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Yearbook on Procedural Law of the Court of Justice of the European Union Fourth Edition - 2022

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Foreword

The chapters contained in this yearbook have been composed by the participants of the fourth edition of the Forum on Procedural Law of the Court of Justice of the European Union held on Monday, 7 March 2022 at the Max Planck Institute Luxembourg for Procedural Law. The scope of the Forum was twofold. First, it set out to tackle cutting-edge procedural issues which arise in the Court's proceedings and case-law. Second, it provided an update on general procedural issues. The Forum took its name from the intention to have an open dialog among specialists of EU Law and Procedural Law and to foster comparison with other courts, be they domestic or international.

Keywords

Court of Justice of the European Union, Procedural Law, Litigation, Preliminary References, Infringement Actions, Appeals on Points of Law, Action of Annulment

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Chapter 1

The Rule of Law within the EFTA-Pillar of the European Economic Area – Living Up to the (New) Expectations of the CJEU?

*Halvard Haukeland Fredriksen**

1. Introduction

The CJEU's case-law on the rule of law matters not only to the EU and its Member States, but also to third countries associated to the European Union through international agreements. This is especially true for the three EFTA States of Iceland, Liechtenstein and Norway that are (almost) fully integrated into the internal market through the 1992 Agreement on the European Economic Area (EEA).[1] The object and purpose of the EEA Agreement is not simply to grant reciprocal *access* to each other's markets, but to *extend* the EU internal market to include the participating EFTA States.[2] This does not only depend on novel EU legal acts of EEA relevance being continuously added to the Agreement;[3] it also depends upon *uniform interpretation and application* of the common rules both in the EEA EFTA States[4] and in the EU. Furthermore, in the highly integrated internal market of today, full participation of the EEA EFTA States is only possible if the fundamental EU law principle of *mutual trust* applies also within the EEA in at least almost the same way as it does within the EU.[5]

If follows inevitably from the aim to integrate the EEA EFTA States into the internal market that the judicial protection on offer within the EEA EFTA States to economic operators and individuals in

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[1] Agreement on the European Economic Area (1994) (EEA) OJ L1/3.

[2] As acknowledged by the CJEU in Case C-452/01 *Ospelt,* Judgment (23 September 2003) EU:C:2003:493, and highlighted by the EFTA Court in Case E-1/03, *EFTA Surveillance Authority v The Republic of Iceland* [2003] EFTA Ct Rep 143, para 27. This understanding of the Agreement's objective has been normative for the interpretation of EEA law ever since, see eg the confirmation by the CJEU in Case C-897/19 PPU, *Ruska Federacija v I.N.*, Judgment (2 April 2020) EU:C:2020:262, para 50.

[3] EEA art 102.

[4] The fourth remaining EFTA State, Switzerland, is not a party to the EEA Agreement, thus the need for the admittedly not very elegant term 'EEA EFTA States'.

[5] See further H H Fredriksen, C Hillion and S Stokke, 'Mutual trust, mutual recognition and the rule of law – National report for Norway' (2023) FIDE XXX Congress (forthcoming).

EEA-related matters needs to be *equivalent* to the protection offered within the EU. As noted in the preamble to the Main Part of the EEA Agreement, the Agreement confers rights on individuals. So, adequate means of enforcement of those rights also at the judicial level is required if one is to establish (and retain) a dynamic and homogeneous European Economic Area, based on common rules and equal conditions of competition.[6] This does not, however, imply that the judicial architecture of the EFTA-pillar needs to mirror the judicial architecture of the EU-pillar, and as will be demonstrated below it indeed does not. Nevertheless, it does imply that adequate judicial protection within the EFTA-pillar is a *sine qua non* for the functioning of the EEA.

Initially, the ultimate authority to rule upon what adequate means of judicial protection actually means within the context of EEA law, was to lie with a common EEA Court, consisting of the (then 12) judges of the CJEU and one judge from each of the (then seven) EFTA States.[7] However, in Opinion 1/91, the CJEU declared this proposition to be incompatible with Article 164 of the EEC Treaty (now: Article 19 TEU) as well as 'with the very foundations of the Community'.[8] As decisions of the EEA Court would have been binding on the Community institutions, including the CJEU itself, the CJEU feared that its future interpretation of the rules governing the internal market would be conditioned by the EEA Court.

The solution found by the Contracting Parties was to extend the already agreed two-pillar-solution as to the legislative[9] and administrative[10] branches of the EEA to include also the judicial branch – through the establishment of an independent Court of Justice for the EFTA-pillar of the EEA (the EFTA Court).[11] The EFTA Court has jurisdiction only within the framework of EFTA and has no personal or functional links with the CJEU. Indeed, the CJEU is not even under an obligation to consider decisions rendered by the EFTA Court.[12]

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[6] See the eighth and the fourth recital, which have to be read together. See further F Arnesen and H H Fredriksen, 'Preamble' in F Arnesen and others (eds), *The Agreement on the European Economic Area – A Commentary* (CH Beck-Hart-Nomos 2018) 150.

[7] See Article 95 of the 1991 draft of the EEA Agreement that the CJEU assessed in its Opinion 1/91. The relevant parts of the draft are reproduced in the introductory part of Opinion 1/91, published in [1991] ECR 6085-6092. The Grand Chamber of the EEA Court was to consist of five CJEU-judges and three of the EFTA-judges, thus securing the EU-side a majority.

[8] ibid para 44.

[9] See eg EEA art 93(2) on the Joint Committee (the EEA 'legislator'): 'The EEA Joint Committee shall take decisions by agreement between the Community, on the one hand, and the EFTA States speaking with one voice, on the other'.

[10] See eg ibid art 109(1): 'The fulfilment of the obligations under this Agreement shall be monitored by, on the one hand, the EFTA Surveillance Authority and, on the other, the EC Commission'.

[11] The CJEU approved this solution in Opinion 1/92.

[12] A provision in the draft agreement that obliged all courts involved to pay due account to each other's decisions was removed after Opinion 1/91. Instead, the EFTA States unilaterally introduced an obligation on the EFTA Court to pay due account to novel

From the perspective of the EEA EFTA States, the absence of a common EEA Court is a structural deficit that inevitably gives the CJEU the upper hand. Without an EEA Court to review the CJEU's interpretation of the EEA Agreement, the CJEU holds unfettered authority over the judicial protection of EEA law within the EU-pillar of the EEA. This, however, also gives the CJEU indirect control over the judicial protection that has to be offered within the EFTA-pillar. The EEA Agreement will function as intended only if the CJEU interprets EEA law in conformity with its own interpretation of corresponding provisions of EU law, thereby giving individuals and economic operators from the EEA EFTA States the same rights within the EU as those enjoyed by EU citizens and companies. As the EEA EFTA States know very well, this is something the CJEU can only be expected to do as long as the judicial protection of EEA law within the EFTA pillar is up to standard. The EEA EFTA States all know that when the national courts of some of the EFTA States refused to give their country's Free Trade Agreement with the EU full effect within their national legal orders, the CJEU responded in the early 1980s by developing the so-called *Polydor* principle: identically worded provisions of the (then) EEC Treaty and the Free Trade Agreements with EFTA States were interpreted differently due to differences in object and purpose.[13] For the EFTA States, it was of paramount importance to avoid a similar approach being taken towards the EEA Agreement, and the Agreement includes several provisions aimed at preventing this.[14] Still, it remains for the CJEU to continually decide in individual cases whether the EEA Agreement indeed gives individuals and economic operators from the EEA EFTA States the same rights within the EU as those enjoyed by EU citizens and companies. Almost 30 years on, it can be concluded that the EFTA-side has thus far succeeded in convincing the CJEU of their intent and ability to play by the rules of the internal market, including by offering judicial protection within the EFTA-pillar that the CJEU appears to consider satisfactory.

The question to be pursued in this article is if recent CJEU case-law on the rule of law might upend the CJEU's view of the EEA Agreement.

CJEU case-law, see Article 3(2) of the 1992 Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (Surveillance and Court Agreement – SCA).

[13] Case 270/80 *Polydor*, Judgment (9 February 1982) ECLI:EU:C:1982:43 and Case 104/81, *Kupferberg,* Judgment (26 October 1982) ECLI:EU:C:1982:362 (both concerning the FTA with the then EFTA State, Portugal).

[14] Such as EEA art 6 on the binding effect of CJEU case law predating the signature of the EEA Agreement and ibid art 105 ff on homogeneity.

2. The Judicial Architecture of the EFTA-Pillar and the Effect of EEA Law in the Legal Orders of the EEA EFTA States

The judicial architecture of the EFTA-pillar differs from that of the EU-pillar and so do the principles concerning the effect of EEA law within the legal orders of the EEA EFTA States. The explanation for this is to be found in the EFTA States' insistence upon the fullest possible avoidance of any formal transfer of legislative, administrative, or judicial sovereignty to any supranational EEA, EFTA or EU institutions.

The furthest the EFTA States were willing to go during the negotiations of the EEA Agreement, was to accept supranational enforcement of the competition rules applying to undertakings;[15] to promise to implement EEA-relevant EU-regulations *'as such'*, i.e. word by word, into their internal legal orders (Article 7 EEA); to give the Main Part of the Agreement the status of statutory law; and to introduce a statutory provision to the effect that *implemented* EEA rules prevail in cases of conflict with other statutory provisions (Protocol 35 EEA). The fact that the EU accepted the lack of reciprocity in this regard (as the EEA Agreement claims and indeed has direct effect within the Union legal order) can only be explained by the corresponding lack of reciprocity, but in the Union's favour, with regard to the future development of the rules governing the internal market. Commission President Delors had initially given the EFTA States high expectations of joint decision-making, but in the end the EFTA States had to settle for little more than rather limited rights to participate in the preparatory stage of EU decision-making (Article 99 ff EEA).[16] To the EU, preserving its decision-making autonomy clearly outweighed the wish for full reciprocity with regard to the effect of EEA law.[17]

A further manifestation of the EU's tacit acceptance of the EEA EFTA States' constitutional concerns is to be found in the fact that there is no EEA law obligation on the national courts to refer unresolved questions of EEA law to either the CJEU or the EFTA Court. Article 107 EEA merely allows for such references to be made to the CJEU, but this is a possibility of which none of the EEA EFTA States have availed themselves, for reasons of judicial sovereignty. And when the EEA EFTA States

[15] See EEA art 55 ff, establishing the competences of the EFTA Surveillance Authority and the Commission, respectively. For the details, see R Gjendemsjø, 'Article 55: Supervision' in Arnesen and others (n 6) 555.

[16] The EFTA States' failure to secure a say in the future regulation of the internal market was an important factor behind the Swiss 'No' to the Agreement in 1992, and it remains one of the main reasons why Swiss accession to the EEA appears off the table.

