policy ([1124]):

- restrictive measures (sanctions);
- civilian missions under the common foreign and security policy;
- human rights issues in multilateral forums.

The second communication discusses the problems of unanimity in the field of tax policy. It sets out a 'progressive and targeted transition' towards qualified majority voting via the passerelle clauses ([1125]). Concretely, it proposes proceeding gradually in four steps: first, make qualified majority voting applicable to measures that have no direct impact on Member States' taxing rights, bases or rates, but are critical for combating tax fraud, evasion and avoidance (notably administrative cooperation); second, apply qualified majority voting to taxes supporting certain other policy goals (fighting climate change, protecting the environment or improving public

([1124]) European Commission, Communication from the Commission – A stronger global actor: a more efficient decision-making for EU Common Foreign and Security Policy, COM(2018) 647 final.

([1125]) European Commission, Communication from the Commission: Towards a more efficient and democratic decision making in EU tax policy, COM(2019) 8 final.

health or transport policy); third, make qualified majority voting applicable to value added tax; fourth, make qualified majority voting applicable to the remaining aspects of tax policy.

The third communication suggests the use of passerelle clauses for energy taxation ([1126]).

The last communication launches a discussion on the possible use of passerelle clauses in the field of social policy, and concretely suggests qualified majority voting regarding only two items (non-discrimination legislation, and Council recommendations on social security and social protection of workers) ([1127]).

4.2. Changes to certain protocols, including Protocol 12 on the excessive deficit procedure

The EU treaties allow certain protocols to be amended by either special or ordinary legislative procedures, without needing national ratifications. Politically, the most significant example is the possibility of amending Protocol 12 on the excessive deficit procedure pursuant to Article 126(14) TFEU by unanimity in the Council, based on a special legislative procedure. Other protocols amendable, for the most part, by the EU legislator are those establishing the statutes of the Court of Justice, the European Central Bank and the European Investment Bank.

4.3. Changes to internal policies

The EU treaties provide for the possibility of amending the scope of policies for which powers are conferred to the EU institutions in a simplified manner. In particular, one can refer to the general clause in Article 48(6) TEU and to some specific provisions in the TFEU.

4.3.1. The general clause in Article 48(6) of the Treaty on European Union

Article 48(6) TEU entrusts the European Council – upon a proposal made by any Member State, the European Parliament or the Commission – to adopt, by unanimity, a decision amending any provisions of Part Three – Union policies and internal action – of the TFEU. The entry into force of such a decision is subject to the approval of all the Member States. It is worth stressing that the competences conferred on the Union by the EU Treaties cannot be increased using this tool. That means that this provision cannot be used, for instance, 'to upgrade' the existing

([1126]) European Commission, Communication from the Commission: A more efficient and democratic decision making in EU energy and climate policy, COM(2019) 177 final.

([1127]) European Commission, Communication from the Commission: Identification of areas for an enhanced move to qualified majority voting, COM(2019) 186 final.

EU competences in the areas of health or social policy ([1128]). The Court of Justice has the competence to verify the respect of that limitation ([1129]).

4.3.2. Specific provisions in the Treaty on the Functioning of the European Union

Article 25 TFEU empowers the Council, acting by unanimity and after obtaining the consent of the European Parliament, to strengthen or add to the rights conferred on European citizens as listed in Article 20(2) TFEU.

Article 83(1) TFEU empowers the Council, acting by unanimity and after obtaining the consent of the European Parliament, to add new items to the list of serious crimes with a cross-border dimension established in that provision. This mechanism is becoming relevant in practice: the Council recently agreed to include the violation or evasion of EU restrictive measures on the list ([1130]). The Commission has also proposed at the end of 2021 to include hate speech and hate crime in this list ([1131]).

Article 86(4) TFEU empowers the European Council, acting by unanimity and after obtaining the consent of the European Parliament and consulting the Commission, to amend Article 86(1) and (2) TFEU to increase the powers and mandate of the European Public Prosecutor's Office.