[17] It is interesting to compare the EEA in this regard with, on the one hand, Article 16 of the 2020 EU-UK Trade and Cooperation Agreement (no direct effect) and, on the other, Article 4 of the 2019 EU-UK Withdrawal Agreement (direct effect on both sides), which may be taken together to suggest that the concessions offered to the EEA EFTA States in 1992 are no longer on offer and that integration into the internal market (as opposed to mere access to it) is now conditioned upon acceptance of the principle of direct effect.

instead vested the EFTA Court with jurisdiction to answer any such questions from their national courts,[18] the EU did not object to the fact that it is for the national courts to decide if a reference is to be made,[19] nor to the fact that the answers from the EFTA Court are advisory rather than binding.[20]

The EEA EFTA States' scepticism towards supranational control is also reflected in another limitation of the EFTA Court's jurisdiction: Unlike the CJEU, the EFTA Court has no jurisdiction to rule upon the validity of EU legal acts that have been incorporated into the EEA Agreement, be it by way of a preliminary reference from a national court or by way of a direct action. All the EU required from the EEA EFTA States with regard to judicial protection of private parties by way of direct actions was that the EFTA Court was vested with jurisdiction to review the validity of decisions in the field of competition taken by the EFTA Surveillance Authority.[21] The EEA EFTA States broadened this to include all decisions of the EFTA Surveillance Authority of direct and individual concern to a natural or legal person,[22] but they were not willing to open up for judicial review of decisions taken by the EEA Joint Committee or the Standing Committee of the (EEA) EFTA States.

For the viability of the EEA, it is of inestimable importance that the CJEU tacitly accepts this state of affairs as it continues to provide EEA rules with essentially the same effect in the legal orders of the EU Member States as that enjoyed by corresponding provisions of EU law.[23] The EFTA Court facilitated this approval, both by deducing from the object and purpose of the Agreement an unwritten principle of State liability for losses caused e.g. by deficient implementation of EEA rules, mirroring the CJEU's findings in *Francovich* (principle of State liability),[24] and by holding that the national courts are

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[18] SCA art 34.

[19] In the EEA literature, much attention has been devoted to the question of whether the last instance courts of the EEA EFTA States are completely free in their decision to refer or not, or whether this freedom is limited by, eg, the general principle of loyalty in EEA art 3. In a couple of cases in 2012 and 2013, the EFTA Court argued *obiter dictum* for an unwritten obligation to refer unresolved questions of EEA law to it (eg Case E-18/11, *Irish Bank* [2012] EFTA Ct Rep 592, para 58; Case E-2/12, *INT HOB-vín ehf* [2013] EFTA Ct Rep 816, para 11), but without convincing either the governments or the courts of the dualist EEA EFTA States. As the EFTA Surveillance Authority could not be convinced to pursue the matter, the debate now appears to be of academic interest only. For an overview, see C Franklin, 'Article 3: Principle of Loyalty' in Arnesen and others (n 7) 180, para 36 ff.

[20] The Supreme Court of Norway has consistently taken the view that national courts must independently decide on the interpretation and application of EEA law in individual cases, but at the same time 'attach considerable importance to the opinions of the EFTA Court', see eg the judgments of the Full Court in HR-2000-1811-P, *Finanger* and HR-2016-2554-P, *Holship*, para 77.

[21] EEA art 108(2).

[22] SCA art 36(4).

[23] The seminal judgment is Case C-452/01, *Ospelt*, Judgment (23 September 2003) EU:C:2003:493. For a recent confirmation, see Case C-897/19 PPU, *Ruska Federacija v I.N.*, Judgment (2 April 2020) EU:C:2020:262.

[24] Case E-9/97, *Sveinbjörnsdóttir* [1998] EFTA Ct Rep 95, which was subsequently endorsed by the CJEU in Case C-140/97, *Rechberger,* Judgment (15 June 1999) ECLI:EU:C:1999:306, para 39, and eventually accepted by the EEA EFTA States and their supreme courts. For an assessment of the importance of *Sveinbjörnsdóttir* to the CJEU's change of mind from the scepticism

obliged to do their utmost to interpret national law in conformity with EEA law, whether or not the relevant parts of the latter have been implemented into their national legal order (principle of conform interpretation).[25] However, the EFTA Court confirmed early on that the EEA Agreement indeed does not entail a transfer of legislative powers and that EEA law therefore does not require that individuals and economic operators can rely directly on non-implemented EEA rules before national courts.[26]

3. Assessing the Judicial Protection of EEA Law within the EFTA-Pillar

Assessment of the judicial protection of EU/EEA rights in the EEA EFTA States has to take into account the differences between the judicial architecture of the EFTA-pillar and the EU-pillar of the EEA. The national courts of the EEA EFTA States play an even more important role in the judicial protection of EEA law than the national courts of the EU Member States. A manifestation of the Contracting Parties´ acknowledgment of this fact is to be found in Article 106 EEA, which includes the courts of last instance of the EEA EFTA States in the envisaged system of exchange of information concerning judgments of EEA-relevance, but not the courts of last instance of the EU Member States.[27] This is a corollary of the limitations put on the EFTA Court's jurisdiction, in particular with regard to the preliminary reference procedure, as well as the absence of EU-style direct effect and primacy. As a result, the relationship between the EFTA Court and the national courts of the EEA EFTA States is, as noted by the EFTA Court itself in *Creditinfo Lánstraust*, 'more partner-like' than the relationship between the CJEU and the national courts of the EU Member States.[28]

An important manifestation of the CJEU's trust in the judicial protection of EEA law offered within the EFTA-pillar is to be found in the case of *Polyelectrolyte Producers Group*, in which the CJEU

towards the EEA voiced in Opinion 1/91 EEA, see eg C Baudenbacher, 'If Not EEA State Liability, Then What? Reflections Ten Years after the EFTA Court's Sveinbjörnsdóttir Ruling' (2019) 10 Chicago Journal of International Law 333.

[25] Case E-4/01, *Karlsson* [2002] EFTA Ct Rep 240, para 28. For a thorough analysis, see C Franklin, 'The EEA Principle of Consistent Interpretation' in C Franklin (ed), *The Effectiveness and Application of EU and EEA Law in National Courts – Principles of Consistent Interpretation* (Intersentia 2018).

[26] See implicitly already Case E-1/94, *Restamark* [1994-1995] EFTA Ct Rep 15, para 77, and later on Case E-9/97, *Sveinbjörnsdóttir* [1998] EFTA Ct Rep 95, para 63, and Case E-4/01, *Karlsson* [2002] EFTA Ct Rep 240, para 28. For a later confirmation, see eg Case E-15/14, *EFTA Surveillance Authority v Iceland* [2015] EFTA Ct Rep 40, para 32.

[27] The system has never been set up, presumably due to technological developments undermining the need for it. This, however, does not detract from the importance of the inclusion of the national courts in EEA art 106 as a matter of principle.

[28] Case E-7/13, *Creditinfo Lánstraust* [2013] EFTA Ct Rep 970, para 46.

appears to have approved of the extension of the reasoning in *Unión de Pequeños Agricultores* to the EFTA-pillar of the EEA.[29]

The case concerned the validity of a decision of the European Council that authorised the EU's representative in the EEA Joint Committee to agree to a decision which permitted Norway to apply more stringent concentration limits for acrylamide than those applicable in the EU. The Court of First Instance had found that the Council's decision was not of individual concern to the applicant, as required by Article 230 TEC (now: Article 263 TFEU), and thus dismissed the action as inadmissible.[30]

If the case had been about an EU Member State being allowed by the competent EU institution(s) to derogate from otherwise applicable secondary law, the solution would have been straightforward: an economic operator affected by a decision of a Member State to make use of such a possibility would have to take the case to the national courts. If the national court should take the view that the EU legal act allowing for the derogation violates higher-ranking EU law, it would be under an obligation to refer the question to the CJEU by way of a preliminary reference under Article 267 TFEU (*Foto Frost*-doctrine). And even if the national court of first instance was to consider the derogation lawful, an affected economic operator could appeal the case to a court against whose decisions there is no judicial remedy under national law, which would then be obliged to bring the matter before the CJEU unless the question could be considered *acte clair*. For these reasons, the CJEU was able to conclude in *Unión de Pequeños Agricultores* that the strict rules on standing in what is now Article 263(4) TFEU could be upheld without violating the right to effective judicial protection.

As noted in *Polyelectrolyte Producers Group*, however, this indirect route to the CJEU is not open to economic operators affected by measures adopted by an EEA EFTA State. Such measures can obviously not be challenged before a national court of an EU Member State, but only before the national court of the relevant EEA EFTA State. The national courts of the EEA EFTA States have no access to the CJEU, however, as Article 107 EEA has never been brought into force. And even if the competent Norwegian court should seek an advisory opinion from the EFTA Court, that court would have no jurisdiction to adjudicate on the Union's power to participate in the Joint Committee's decision. The Polyelectrolyte Producers Group thus argued that dismissal of its action would entail a violation of the right to effective judicial protection.

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[29] Case C-368/05 P, *Polyelectrolyte Producers Group v Council and Commission,* Judgment (8 December 2006) EU:C:2006:771.

[30] Case T-376/04, *Polyelectrolyte Producers Group v Council and Commission*, Order (22 July 2005) EU:T:2005:297.

The Court of First Instance was not convinced, however, as it held that the only measures capable of adversely affecting the economic operators in question were the Norwegian authorities' implementing measures and then simply added that it was for Norwegian courts to guarantee judicial protection against those measures for those subject to them.[31]

As the case was brought before the CJEU, it was clearly not considered particularly interesting: it was allocated to a chamber of only three judges and dismissed by reasoned order, without opening the oral procedure and without an opinion from the advocate general. As to the plea concerning the alleged lack of effective judicial protection, the CJEU simply noted that

> the Court of First Instance was right in finding that the only acts capable of adversely affecting PPG were the Norwegian measures implementing the derogations relating to the concentration limits for acrylamide and resulting from the decision of the Joint Committee. It was, accordingly, able to infer therefrom that the competent Norwegian courts are bound, under their national procedural rules, to ensure the judicial protection of persons against national measures taken pursuant to the decision of the Joint Committee. In so doing, the Court of First Instance applied the aforementioned case-law correctly, within the limits of the jurisdiction conferred on it by the Treaty, and rightly rejected the plea alleging a lack of legal remedies at Community level.[32]

The CJEU's summary dismissal of the case leaves open a rather important question from the perspective of the EEA EFTA States: was the appeal dismissed because the judicial protection offered in third countries with which the EU has entered into an agreement of association (Article 217 TFEU) was simply not considered the concern of the EU judiciary? Or rather because the judicial protection offered within the EFTA-pillar could be considered sufficient to allow for the reasoning in *Unión de Pequeños Agricultores* to be extended to the entire EEA? The CJEU's statement that Norwegian courts were 'bound' to ensure the judicial protection of affected economic operators suggests the latter interpretation, but it might be reading too much into an unassuming order from a small chamber.

Be that as it may, for the viability of the EEA Agreement in the ever-more integrated internal market of today, it is important that the judicial protection of EEA law offered within the EFTA-pillar is

[31] ibid para 58.

[32] ibid para 68.

considered a concern for the EU judiciary and, furthermore, recognised as on par with the judicial protection offered within the EU. As noted in the introduction, full participation of the EEA EFTA States in the internal market is only possible if the principle of mutual trust applies also within the EEA in at least almost the same way as it does within the EU. And effective judicial protection is an indispensable basis for mutual trust.