4.4. Strengthening external action

Beyond the use of the passerelle clauses for the common security and defence policy (see Section 4.1.3), the rules provided for in the Treaty of Lisbon allow a significant strengthening of the external action of the Union compared with current practice, without treaty change.

First, the practice of 'optional mixity' could be terminated. Optional mixity describes the following situation: the Commission proposes that the Union concludes a certain international agreement falling into the area of shared competence between the Union and the Member States. However, the Union has not yet exercised that competence in a manner that would cover all areas covered by the international agreement. In such a situation, the Council can decide

([1128]) This provision has been applied to amend Article 136 TFEU in order to introduce the possibility for the euro-area Member States to constitute the European Stability Mechanism (Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, OJ L 91, 6.4.2011, p. 1).

([1129]) Judgment of 27 November 2012, C-370/12, *Pringle*, EU:C:2012:756.

([1130]) The Commission made the proposal for a Council decision on adding the violation of Union restrictive measures to the areas of crime laid down in Article 83(1) of the Treaty on the Functioning of the European Union, COM(2022)247 final, on 25 May 2022. The Council endorsed this proposal on 30 June 2022. The text now awaits consent of the European Parliament, and is expected to enter into force in October 2022.

([1131]) European Commission, Communication from the Commission to the European Parliament and the Council – A more inclusive and protective Europe: Extending the list of EU crimes to hate speech and hate crime, COM(2021) 777 final.

by qualified majority voting ([1132]) that the shared competence is exercised for the purposes of concluding the international agreement. The Council can then take decisions on signature and conclusion by qualified majority ([1133]). In addition, there is no need for the Member States to ratify the international agreement. It suffices that the Council approves it and the European Parliament gives its consent.

Currently, the Council uses this possibility only very rarely, and instead opts to conclude the international agreements as mixed agreements, that is as international agreements to which both the Union and its Member States become parties. The use of this optional mixitiy has the drawbacks that *de facto* the Council always acts by unanimity and that all Member States have to ratify the agreement ([1134]).

Second, for international organisations dealing with policy areas that fall (entirely or at least to a large extent) under EU competences (whether exclusive or shared), the EU and its Member States should ensure that the EU becomes either a full member (and, for certain organisations, replaces Member States) or at least an observer with the right to speak and act on behalf of EU Member States. This would allow the EU to effectively exercise external aspects of certain core policies. Prominent examples are economic and monetary policy (through involvement in the International Monetary Fund) or health policy (through involvement in the World Health Organization). In addition, the way in which positions in international organisations are to be taken on behalf of the EU (or the EU and its Member States) should be streamlined to ensure effective action (which is often lacking, even for organisations where the EU is a full member, such as the Food and Agriculture Organization).

It should be recalled that, in 2015, the Commission proposed a Council decision aiming to progressively establish unified representation of the euro area in the International Monetary Fund, based on Article 138 TFEU ([1135]). The Council has not yet acted on that proposal.

([1132]) Unless the international agreement falls into any of the situations in which the second subparagraph of Article 218(8) TFEU requires a unanimous vote.

([1133]) Judgment of 5 December 2017, *Germany* v *Council ('COTIF')*, C-600/14, EU:C:2017:935, paragraph 68.

([1134]) The Court held that there is no legal requirement to await a 'common accord' of the Member States, before proceeding to a vote by qualified majority in the Council to approve the international agreement for the EU; see Opinion 1/19 of the Court of 6 October 2021, *Istanbul Convention*, paragraphs 229 to 274.

([1135]) European Commission, Proposal for a Council Decision laying down measures in view of progressively establishing unified representation of the euro area in the International Monetary Fund, COM(2015) 603 final.

4.5. Common defence

Article 42(2) TEU provides the following:

> *The common security and defence policy shall include the progressive framing of a common Union defence policy. This will lead to a common defence, when the European Council, acting unanimously, so decides. It shall in that case recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements.*

This provision allows for the creation of a common defence for the Union.

4.6. The use of Article 352 of the Treaty on the Functioning of the European Union

Article 352 TFEU is the flexibility clause. It provides the following:

> *If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. […]*
>
> *Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation.*

This provision was used more frequently in the early years of EU integration. This is explained mainly by the fact that, today, the Union has explicit competences in many more fields than in its early years, but also by the fact that its use has been subject to onerous constitutional requirements in certain Member States.

One prominent proposal the Commission made in 2017 on the basis of Article 352 TFEU is the proposal to integrate the European Stability Mechanism into EU law as the European Monetary Fund. The Council has not yet acted on that proposal.

4.7. Evolution of the European Union's institutional system through 'constitutional practice'

The EU Member States and the EU institutions can further develop the EU's institutional system through their constitutional practice, without formal treaty change. Some examples can be given of this.

The first is the so-called *Spitzenkandidaten* debate. Article 17(7) TEU provides that the European Council shall 'take into account' the result of the European Parliament elections when nominating the candidate for the office of President of the Commission. The European Parliament must approve the candidate. It is conceivable that, in the future, a constitutional practice could be established whereby the European Council interprets 'take into account' in a more binding manner and nominates the lead candidate of the European political party obtaining the largest number of votes in the European elections, provided they can muster the necessary support in the European Parliament ([1136]).

Second, there is the European Parliament's proposal to establish a system of transnational lists for the election of a (small) number of Members of the European Parliament. Depending on its precise features, it could be realised without treaty change ([1137]).

A third example is the right of initiative of the European Parliament and the Council. Both co-legislators can already ask the Commission to present a legislative proposal pursuant to Articles 225 and 241 TFEU (using their political right of initiative). The President of the Commission has given a political commitment, in principle, to make a proposal each time the European Parliament asks for one ([1138]).

It has been debated in the past whether the positions of the President of the Eurogroup and of the Vice President of the European Commission could be filled by one person on the basis of the current treaties ([1139]). There are legal arguments for both sides of this debate.

([1136]) See in more detail Commission Recommendation 2013/142/EU on enhancing the democratic and efficient conduct of the elections to the European Parliament, OJ L 79, 21.3.2013, p. 29.

([1137]) European Parliament, Proposal of the European Parliament of 3 May 2022 for a Council Regulation on the election of the members of the European Parliament by direct universal suffrage, repealing Council Decision (76/787/ECSC, EEC, Euratom) and the Act concerning the election of the members of the European Parliament by direct universal suffrage annexed to that decision, 2020/2220(INL).

([1138]) von der Leyen, U., *A Union that Strives for More: My agenda for Europe – Political guidelines for the next European Commission 2019–2024*, p. 20: 'When Parliament, acting by a majority of its members, adopts resolutions requesting that the Commission submit legislative proposals [footnote omitted], I commit to responding with a legislative act, in full respect of the proportionality, subsidiarity and better law making principles.'

([1139]) This idea has been outlined in particular by President Juncker in his speech on the State of the Union on 13 September 2017 (Juncker, J.-C., 'State of the Union Address 2017', SPEECH/17/3165, Strasbourg, 13 September 2017), and developed in European Commission, Communication from the Commission: A European Minister of Economy and Finance, COM(2017) 823 final.

Finally, the idea of giving citizens' panels an opportunity to formulate recommendations before key legislative initiatives are proposed could also be realised by the Commission without treaty change.

5. Conclusion

Over the past 70 years, EU law has not only expanded from economic law into many other areas, but, more importantly, delivered very concrete results. Today, the EU is stronger and has more influence than ever. To ensure that the EU can effectively protect its citizens, the environment and the climate, and remain an important player on the world stage, the process must continue – and it will, provided that the EU remains committed to the defence of its values.

Whatever the path of the future of EU law is, the EU is a dynamic and adaptable project. The past 70 years of EU law have led to very concrete results for EU citizens, and we can be proud of it.

The EU's responses to the most recent crises, in particular the COVID-19 pandemic and Russia's war of aggression against Ukraine, have demonstrated that, based on the EU leaders' strong political will to act unitedly, EU law is a powerful and effective tool to deliver responses to new and unforeseen crises.

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