Two recent judgments from the CJEU indeed illustrate the Court's trust in the judicial protection offered within the EFTA-pillar of the EEA.

In the 2020 judgment in *I.N.,* the Grand Chamber of the CJEU held that the principle of mutual trust extends to both the Agreement associating Iceland and Norway to the Union's Asylum System (the Dublin Regulation, etc.) and to the 2014 Agreement on the surrender procedure between EU Member States and Iceland and Norway.[33] As to the former agreement, the CJEU ruled that the referring court (the Supreme Court of Croatia) had to recognize Iceland's decision to grant asylum to I.N. and that this compelled it to refuse his extradition to Russia.[34] What this essentially means, is that the EEA EFTA States' association to the Dublin system entails that EU Member States are bound to trust that the Dublin III Regulation is correctly applied in the EEA EFTA States and to presume that a decision from an EEA EFTA State to grant a person asylum is sound.[35] In short: the EEA EFTA States' participation in the Dublin system puts them on the same footing as EU Member States when it comes to mutual recognition of asylum decisions.

As to the Agreement on the surrender procedure, the CJEU held *obiter dicta* that it is to be interpreted in line with its EU law template – the EU Framework Decision on the European arrest warrant and the surrender procedures between Member States. Consequently, as I.N. had obtained Icelandic citizenship and was as such exercising his free movement rights under the EEA Agreement when he was arrested in Croatia, he was held to be shielded from extradition to Russia in the same way that EU citizens are according to the CJEU's judgment in *Petruhhin* – the host State is to trust the

[33] Case C-897/19 PPU ,*Ruska Federacija v I.N.*, Judgment (2 April 2020) EU:C:2020:262. For a much more thorough analysis of the case than is possible here, see the annotation by H H Fredriksen and C Hillion, 'The "special relationship" between the EU and the EEA EFTA States and the free movement of persons in an extended area of freedom, security and justice' (2021) 58 Common Market Law Review 851-76.

[34] Case C-897/19 PPU, *Ruska Federacija v I.N.*, Judgment (2 April 2020) EU:C:2020:262, paras 63-68.

[35] As noted by AG Tanchev in his opinion in Case C-897/19 PPU, *Ruska Federacija v I.N.*, Opinion (27 February 2020) EU:C:2020:128, paras 101-10.

home State's criminal justice system and to prioritize surrender to the home State above extradition to a third State.[36] The fact that the home State is an EEA EFTA State, is immaterial.

The approach taken in *I.N.* was continued in the 2021 judgment in *J.R.*[37] The case concerned the execution in Ireland of a European arrest warrant issued by Lithuania, based on a custodial sentence imposed by a Norwegian court. The CJEU held that a European arrest warrant may be issued in such circumstances, provided that the judgment in question has been recognised by a decision of a court of the issuing Member State and that the procedure leading to the sentence complied with fundamental rights and, in particular, the obligations arising under Articles 47 and 48 of the Charter of Fundamental Rights of the European Union. As to the latter condition, the CJEU added the following observation:

> it must be observed that the dispute in the main proceedings concerns a European arrest warrant issued on the basis of acts of recognition and enforcement of a judgment delivered by a court of the Kingdom of Norway, a third State which has a special relationship with the European Union, going beyond economic and commercial cooperation, since it is a party to the Agreement on the European Economic Area, participates in the Common European Asylum System, implements and applies the Schengen acquis, and has concluded with the European Union the Agreement on the surrender procedure between the Member States of the European Union and Iceland and Norway, which entered into force on 1 November 2019. In that last agreement, the parties expressed their mutual confidence in the structure and functioning of their legal systems and their ability to guarantee a fair trial.[38]

Even clearer in this regard was AG Kokott. In her opinion, she noted that the case did not relate to the recognition of a judgment of 'any' third State, but rather a State in which the EU has expressed confidence *'which reaches to the mutual confidence between Member States*'.[39] In the case of Norway, and

[36] See Case C-182/15, *Petruhhin*, Judgment (6 September 2016) EU:C:2016:630.

[37] Case C-488/19, *J.R.*, Judgment (17 March 2021) EU:C:2021:206.

[38] ibid para 60

[39] AG Kokott's Opinion in Case C-488/19, *J.R.*, Opinion (17 September 2020) EU:C:2020:738, para 61.

presumably also the other two EEA EFTA States, the courts of EU Member States can presume that fundamental rights have already been protected hitherto and will also be protected in the future.[40]

4. Will the CJEU's Recent Case-Law on the Rule of Law Cause Problems for the EEA?

Based on the assessment above, the EEA EFTA States might be tempted to conclude that the CJEU's recent case-law on the rule of law will not cause any problems: Notwithstanding the differences in the judicial architecture of the EFTA-pillar of the EEA, the CJEU acknowledges the judicial protection offered as adequate and can be presumed to continue to do so in the future. After all, when compared to the rule of law backsliding that has taken place in certain EU Member States in recent years, whatever weaknesses one may see with the rule of law in the EEA EFTA States (there are always some, in all countries), they hardly compare.

Nevertheless, there are certain reasons why such a conclusion should not be taken for granted and that certain weaknesses in the judicial set-up of the EFTA-pillar ought to be remedied before they are exposed in a case before the CJEU.

It ought not to be overlooked that *none of the provisions* upon which the CJEU has built its recent rule of law jurisprudence are to be found in the EEA Agreement. The EU Charter of Fundamental Rights has not been incorporated into the EEA Agreement nor in other ways taken over by the EEA EFTA States.[41] Furthermore, there is no parallel in the EEA Agreement to Article 19 TEU – the provision operationalized by the CJEU in *Associação Sindical dos Juízes Portugueses* and subsequent cases to extend the call for effective remedies before independent courts or tribunals beyond the reach of the Charter.[42] Further still, the EEA Agreement lacks a parallel to Article 2 TEU and its reference to the rule of law as a foundational value for the Union – the closest one comes is the reference in the first recital of the preamble to the EEA Agreement to the construction of a Europe based on peace, democracy and human rights.

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[40] ibid.

[41] As noted by the ECtHR in *Konkurrenten.no AS v Norway*, Judgment (ECtHR, 5 November 2019) App No 47341/15, para 43. The context was an *obiter dictum* concerning the application to the EEA EFTA States of the ECtHR's so-called *Boshporus* presumption of conformity with the ECHR in cases where an EU Member State does no more than implement legal obligations flowing from its membership of the EU. According to the ECtHR, 'the basis for the presumption established by *Bosphorus* is in principle lacking when it comes to the implementation of EEA law at domestic level within the framework of the EEA Agreement, due to the specificities of the governing treaties, compared to those of the European Union'.

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

On this point, however, the EEA EFTA States can point to the fact that their commitment to the rule of law follows from their status as parties to the ECHR as well as their common constitutional traditions, and that this has allowed the EFTA Court to declare the principle of effective judicial protection an unwritten principle of EEA law:

> According to the Court's established case-law, the provisions of the EEA Agreement are to be interpreted in the light of fundamental rights. The provisions of the ECHR and the judgments of the European Court of Human Rights are important sources for determining the scope of these fundamental rights …
>
> The principle of effective judicial protection including the right to a fair trial, which is inter alia enshrined in Article 6 ECHR, is a general principle of EEA law. It may be noted that expression to the principle of effective judicial protection is now also given by Article 47 of the Charter of Fundamental Rights of the European Union …[43]

Importantly, this state of affairs was acknowledged by the European Court of Human Rights in its recent judgment in *Norwegian confederation of Trade Unions and the Norwegian Transport Workers' Union v. Norway*: 'the Court observes …, as clearly stated by the EFTA court …, that fundamental rights form part of the unwritten principles of EEA law'.[44]

Although it would be beneficial for the standing of the EEA Agreement if the EEA EFTA States were to formally recognize the EEA-relevance of the EU Charter of Fundamental Rights in some form,[45] it can hardly be considered a *sine qua non* for the viability of the EEA. After all, the status of fundamental rights as unwritten principles of EEA law essentially mirrors the situation within the Union legal order prior to the 2009 Lisbon Treaty.

As regards, more concretely, the principle of judicial independence, the concurrent case-law of the CJEU and the ECtHR should suffice to conclude that the EEA EFTA States are subject to legally binding obligations equivalent to those that apply to the EU Member States by virtue of EU law.[46] The EFTA Court got an opportunity to recognize this principle and its applicability to the Court itself when

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[43] See eg Case E-15/10, *Posten Norge* [2012] EFTA Ct Rep 246, paras 85-86.

[44] *Norwegian Confederation of Trade Unions and the Norwegian Transport Workers' Union v Norway*, Judgment (ECtHR, 10 June 2021) App No 45487/17, para 107.

[45] See H H Fredriksen, '25 Years after Liechtenstein saved the EFTA Court: The Case for Reform' (2020) 41 Liechtensteinische Juristen-Zeitung 50-56, 54.

[46] See *Xero Flor v Poland*, Judgment (ECtHR, 7 May 2021) App No 4907/18.

the EEA EFTA States in 2016 decided to limit the new term of its Norwegian member: In a misguided attempt to impose the retirement age for judges under Norwegian law upon the Norwegian member of the EFTA Court, the EEA EFTA States capped his reappointment to the three years that remained until he turned 70 years of age, as opposed to the six years foreseen by EEA law.[47] The decision was criticised by the legal community,[48] questioned by the EFTA Surveillance Authority[49] and then put to the test by a court in Liechtenstein that used a request for an advisory opinion to question whether the EFTA Court was lawfully composed. As that question was pending before the Court, however, the EEA EFTA States repealed the decision and reappointed the Norwegian judge for a full six-year term. This then allowed for the EFTA Court conclude that there could no longer be any doubt as to the lawfulness of its composition.[50] Nevertheless, the Court seized the opportunity to explicitly recognize the principle of judicial independence and its importance:

> First, the principle of judicial independence is one of the fundamental values of the administration of justice. … Second, it is vital not only that judges are independent and fair, they must also appear to be so. Third, maintaining judicial independence requires that the relevant rules for judicial appointments, as set out in Article 30 SCA, must be strictly observed. Any other approach could lead to the erosion of public confidence in the Court and thereby undermine its appearance of independence and impartiality. [51]

This statement was subsequently highlighted by the EFTA Surveillance Authority in several rule of law-cases before the CJEU, presumably in order to reassure EU lawyers that the principle of judicial independence, as developed by the CJEU in recent case-law, is recognised under EEA law.[52] Thus, whilst undoubtedly embarrassing to Norwegian authorities, the case ultimately had a positive outcome. Crucially, and in contrast to more recent developments within the EU-pillar of the EEA, the

[47] SCA article 30(1), which mirrors TFEU article 25(1)3.

[48] For example, by the Norwegian Judges' Association in an open letter to the Norwegian government.

[49] After a complaint from a group of Norwegian scholars.

[50] Case E-21/16, *Pascal Nobile*, Decision of the Court (Competition of the Court – Independence of the Judges) (14 February 2017) EFTA Ct Rep 554.

[51] ibid para 16. For further details, see the subsequent order in the same case: Case E-21/16, *Pascal Nobile*, Order of the Court's President (20 February 2017).

[52] See the interventions by the EFTA Surveillance Authority in Case C-558/18, *Miasto Lowicz* and in Case C-585/18, *A.K.*, as they are reported by the AGs.

EEA EFTA States reversed course when realizing that the initial decision infringed the principle of judicial independence.

The same holds true for the Icelandic government's appointment of some of the judges to Iceland's new Court of Appeal in 2017, which in 2020 was found to violate Article 6(1) by the Grand Chamber of the ECtHR in *Ástráðsson*.[53] Without in any way trivialising the flaws in the appointment procedure, they hardly compare to the political interference in judicial appointments seen more recently in certain EU Member States. And whereas Poland has quite simply refused to comply with the ECtHR's judgment in *Xero Flor*, Iceland acted quickly to restore its rule of law credentials: The minister of justice was forced to resign, affected cases were reopened and the exposed flaws in the process of judicial appointments were remedied.

In short, there is no reason to consider the protection of judicial independence weaker in the EFTA-pillar of the EEA than in the EU, neither in law nor in fact.

More problematic, however, is the EFTA Court's lack of jurisdiction to assess the legality of decisions of the EEA Joint Committee, both in direct actions and by way of preliminary references from national courts which might wonder if the EU legal act they are asked to apply, is valid *as a matter of EU law*.[54] As highlighted by the CJEU in several of its recent rule of law-judgments, 'the European Union is a union based on the rule of law in which individuals have *the right to challenge before the courts the legality of any decision or other national measure concerning the application to them of an EU act*'.[55]

To a certain extent, as suggested by the EFTA Court in *CIBA*, this flaw in the judicial protection under the EFTA-pillar may be remedied by 'interpreting away' an EEA norm which the EU courts, in the setting of EU law, would declare null and void.[56] Still, there are limits as to how far one can get by way of interpretation, and the underlying assumption that the validity of an EU legal act *qua EU law* is a premise for the validity of the Joint Committee's decision to incorporate it into the EEA Agreement is controversial.[57]

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[53] *Ástráðsson v Iceland*, Judgment (ECtHR, 1 December 2020) App No 26374/18.

[54] See SCA arts 36 and 34, respectively.

[55] See eg Case C-619/18, *Commission v Poland*, Judgment (24 June 2019) EU:C:2019:531, para 46.

[56] Case E-6/01, *CIBA* [2002] EFTA Ct Rep 282.

[57] See further H H Fredriksen and C Franklin, 'Of pragmatism and principles: The EEA Agreement 20 years on' (2015) 52 Common Market Law Review 629-84, 682.

The problem is accentuated by developments in the EU's administration of the internal market. The Commission's powers to enact delegated or implementing acts[58] are constantly growing, in ever more fields of the internal market. As the main rule, such acts only become effective in the EEA once they have been adopted by the EEA Joint Committee, and their validity as a matter of EEA law is then based on the decision of the Joint Committee. If an affected individual or economic operator in the EFTA-pillar of the EEA wants to challenge the legality *as a matter of EU law* of such an act, citing the CJEU's abovementioned statement of principle, the EFTA Court's lack of jurisdiction to review the decisions of the EEA Joint Committee will be exposed. Furthermore, there is nothing the EEA EFTA States can do to prevent an affected individual or economic operator from pursuing this question before the EU Courts, e.g., as a reason to challenge the legality of the EU's decision to take part in the relevant decision of the EEA Joint Committee. Whilst it is true that such an attempt was rejected in *Polyelectrolyte Producers Group* (see Section 3 *infra*), the CJEU did not really analyse the ability of Norwegian courts and/or the EFTA Court to rule on the legality of a decision of the EEA Joint Committee, either generally or with regards to alleged underlying violations of EU law.[59] In light of subsequent developments of EU law, including the entry into force of the Charter of Fundamental Rights, the enactment of Article 19(2) TEU and the CJEU's emphasis of the right of individuals to challenge before the courts the legality of any decision or other national measure concerning the application to them of an EU act, the EEA EFTA States should not take for granted that the pragmatic approach adopted in *Polyelectrolyte Producers Group* is still good law. It ought not to be overlooked that the CJEU in Opinion 1/17 *CETA* highlighted that Article 47 of the Charter requires the Union to make sure that tribunals established by international agreements with third States provide EU litigants with the safeguards provided under EU law.[60] These statements concerned the accessibility and independence of the tribunals established by CETA, but the underlying *raison d'etre* appears applicable to the right of Union citizens and economic operators to effective judicial protection in general.

[58] TFEU arts 290 and 291.

[59] The matter was pursued before Norwegian courts, but never put to the test as the EFTA Court, upon a request from the Oslo City Court, which held the decision of the EEA Joint Committee to be within the Committee's competences (Case E-6/01, *CIBA* [2002] EFTA Ct Rep 282), which again caused the plaintiffs to withdraw the action.

[60] Opinion 1/17, *CETA*, paras 190-92.

5. A Proposal for Reform: Allowing for *Foto Frost* Referrals from the EFTA Court to the CJEU

In order to offer adequate judicial protection in cases where the decisive question is whether an EEA legal act is valid *qua* EU law, the EEA EFTA States ought to introduce the possibility for the EFTA Court to ask the CJEU to rule on this specific question.[61] As long as this possibility is limited to questions of validity of EU legal acts *as a matter of EU law*, such a preliminary reference procedure should be acceptable to the EEA EFTA States as well as to the EFTA Court – it will still be for the EFTA Court to rule on the consequences in the EFTA pillar of the EEA of an answer from the CJEU which either invalidates or upholds the EU legal act in question. Furthermore, following the logic behind the *Foto Frost* doctrine, a referral should only be made in cases where the EFTA Court is inclined to regard the underlying EU legal act as invalid. Clearly, it should be exclusively for the EFTA Court to decide if the assistance of the CJEU is called for.

Such a reform would fit well with the current trend towards more formalised forms of judicial dialogue,[62] and is better tailored to the specificities and current functioning of the EEA than the alternative – direct referrals from the national courts of the EFTA States to the CJEU (Article 107 EEA). Importantly, it should not be viewed as any depreciation of the EFTA Court but rather as a reform elevating it to the status of a formal dialogue partner of the CJEU. In addition to remedying a flaw in the judicial protection offered in the EFTA-pillar of the EEA, it might also increase the number of preliminary references from national courts to the EFTA Court.

It can be accomplished by the EEA/EFTA States unilaterally by operationalizing Article 107 and Protocol 34 EEA as follows:

> Where a question concerning the validity of an act of an institution, body, office or agency of the European Union arises in a case pending before the EFTA Court, that court, as a court common to the EFTA States, may, if it considers this necessary, request the Court of Justice of the EU to decide thereon.

[61] As suggested by Fredriksen and Franklin (n 59) 683 f.

[62] See the new preliminary reference procedures under Protocol 16 ECHR (referrals to the ECtHR from the highest courts and tribunals of the States party to the ECHR) and Article 21 of the Agreement on a Unified Patent Court (referrals to the CJEU) as well as the proposed 'prior involvement procedure' under Article 3(6) of the Treaty on the Accession of the EU to the ECHR (referrals from the ECtHR to the CJEU). The fate of the latter procedure is of course highly uncertain after the CJEU's Opinion 2/13, *ECHR*, but this does not change the fact that formalized forms of judicial dialogue are on the rise.

The Court of Justice of the EU shall only have jurisdiction to give a preliminary ruling on the act's validity as a matter of EU law, leaving it to the EFTA Court to draw the EEA law consequences thereof.

Section II
National Remedies / National Litigation

Chapter 2

European Court of Justice versus Member State Courts: Who Decides What?

Preliminary Rulings Concerning the Application of EU Law in the Main Proceedings

Morten Broberg and Niels Fenger[*]

1. Introduction

Article 267 TFEU enables a court of an EU Member State to put questions to the European Court of Justice on the interpretation or validity of EU legal measures where such questions arise in a dispute heard by that Member State court. These are known as preliminary references. Within the framework of the preliminary reference procedure, it is the competence of the Court of Justice to interpret EU law authoritatively, whereas it is the competence of the Member State courts to apply EU law to the facts in the cases before them (i.e. the legal classification of facts or 'subsumption'). The Court often reminds national courts about this distinction in its preliminary rulings when it either refuses to answer fact-specific questions or reformulates those questions, holding that 'it must be borne in mind that Article 267 TFEU does not empower the Court to apply rules of EU law to a particular case, but only to give a ruling on the interpretation of the Treaties and on acts adopted by the EU institutions.'[1]

However, in two respects the Court of Justice has itself effectively blurred the difficult line between interpretation and application.

Firstly, in a considerable number of preliminary rulings, the Court of Justice has answered the preliminary reference in a way that in practice amounts to an application of the ruling to the facts

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[1] Case C-17/19, *Bouygues travaux publics,* EU:C:2020:379, paras 51–53. See similarly Joined Cases C-585, 624 & 625/18, *A.K.,* EU:C:2019:982, para 132; Joined Cases C-477 & 478/18, *Gosschalk*, EU:C:2019:1126, para 51; Case C-189/18, *Glencore Agriculture Hungary,* EU:C:2019:861, para 31; and Case C-106/14, *FCD and FMB,* EU:C:2015:576, paras 21–30.

of the main proceedings. However, as we shall show in this article, it appears that there has been a noteworthy change in the Court's caselaw in this respect.

Secondly, Article 267(3) lays down that where a question on validity or 'interpretation' of EU law is raised in a case pending before a Member State court which is to rule in the last instance, that court must make a preliminary reference. However, in *CILFIT and Lanificio di Gavardo SpA v Ministry of Health* (hereafter *CILFIT*), where the Court recognised the so-called *acte clair* principle, it formulated that principle to mean that:

> The third paragraph of Article 177 of the EEC Treaty [now Article 267 TFEU] must be interpreted as meaning that a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of Community law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the question raised is irrelevant or that the Community provision in question has already been *interpreted* by the Court of Justice or that the correct *application* of Community law is so obvious as to leave no scope for any reasonable doubt …[2]

As can be seen from the quote, whereas '*acte éclairé*' (i.e. previous rulings by the Court of Justice makes the correct construction of EU law obvious) is explained in terms of 'interpretation', *acte clair* (i.e. the correct construction of EU law is so obvious as to leave no scope for any reasonable doubt) is delimited not with regard to whether the abstract interpretation gives rise to doubts, but whether the 'correct *application* of Community law is so obvious as to leave no scope for any reasonable doubt'.[3]

As we will show below in Section 3, in a number of subsequent judgments concerning *acte clair*, the Court of Justice continued to use the term 'application' when delimiting the scope of the *acte clair*-exception. However, on 6 October 2021, the Court, sitting as the Grand Chamber, rendered its ruling in *Consorzio Italian Management e Catania Multiservizi* (hereafter *Consorzio*), which both clarified and revised the doctrine. Thus, the Court ruled, *inter alia* that:

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[2] Case 283/81, *CILFIT,* EU:C:1982:335, operative part, (emphasis added).

[3] On the Court of Justice's *acte clair* doctrine, see M Broberg and N Fenger, 'Theorie und Praxis der Acte-clair-Doktrin des EuGH' (2010) 45(6) Europarecht 835-53 and (critical) M Broberg, 'Acte Clair Revisited: Adapting the Acte Clair Criteria to the Demands of the Times' (2008) 45(5) Common Market Law Review 1383-97.

> Article 267 TFEU must be interpreted as meaning that a national court or tribunal against whose decisions there is no judicial remedy under national law must comply with its obligation to bring before the Court of Justice a question concerning the *interpretation* of EU law that has been raised before it, unless it finds that that question is irrelevant or that the provision of EU law in question has already been *interpreted* by the Court or that the correct *interpretation* of EU law is so obvious as to leave no scope for any reasonable doubt…[4]

The *Consorzio* ruling has attracted considerable attention, for good reasons.[5] However, until now one aspect of the ruling has attracted very limited attention: namely, that in the *CILFIT* ruling the Court referred to both 'interpretation' and 'application' whereas in the *Consorzio* ruling it only referred to 'interpretation'.

Below, we first consider the development of the Court of Justice's 'tailoring' of its preliminary rulings to the facts of the main proceedings (Section 2). Next, we consider the significance of the terms 'application' versus 'interpretation' in the *acte clair* doctrine as it was defined in the *CILFIT* ruling (Section 3), and we consider how in the *Consorzio* ruling this issue was addressed by the Advocate General and by the Court (Section 4). Against this background, we analyse the consequences of the *Consorzio* ruling (Section 5). Finally, we sum up our findings (Section 6).

2. 'Tailoring' the Preliminary Ruling to the Facts of the Main Proceedings

The Court of Justice will only admit a preliminary reference from a Member State court if an answer to the question is necessary for the referring court to decide the main proceedings before it. Moreover, normally the referring court is first of all interested in a preliminary ruling that allows it to decide the main proceedings – whereas it is less interested in the preliminary ruling's wider implications. It is therefore not surprising that many preliminary references are formulated in a way where the Court of Justice, by answering the preliminary question, in reality decides the case.

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[4] Case C-561/19, *Consorzio*, EU:C:2021:799, operative part (emphasis added).

[5] See for example M Broberg and N Fenger, 'If you love somebody set them free: on the Court Of Justice's revision of the acte clair doctrine' (2022) 59(3) Common Market Law Review 711-38; I Maher, 'The CILFIT Criteria Clarified and Extended for National Courts of Last Resort Under Art. 267 TFEU' (2022) 7(1) European Papers 265-74; and R Palmstorfer and J Kreuzhuber, 'Keine Abkehr von CILFIT: Anmerkung zum Urteil des EuGH v. 6.10.2021, Rs. C-561/19 (Consorzio Italian Management)' (2022) 57(2) Europarecht 239-53.

Frequently the Court of Justice will provide the case-specific answer that the referring court has requested – even though this may give rise to questions as to whether the Court thereby blurs the line between interpretation and application. However, practice shows that even though the referring court has submitted a case-specific question, it cannot be certain that the Court of Justice will provide an equally case-specific answer. On the contrary, while the Court has often been willing to answer preliminary references that imply the application of EU law to the facts of the main action, it regularly rephrases such questions so that its answers only address the abstract interpretation of EU law. Indeed, it sometimes refuses to answer such case-specific preliminary questions, holding that it is for the referring court itself to apply EU law to the facts of the main proceedings. In other words, before making the preliminary reference, the referring court will often not be able to predict whether the Court of Justice will be willing to provide a case-specific answer or not.

In the *Parodi* case, the French *Cour de cassation* (Court of Cassation) made a preliminary reference in which it asked '… are Articles 59 and 61(2) of the EEC Treaty to be interpreted as precluding national legislation requiring authorization in order to supply banking services, in particular in order to grant a mortgage loan, where the bank concerned is established in another Member State where it has been authorized?' In other words, the referring court expressly asked the Court of Justice to give a ruling on whether some specific EU provisions precluded some specific national legislation, and so the question in reality concerned the application of the EU provisions to the case at hand. In its preliminary ruling, the Court of Justice however provided a generic answer which did not offer the referring judges any insights they did not possess prior to making the reference. Thus, the Court of Justice ruled:

> Article 59 of the Treaty must be construed as precluding a Member State from requiring a credit institution already authorized in another Member State to obtain an authorization in order to be able to grant a mortgage loan to a person resident within its territory, unless that authorization
>
> - is required of every person or company pursuing such an activity within the territory of the Member State of destination;
>
> - is justified on grounds of public interest, such as consumer protection; and
>
> - is objectively necessary to ensure compliance with the rules applicable in the sector under consideration and to protect the interests which those

> rules are intended to safeguard, and the same result cannot be achieved by less restrictive rules.

Whilst it is very difficult for a Member State court to predict how general/specific the Court of Justice's preliminary answer will be, it seems that when the Court decides whether to make an abstract or a specific ruling, four factors play particular roles:

1. Whether the preliminary questions as such are given abstract or case-specific formulations.
2. Whether uniform solutions are required at EU level.
3. Whether the Court of Justice finds that it has sufficient information about the facts of the case in the main proceedings and about national law applying in these proceedings.
4. Whether it is easier for the EU judges deciding the case to agree on the abstract interpretation or on the specific solution of the main proceedings.[6]

The Court of Justice has always been willing to admit very specific questions – and, in particular, during the first two decades after the turn of the Millenium, in its preliminary rulings it often gave very specific answers which might have an abstract appearance but which in reality amounted to specific applications to the facts before the referring court.[7] This was especially clear where the Court explained that the EU provision in question led to a specific outcome 'in circumstances such as those in the main proceedings'.

For example, in *Fuss* a German court heard a case between Mr Fuß and his employer, the town of Halle. In this connection, the German court decided to make a preliminary reference and therefore put five questions that were all formulated in general terms. However, in its preliminary ruling, the Court of Justice gave an answer that in reality amounted to an application to the case. Thus, in the first paragraph of the operative part, it ruled:

> A worker *such as Mr Fuß in the main proceedings* who has completed, as a fire-fighter employed in an operational service in the public sector, a period of average weekly working time exceeding that provided for in Article 6(b) of Directive 2003/88/EC of

[6] N Fenger and M Broberg, *Le renvoi préjudiciel à la Cour de justice de l'Union européenne* (Larcier 2013) 545f.

[7] See Case C-561/19, *Consorzio*, Opinion, EU:C:2021:291, paras 139–42, as well as the several references provided in *R (on the application of Newby Foods Ltd) (Appellant) v Food Standards Agency (Respondent)* [2019] UKSC 18, para 69.

> the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, may rely on European Union law to establish the liability of the authorities of the Member State concerned in order to obtain reparation for the loss or damage sustained as a result of the infringement of that provision.[8]

Formulating the operative part of a preliminary ruling in this way, we submit, effectively blurs the distinction between interpretation and application that Article 267 seems to establish.

Similarly, in *Morgan*, the operative part of the judgment reads as follows:

> Articles 17 EC and 18 EC preclude, *in circumstances such as those in the cases before the referring court*, a condition in accordance with which, in order to obtain an education or training grant for studies in a Member State other than that of which the students applying for such assistance are nationals, those studies must be a continuation of education or training pursued for at least one year in the Member State of origin of those students.[9]

And in *Förster*, part of the operative part of the judgment holds that a '*student in the situation of the applicant in the main proceedings* cannot rely on Article 7 of Regulation (EEC) No 1251/ 70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State in order to obtain a maintenance grant'.[10]

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[8] Case C-429/09, *Fuss*, EU:C:2010:717, para 1 of the operative part (emphasis added).

[9] Joined Cases C-11/06 and C-12/06, *Morgan*, ECLI:EU:C:2007:626 (emphasis added). See similarly Case C-342/12, *Worten*, ECLI:EU:C:2013:355; Case C-380/11, *DI. VI. Finanziaria di Diego della Valle & C.*, ECLI:EU:C:2012:552; Case C-199/11, *Otis*, ECLI:EU:C:2012:684; Joined Cases C-186/11 and C-209/11, *Stanleybet International*, ECLI:EU:C:2013:33; Case C-18/11, *Philips Electronics UK*, ECLI:EU:C:2012:532; Case C-544/10, *Deutsches Weintor*, ECLI:EU:C:2012:526; Case C-522/10, *Reichel-Albert*, ECLI:EU:C:2012:475; Case C-491/10 PPU, *Aguirre Zarraga*, ECLI:EU:C:2010:828; Joined Cases C-244/10 and C-245/10, *Mesopotamia Broadcast and Roj TV*, ECLI:EU:C:2011:607; and Joined Cases C-89/10 and C-96/10, *Q- Beef and Bosschaert*, ECLI:EU:C:2011:555.

[10] Case C-158/07, *Förster*, ECLI:EU:C:2008:630 (emphasis added). See also Case C-502/17, *C&D Foods Acquisition*, ECLI:EU:C:2018:888; Case C-345/17, *Buivids*, ECLI:EU:C:2019:122; Case C-337/17, *Feniks*, ECLI:EU:C:2018:805; Case C-312/17, *Bedi*, ECLI:EU:C:2018:734; Case C-214/17, *Mölk*, ECLI:EU:C:2018:744; Case C-41/17, *González Castro*, ECLI:EU:C:2018:736; Case C-1/17, *Petronas Lubricants Italy*, ECLI:EU:C:2018:478; Case C-577/16, *Trinseo Deutschland*, ECLI:EU:C:2018:127; Case C-434/16, *Nowak*, ECLI:EU:C:2017:994; Case C-316/15, *Hemming*, ECLI:EU:C:2016:879; Case C-176/15, *Riskin and Timmermanns*, ECLI:EU:C:2016:488; Case C-155/15, *Karim*, ECLI:EU:C:2016:410; Case C-520/14, *Gemeente Borsele*, ECLI:EU:C:2016:334; Case C-245/14, *Thomas Cook Belgium*, ECLI:EU:C:2015:715; Case C-172/14, *ING Pensii*, ECLI:EU:C:2015:484; Case C-549/13, *Bundesdruckerei*, ECLI:EU:C:2014:2235; Case C-495/12, *Bridport and West Dorset Golf Club*, ECLI:EU:C:2013:861; Case C-443/12,

Federico Mancini, a former member of the Court of Justice, has explained that through the above practice 'the national judge is … led in hand as far as the door; crossing the threshold is his job, but now a job no harder than a child's play'.[11] Similarly, Francis Jacobs, another former member of the Court of Justice, has stated that the Court's rulings have in reality decided the main proceedings in 'an extremely high proportion of cases'.[12] These statements are corroborated by a 2008 report from the European Parliament's Committee on Legal Affairs according to which 89% of 123 national judges having made preliminary references found that the Court's preliminary ruling was readily applicable to the facts of the case.[13]

Nevertheless, the Court of Justice's more recent caselaw may be taken to mean that the tide is turning so that the Court has become less willing to give preliminary rulings that are tantamount to deciding the main proceedings. Thus, it appears that in 2021 and 2022[14] the Court has abstained from making references to 'circumstances such as those in the main proceedings' in the operative part of its preliminary rulings.[15] Indeed, this change is so remarkable that it is difficult to dismiss it as a coincidence. This is not to say that the Court of Justice now only renders general and abstract preliminary rulings, but it seems as if it now views its own role *vis-à-vis* the referring courts as one of primarily providing guidance on the abstract interpretation of EU law rather than one where it assists the referring court with the specific decision in the main proceedings.

3. 'Application' vs 'Interpretation' in the *CILFIT acte clair* Doctrine

As we have seen in section 1 above, in *CILFIT* the Court of Justice not only ruled that when rendering preliminary rulings it befell it to interpret EU law, the Court also expressly referred to 'the correct

Actavis Group PTC and Actavis UK, ECLI:EU:C:2013:833; Case C-391/12, *RLvS*, ECLI:EU:C:2013:669; and Case C-14/09, *Genc*, ECLI:EU:C:2010:57.

[11] F Mancini, 'A Constitution for Europe' (1989) 26(4) Common Market Law Review 595.

[12] F Jacobs, 'The Effect of Preliminary Rulings in the National Legal Order' in M Andenas (ed), *Article 177 References to the European Court: Policy and Practice* (1994) 29.

[13] European Parliament's Committee on Legal Affairs, Rapporteur: D Wallis, 'Report on the role of the national judge in the European judicial system' (4 June 2008) A6-0224/2008, 23.

[14] This article was finalised in October 2022. It is therefore only possible to consider judgments rendered prior to 1 October 2022.

[15] This finding is based on searches in Eurlex in the French language version (working language of the Court of Justice) for the phrase 'dans des circonstances telles que celles de' in all judgments rendered by the Court.

application of Community law'.[16] This dual reference to both interpretation and application has characterised the Court's construction of the *acte clair* doctrine post-*CILFIT*. Indeed, in all key rulings regarding the *acte clair* doctrine leading up to *Consorzio*, the Court of Justice defined *acte clair* so as to concern situations where 'the correct application of EU law is so obvious as to leave no scope for any reasonable doubt', thus using the term 'application' and not 'interpretation', which is found in Article 267.[17]

A good illustration of the Court's merging of 'interpretation' and 'application' is its ruling in *Ferreira da Silva.* In this case, a Portuguese charter flight operator, AIA, was wound up whereupon TAP – the incumbent Portuguese air carrier and the main shareholder in AIA – began to operate some of the flights which AIA had contracted. A dispute then arose between the former AIA employees and TAP concerning the correct interpretation of Directive 77/187 on the safeguarding of employees' rights in the event of transfers of undertakings or businesses. In this respect, a key question was whether there had been a 'transfer of a business'. The dispute came before the Portuguese courts, which arrived at conflicting results. Before the Portuguese *Supremo Tribunal de Justiça* (Supreme Court), the employees requested a preliminary reference on the interpretation relating to the dispute's key question. The *Supremo Tribunal de Justiça*, however, refused to make such reference, stating that there was 'no material doubt' as to the interpretation of the applicable rules 'which would make a reference for a preliminary ruling necessary', whereupon it went on to decide against the employees. This led the employees to institute new proceedings before the *Varas Cíveis de Lisboa* (Court of First Instance, Lisbon), this time for a declaration of non-contractual civil liability against the Portuguese State. Their claim was that the *Supremo Tribunal de Justiça* had acted manifestly unlawfully since it had made an erroneous interpretation of EU law and had not made a preliminary reference to the Court of Justice. Against this background, the *Varas Cíveis de Lisboa* decided to make a preliminary reference.

In its preliminary ruling, with regards to the key question whether there had been a 'transfer of a business', the Court of Justice referred to 'difficulties of interpretation', despite the fact that the

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[16] Case 283/81, *CILFIT*, EU:C:1982:335, operative part (emphasis added).

[17] See in particular Case C-495/03, *Intermodal Transports*, EU:C:2005:552, para 45; Joined Cases C-72 & 197/14, *X and van Dijk*, EU:C:2015:564*,* paras 55, 56 and 58; Case C-160/14, *Ferreira da Silva*, EU:C:2015:565, para 38; and Case C-587/17 P, *Belgium v Commission*, EU:C:2019:75*,* para 77. It is remarkable that an examination of these rulings in the nine language versions that the two present authors are able to understand shows that they are not fully consistent. The Swedish version (as the only one of those nine versions) uses the term 'tolkningen' (interpretation) from *CILFIT* and onwards. It may also be noted that in the French version of Case C-416/17, *Commission v France (Advance Payments)*, EU:C:2018:811*,* the Court uses the term 'application' in para 110 and 'interprétation' in para 113.

Supremo Tribunal de Justiça had identified all relevant aspects which, according to the Court of Justice, had to be taken into consideration in this respect. Indeed, when finding that the *Supremo Tribunal de Justiça* had been under an obligation to refer, the Court of Justice observed 'not only [that]… there are difficulties of interpretation, but also that there is a risk of divergences in judicial decisions within the European Union';18 thereby, in reality it only referred to both 'interpretation' and 'application'. Moreover, the main problem pointed out by the Court of Justice in Ferreira da Silva was not that the national court did not adopt the abstract interpretation laid down in the Court's case law but that the national court applied this abstract interpretation in a way that the Court of Justice did not agree with.

By holding that in those circumstances the *Supremo Tribunal de Justiça* had an obligation to refer, the Court of Justice seemed to imply, first, that there was an obligation to refer not only questions on interpretation but also questions on application and, second, that the duty for last instance courts to make a preliminary reference was congruent with the Court's competence to render such rulings.[19]

As we have seen in Section 2, it is difficult for a Member State court to predict how general/specific the Court of Justice's preliminary answer will be. We respectfully submit that to require last instance courts to refer preliminary questions not only when there is reasonable doubt about the correct abstract *interpretation* of EU law, but also when there is such doubt regarding the correct *application*, would make it practically impossible to delimit the duty to make preliminary references under Article 267(3). It follows that national courts of last instance should not be under an obligation to make preliminary references that *de facto* only concern the application of EU law to the facts of the main action.[20] Indeed, a number of Member State courts have explained a refusal to make a preliminary reference precisely on the basis that the question which arose related not to the interpretation of EU law, but to its application.[21]

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[18] Case C-160/14, *Ferreira da Silva*, EU:C:2015:565, para 43.

[19] Where a court of last instance fails to make a preliminary reference, this may have important consequences, see M Broberg, 'National courts of last instance failing to make a preliminary reference: The (possible) consequences flowing therefrom' (2016) 22(2) European Public Law 243-56.

[20] For a closer examination of this matter, see Broberg and Fenger, *Preliminary References to the European Court of Justice* (3rd edn, OUP 2021) 216–18.

[21] See Court of Justice, Directorate-General for Library, Research and Documentation, *Research Note – Application of the Cilfit case-law by national courts or tribunals against whose decisions there is no judicial remedy under national law* (2019), pp. 20–21, para 55; the English version is a summary of the French *Note de Recherche – Application de la jurisprudence Cilfit par les juridictions nationales dont les décisions ne sont pas susceptibles d'un recours juridictionnel de droit interne* (2019). The English version is available at <curia.europa.eu/jcms/upload/docs/application/pdf/2020-01/ndr-cilfit_synthese_en.pdf> (website last visited 30 September 2022).

The above provides the backdrop to our examination of the Court of Justice's 2021 ruling in *Consorzio*, which we shall turn to next.

4. *Consorzio* – A New Approach

4.1. Background to the *Consorzio* Reference

The Court of Justice's ruling in *Consorzio* finds its origins in a 2017 preliminary reference from the Italian *Consiglio di Stato* (Council of State) in a case concerning a public contract for the supply of services relating to the cleaning, *inter alia*, of Italian railway stations. The Court gave its response to this preliminary reference in 2018, but the parties to the national proceedings then asked the *Consiglio di Stato* to refer other questions for a preliminary ruling. The *Consiglio di Stato* therefore made a new preliminary reference in 2019 where, *inter alia*, it sought to ascertain whether a national court of last instance must bring before the Court a question concerning the interpretation of EU law where that question is put to it by a party at an advanced stage of the proceedings, such as where the case has already been set down for judgment or where a reference for a preliminary ruling has previously been made in that case.

The focus of the referring court in its reference seemed to be on whether the obligation to refer differed depending on when, during the national proceedings, questions of EU law were brought up. However, both the Advocate General and the Court of Justice itself concentrated on when national courts deciding in last instance were under an obligation to make a preliminary reference. In other words, they used the reference as a welcome opportunity to reconsider the *acte clair* doctrine.

4.2. The Advocate General's Opinion

In his Opinion, Advocate General Bobek proposed that the Court should find that national courts of last instance only have a duty to make a reference for a preliminary ruling on the interpretation of EU law where three cumulative requirements are met:[22]

1. The case raises a general issue of interpretation of EU law.
2. The EU law may be reasonably interpreted in more than one possible way.
3. The way in which the EU law has to be interpreted cannot be inferred from the existing case law of the Court nor from a single, clear enough judgment of

[22] Opinion of A.G. Bobek in Case C-561/19, *Consorzio Italian Management e Catania Multiservizi,* EU:C:2021:291, points 134–135.

the Court.

The three proposed cumulative requirements were concerned exclusively with interpretation of EU law, not with its application. Indeed, in his Opinion, the Advocate General observed that the aim of the duty for a last instance court to refer was to ensure the uniform interpretation of EU law by all courts within any of the Member States and across the Union.[23]

When going further into the distinction between 'application' and 'interpretation', Advocate General Bobek first pointed to his own earlier Opinion in *Van Ameyde España*[24], where he had sought to set out the line between the two by identifying the following three conditions:[25]

1. Any need for interpretation of an indeterminate legal concept provided for in EU law is naturally delimited by the text, context and the purpose of the provision at issue.26
2. There is only so far (or so low in the level of abstraction) any (normative) legal rule can go in view of the infinite variety of possible factual scenarios. Only if such a discussion concerning the scope of an EU law notion is expressly and clearly triggered by an order for reference, will a preliminary reference contribute to securing uniform interpretation of EU law across the Union, envisaged by the drafters of the Treaties.[27]
3. The primary role of the Court ought to be the articulation or the refinement of normative, legal principles (so-called *premissa maior)* stemming from EU law, to be applied by national courts. The subsumption of the facts of the individual case and the conclusion as to the application of EU law in that particular case, is the task of national courts.[28]

In his Opinion in *Consorzio*, for the purpose of the first of the three above conditions, Advocate General Bobek observed that

> [t]he duty to refer ought to be triggered whenever a national court of last instance is confronted with an issue of interpretation of EU law, formulated at a reasonable

[23] ibid point 149.

[24] Opinion of A.G. Bobek in Case C-923/19 *Van Ameyde España* EU:C:2021:125, points 52-57.

[25] Opinion of A.G. Bobek in Case C-561/19, *Consorzio Italian Management e Catania Multiservizi,* EU:C:2021:291, point 144.

[26] Opinion of A.G. Bobek in Case C-923/19 *Van Ameyde España* EU:C:2021:125, point 52.

[27] Ibid. point 53.

[28] Ibid. point 56.

> and appropriate level of abstraction. That level of abstraction is logically defined by the scope and purpose of the legal provision at issue. In the particular context of (indeterminate) legal concepts of EU law, the task of the Court is to provide an interpretation of that concept. Its application, including the subsumption of specific facts under that definition, is a matter of application of EU law.[29]

And he added that

> [c]ertainly, a mere application may quickly turn into interpretation, provided, for instance, that the referring court were to invite the Court to narrow, broaden, qualify, or depart from the definition already provided. However, provided that that is indeed what is being requested, the referring court ought to state this element clearly, explaining specifically why the case being referred is more than merely another confirmation (and in this sense application) of the previously stated *premissa maior*.[30]

With respect to the distinction between 'interpretation' and 'application', the Advocate General summed up his view as follows:

> [t]he aim of the duty to refer is to ensure the uniform interpretation of EU law, not the correct application of that law. Thus, the uniformity sought is not and has never been at the level of the single outcome of each individual case, but at the level of the legal rules to be applied. This means that, logically, while there is a reasonable degree of uniformity of the legal rules, there may be diversity in terms of specific outcomes.[31]

4.3. The Court of Justice's Ruling

At first sight, the Court of Justice's ruling differs significantly from the Advocate General's Opinion. In particular, contrary to what Advocate General Bobek had suggested, the Court did not explicitly address whether the duty to refer only applies to questions of general interpretation or whether it also applies

[29] Case C-561/19, *Consorzio Italian Management e Catania Multiservizi,* Opinion of AG Bobek, EU:C:2021:291, point 145 (emphasis added).

[30] ibid point 146.

[31] ibid point 149.

to difficulties in deciding whether a given factual situation was covered by the EU rule in question. Nevertheless, in the judgment – in a remarkably understated manner – the Court changed its wording from that of 'application' to that of 'interpretation', and did so both in its summary of its judgment in *CILFIT* (para 33) and in its (new) formulation of when a national court is under a duty to refer (paras 39, 66 and the operative part).[32]

That the aim of Article 267 is to ensure uniform interpretation, but not to involve the Court of Justice in each and every difficult application of EU law by courts of last instance, also finds support in paragraph 49 of the judgment, where the Court holds that:

> where the national court or tribunal of last instance is made aware of the existence of diverging lines of case law – among the courts of a Member State or between the courts of different Member States – concerning the *interpretation* of a provision of EU law applicable to the dispute in the main proceedings, that court or tribunal must be particularly vigilant in its assessment of whether or not there is any reasonable doubt as to the correct *interpretation* of the provision of EU law at issue and have regard, inter alia, to the objective pursued by the preliminary ruling procedure which is to secure uniform *interpretation* of EU law.[33]

From the above, it follows that the Court of Justice in *Consorzio* deliberately changed the original *CILFIT* formulation so that henceforth the obligation to refer in Article 267(3) is exclusively concerned with the interpretation of EU law – not with its application.

5. Consequences of the *Consorzio* Ruling

In *Consorzio,* Advocate General Bobek proposed that the Court of Justice expressly made substantive amendments to its *acte clair* doctrine as laid down in *CILFIT*, whereas the Court of Justice limited itself to

[32] The Court of Justice's change of the wording was so understated that, at the time when it rendered its ruling in *Consorzio*, the English and Danish language versions both mistakenly referred to 'application' rather than to 'interpretation'. Subsequently, the English and Danish language versions have been corrected so that they now also refer to 'interpretation'. This subsequent correction in itself is testament to the change from 'application' to 'interpretation' being deliberate.

[33] Emphasis added.

providing a blueprint for a more pragmatic approach.[34] However, as we have seen above, precisely when it came to the distinction between 'interpretation' and 'application', the Court would seem to have followed its Advocate General, albeit in a surprisingly understated manner. Thus, while prior to its ruling in *Consorzio* the Court of Justice held that national last instance courts could violate the *acte clair* doctrine – not because they adopted a wrong abstract interpretation of EU law, but because they failed to provide a correct application of the correct interpretation – the *Consorzio* ruling seems to signal a change of the Court's focus towards issues of abstract interpretation.[35]

This is a welcome change. In our opinion, the Court of Justice's role is to lay down the correct interpretation of EU law, whereas it is for the national courts – and for them only – to apply this interpretation to the facts of the case pending before them. Therefore, where the *interpretation* of EU law is clear and leaves no scope for any reasonable doubt, this fulfils the *acte clair* criteria, even if a national court of last instance has doubts as to the correct *application* of said EU law to the case at hand.[36] That said, there are, of course, situations where it is far from straightforward to draw a clear distinction between interpretation and application. In these situations it may therefore be difficult to delimit the obligation to refer.[37]

In its post-*Consorzio* caselaw, it appears that the Court of Justice consistently has adhered to the above distinction between 'interpretation' and 'application', whereas, at the time of writing, in its post-*Consorzio* caselaw, the Court appears to have made no references to the original *CILFIT* formulation. Thus, in its 2022 ruling in *F Hoffmann-La Roche and Others*, the Court ruled that:

> it is for the national court alone to find and assess the facts of the dispute in the main proceedings. It follows that it is not for the Court, in the context of a new reference for a preliminary ruling, to carry out a review designed to ensure that that national court, after making a request to the Court for a preliminary ruling on the interpretation of provisions of EU law applicable to the dispute before it, has

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[34] Broberg and Fenger (n 5) 711-38.

[35] Case C-561/19, *Consorzio*, EU:C:2021:799, paras 33, 39, and 66, as well as para 1 of the judgment's operative part. Compare with AG Bobek's Opinion in the case, point 145.

[36] The *Consorzio* ruling will by necessity have an impact on the possibility of using preliminary references as a means for enforcing EU law. See M Broberg, 'Preliminary references as a means for enforcing EU law' in A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (OUP 2017) 99-111.

[37] See similarly Case C-561/19, *Consorzio*, Opinion of AG Bobek, EU:C:2021:291, points 144, 146 and 149.

> applied those provisions in a manner consistent with the interpretation of those provisions given by the Court. Although, under the cooperation between the national courts and the Court established in Article 267 TFEU, it is permissible for the national courts to make a further reference to the Court before settling the dispute before them, in order to obtain further clarifications on the interpretation of EU law provided by the Court …, that provision cannot, however, be interpreted as meaning that a national court could make a request to the Court for a preliminary ruling on whether that national court correctly applied, to the case in the main proceedings, the interpretation provided by the Court in response to a request for a preliminary ruling which the national court had previously made to the Court in the same case.[38]

Similarly, in its 2021 ruling in *Euro Box Promotion and others,* the Court of Justice held:

> In that context, it must be made clear that, in accordance with Article 19 TEU, whilst *it is for the national courts and tribunals and the Court to ensure the full application* of EU law in all the Member States and to ensure effective judicial protection of the rights of individuals under that law, *the Court has exclusive jurisdiction to give the definitive interpretation of that law* …. In addition, in the exercise of that jurisdiction, it is ultimately for the Court to clarify the scope of the principle of the primacy of EU law in the light of the relevant provisions of that law; that scope cannot turn on the interpretation of provisions of national law or on the interpretation of provisions of EU law by a national court which is at odds with that of the Court. To that end, the preliminary-ruling procedure provided for in Article 267 TFEU, which is the keystone of the judicial system established by the Treaties, sets up a dialogue between one court and another, specifically between the Court of Justice and the courts of the Member States, having the object of securing *the uniform interpretation of EU law*, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties…
>
> …

[38] Case C-261/21, *F Hoffmann-La Roche and Others*, EU:C:2022:534, para 55 (emphasis added).

> In that regard, it must be recalled that a judgment in which the Court of Justice gives a preliminary ruling is binding on the national court, *as regards the interpretation of the provisions of EU law in question*, for the purposes of the decision to be given in the main proceedings…[39]

Above, we have argued that where a national court that is to rule in last instance is faced with an abstract interpretation of EU law which is clear and leaves no scope for any reasonable doubt the national court will not be under an obligation to make a preliminary reference as this will be a case of *acte clair*. However, whereas the national court is not under an obligation to make a preliminary reference, it is still free to make such reference. As duly observed by Advocate General Bobek, with particular regard to a last instance court's access to seek assistance from the Court of Justice under Article 267(2), 'The absence of an obligation to do something does not preclude the possibility to do that same thing'.[40]

6. Summary of Findings

Traditionally, the Court of Justice draws a distinction between the interpretation of EU law, which is the preserve of the Court, and the application of EU law to national cases, which is the preserve of the national courts. However, in particular, after the turn of the Millenium, the Court has blurred this distinction.

Nevertheless, we have pointed out that there are indications that the tide is turning. Thus, in 2021 and 2022, the Court of Justice no longer refers to 'circumstances such as those in the main proceedings' in the operative part of the judgments. This in turn indicates that the Court has become less willing to give preliminary rulings that are tantamount to deciding the main proceedings.

Moreover, in its seminal 2021 ruling in *Consorzio*, the Court of Justice not only made an overhaul of the workings of the *acte clair* doctrine, it also made a discreet and barely noticeable change regarding the very formulation of this doctrine. Thus, whereas prior to *Consorzio* the doctrine would refer to both the 'interpretation' and the 'application' of EU law, in *Consorzio* the Court omitted references to 'application'. When deciding whether an EU rule is *acte clair*, it is therefore only the

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[39] Case C-203/20, *AB and Others (Revocation of an Amnesty)*, EU:C:2021:1016, para 49. See also Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Euro Box Promotion and others*, EU:C:2021:1034, paras 254 and 256; and Case C-430/21, *RS (Effect of the Decisions of a Constitutional Court)*, EU:C:2022:99, paras 73-74.

[40] Case C-561/19, *Consorzio*, Opinion of A.G. Bobek, EU:C:2021:291, point 137.

abstract interpretation that matters, meaning that it is necessary to distinguish between 'interpretation' of EU law (which is for the Court of Justice) and 'application' of EU law to the facts of the main action (which is for the referring court).

An important consequence of the above is that where a national court which is to rule in last instance is faced with an abstract interpretation of EU law which is clear and leaves no scope for any reasonable doubt this will be a situation of *acte clair*, even if the national court entertains doubts as to the correct application of said EU law to the case pending before it.

Chapter 3

From *Achmea* to *PL Holdings*, *Republic of Moldova*, and Opinion 1/20: The End of Intra-EU Investment Treaty Arbitration

*Paschalis Paschalidis**

1. Introduction

The recent judgments of the CJEU in *PL Holdings*, *Republic of Moldova*, and Opinion 1/20 are the latest developments in the line of case law regarding the relationship between EU law and investor-State dispute settlement (ISDS) starting with *Achmea*. The CJEU's recent decisions complete the picture of EU law's complete rejection of ISDS as the traditional means of settlement of investor-State disputes.

The purpose of the present contribution is to trace the trajectory of ISDS' unavoidable collision with EU law by recalling the historical development of EU law's relation to international law and the broader context in which the CJEU was called upon to address the question of compatibility of ISDS with EU law.

2. The Trajectory of Unavoidable Collision of ISDS and EU law

ISDS and EU law were confronted each other for the first time in the context of the *Eastern Sugar* arbitration. At that time, investment treaty arbitration was in a State of relevant infancy, whereas EU law could claim decades of existence. As will be explained below, this was a curious circumstance given that both the EU Treaties and bilateral investment treaties date back to the first post-war years. Both are inspired by the same objective, the desire to promote peace and prosperity through economic development. Nevertheless, this shared aim did not prevent them from entering into a trajectory of collision, which with the benefit of hindsight appears to have been inescapable. Indeed, the line of

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CJEU case law composed of *Achmea*, *PL Holdings*, *Republic of Moldova* as well as Opinions 1/17 and 1/20 illustrates the 'conflict of logics'[1] between EU law and international investment law in which ISDS, namely the promise to arbitrate before a neutral forum, as the keystone of international investment protection, is set against certain EU law principles of constitutional value, namely autonomy, mutual trust and sincere cooperation.

2.1. The Birth and Progressive Development of the Principle of Autonomy

The conflict between EU law and ISDS forms part of the deeper and more complicated relationship that EU law has had with public international law since the very beginning of European integration. In the early 1960s, the CJEU was confronted with an existential question regarding the nature of the EU legal order and its relation to international and domestic law. In its ground-breaking judgment in *van Gend en Loos*, the CJEU described the EU as a new legal order of international law which does not simply create rights and obligations between States but elevates individuals to the status of subjects of that law: 'a *new legal order of international law* for the benefit of which the States have limited their sovereign rights … and the subjects of which comprise not only the Member States but also their nationals.'[2]

Although the principle of autonomy was not enunciated as such by the CJEU until its Opinion 1/91,[3] *van Gend en Loos* is understood at present as consecrating the autonomy of EU law vis-à-vis international law.[4] By ruling that a breach of a EU Treaty provision by a Member State could not only be remedied by an action brought by another Member State or the European Commission (EC) against the first Member State but also through actions brought by the nationals of the Member States before the courts, the CJEU rejected the assumption under international law according to which treaties operate between their contracting parties. It also rejected the assumption that actions brought by a contracting party against another are sufficient to guarantee respect for a treaty. Without denying EU law's origin in international law, a step that would be perceived as far too radical in the 1960s, the CJEU established the autonomy of EU law vis-à-vis the rest of international law. It also asserted that EU law is not ordinary international law.[5] In 1964, the CJEU further distanced EU law from

[1] See Emmanuel Gaillard, 'L'affaire Achmea ou les conflits de logiques (CJUE 6 mars 2018, aff. C-284/16)' (2018) RCDIP 616-30.

[2] C-26/62, *van Gend & Loos*, Judgment (5 February 1963) EU:C:1963:1 (emphasis added).

[3] See CJEU, Opinion 1/91 *(EEA Agreement – I)*, (14 December 1991) EU:C:1991:490, paras 30 and 35.

[4] See Koen Lenaerts, 'The autonomy of European Union Law' in *Annali Aisdue*, vol 1 (Cacucci Editore, 2020) 3-13, 4.

[5] See ibid

international law by precluding Member States from relying on the rule of customary international law known as *exceptio non adimpleti contractus* to justify a failure to comply with their obligations under the EEC Treaty.[6] In doing so, it eliminated the reference to international law from the description of the EU as a new legal order and never repeated it again.[7] Many decades later, the CJEU went a step further in its approach to international law to rule in *Kadi I* that norms of international law, even those stemming from the UN Charter, cannot be incorporated into the EU legal order, be complied with and be given effect, if they do not comply with the fundamental values and structures of the EU.[8]

The CJEU did not simply push back the boundary of EU and international law. It asserted the inviolability of the normative space occupied by EU law through the articulation of the principle of autonomy in the early 1990s. At that time, the EU was negotiating a series of international agreements with non-EU Member States that provided for their own dispute settlement mechanisms, the decisions of which would be binding on the EU institutions, including the CJEU.

Two of these agreements, the first version of the draft European Economic Area (EEA) Agreement and the proposed agreement on the establishment of a European Common Aviation Area (ECAA), aimed to extend the relevant EU rules (*acquis*) to third countries. This offered the CJEU the opportunity to enunciate the principle of autonomy.[9] Treaties of this kind raise a question of homogeneity of rules, i.e. the question of ensuring that two sets of identical rules will be interpreted in the same manner by different court systems. The CJEU was preoccupied with ensuring that the new sets of rules would mirror EU law and its jurisprudential development rather than the opposite.

In Opinion 1/91, relating to the first version of the draft EEA Agreement, the CJEU acknowledged that the EU has the power to enter into international agreements providing for their own system of courts, the decisions of which are binding on the EU institutions, including the CJEU.[10] However, it noted the problems that arise in cases where the international agreement would introduce into the EU legal order a large body of legal rules that would be juxtaposed with a corpus of identically-worded EU rules.[11] The CJEU concluded that the first version of the EEA Agreement undermined the

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[6] See C-90/63 and C-91/63, *Commission v Luxembourg and Belgium*, Judgment (13 November 1964) EU:C:1964:80, 631.

[7] See ibid

[8] See C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission*, Judgment (3 September 2008) EU:C:2008:461, paras 305-08; Lenaerts (n 4) 8.

[9] See Opinion 1/91 *(EEA Agreement I)* (n 3); CJEU, Opinion 1/00 *(Agreement on the establishment of a European Common Aviation Area)*, (18 April 2002) EU:C:2002:231.

[10] See Opinion 1/91 (n 3) paras 39-40.

[11] See ibid para 42.

autonomy of the EU legal order inasmuch as, in view of the concern for homogeneity, it was proposed *inter alia* to entrust final decisions on interpretation of the rules of that agreement, in substance identical to those of EU law, to an EEA Court. In addition, the EEA Court could have found it necessary to rule on the distribution of powers between the EU in order to discern whether a possible violation of the EEA Agreement was attributable to the EU or to its Member States.[12]

In making these findings, the CJEU identified two aspects of the principle of autonomy. The first protects the allocation of responsibilities between the EU and its Member States as defined in the EU Treaties, and which, pursuant to Article 344 of the Treaty on the Functioning of the EU (TFEU), is of the CJEU's exclusive jurisdiction.[13] The second aspect protects the fundamental provisions of the EU legal order, including the rules pertaining to the internal market and therefore to investment protection, from being mixed with identically worded rules of international treaties to be interpreted by a court or tribunal outside the EU.[14] As clarified in a subsequent case, the CJEU favours international agreements that 'more clearly separate[] the [EU] from the other Contracting Parties from an institutional point of view and no longer affect[] either the exercise by the [EU] and its institutions of their powers by changing the nature of those powers, *or the interpretation of [EU] law*'.[15] Where the rules created by the international agreement are intended to extend the EU *acquis* to third countries, the principle of autonomy requires that the interpretation of the relevant EU rules by the CJEU is binding on the institutions created by the international agreement.[16] However, the agreement cannot bind the EU to a particular interpretation of the rules of EU law referred to in that agreement.[17] In other words, if third countries wish to benefit from the common rules without becoming members of the EU, they will have no say in the creation and interpretation of these rules.

In Opinion 1/00 regarding the ECAA Agreement, the CJEU hinted, albeit not explicitly, at the fact that the principle of autonomy had a third aspect. Its protective scope goes beyond a mere inquiry about the effects of a dispute settlement mechanism created by an international agreement on the EU's judicial system. It includes an inquiry about the impact that the substantive rules of the agreement

[12] See ibid paras 30-46.

[13] See ibid para 35.

[14] See ibid paras 41-42.

[15] Opinion 1/00 (n 9) para 6.

[16] See CJEU, Opinion 1/92 (*EEA Agreement II)*, (10 April 1992) EU:C:1992:189, para 35.

[17] See Opinion 1/00 (n 9) para 13.

could have on the essential character of the powers of the EU institutions.[18] The meaning of this enigmatic statement would become apparent only later in the ground-breaking Opinion 1/17.

The first Member State to rely on the principle of autonomy to challenge a tribunal's jurisdiction was Slovakia in the first *Achmea* arbitration.[19] However, neither the *Achmea* tribunal nor any of the subsequent tribunals, including after the CJEU's ruling in *Achmea*, conceived of the interposition of an ISDS mechanism in intra-EU relations as the source of conflict with the EU legal order. Following the precedent set by the *Eastern Sugar* tribunal in 2007,[20] a body of arbitral *jurisprudence constante* rejected the so-called intra-EU objection by resorting to the rules of conflict of international law and in particular Articles 30 and 59 of the Vienna Convention on the Law of Treaties.[21] Even after *Achmea*, tribunals denied that bilateral investment treaties ('BITs') and the TFEU are successive treaties having the same subject matter, despite the fact that they both protect cross-border investments, and that ISDS clauses are incompatible with the TFEU.[22] They consistently reached the same conclusion with respect to the ISDS provision of the Energy Charter Treaty (ECT),[23] with only one exception.[24]

Two critical aspects of the pre-*Achmea* judgment arbitral jurisprudence are worth highlighting. First, not all Member States and EU institutions were categorically opposed to the intra-EU application of investment protection treaties. While one could expect that this would be the case of the capital exporting EU Member States, such as the investors' home States, it is notable that even the EC's initial reaction was not as anti-ISDS as it is at present. Indeed, in its letter of 13 January 2006 addressed to Czechia with respect to the *Eastern Sugar* arbitration, the EC did not identify an issue

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[18] See ibid paras 20-22.

[19] See *Achmea B.V. (formerly Eureko B.V.) v Slovak Republic*, UNCITRAL, PCA Case No 2008-13, Decision on Jurisdiction, Arbitrability and Suspension (26 October 2010) para 59.

[20] See *Eastern Sugar B.V. v Czech Republic*, UNCITRAL, SCC Case No 088/2004, Partial Award (27 March 2007) paras 142-180.

[21] For an overview of the arbitral jurisprudence, see eg *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v Hungary*, ICSID Case No ARB/17/27, Award (13 November 2019) paras 225-48; *Muszynianka Spółka z Ograniczoną Odpowiedzialnośią (formerly Spółdzielnia Pracy 'Muszynianka') v Slovak Republic*, UNCITRAL, PCA Case No 2017-08, Award (7 October 2020) paras 227-59. See also the most recent decision on the so-called intra-EU objection, *AS PNB Banka and Others v Republic of Latvia*, ICSID Case No ARB/17/47, Decision on the Intra-EU Objection (14 May 2021) paras 606-72.

[22] See eg *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v Republic of Estonia*, ICSID Case No ARB/14/24, Award (21 June 2019) paras 543-60.

[23] See eg *Electrabel S.A. v Republic of Hungary*, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012); *Vattenfall AB and Others v Federal Republic of Germany*, ICSID Case No ARB/12/12, Decision on the *Achmea* Issue (31 August 2018); *Eskosol S.p.A. in liquidazione v Italian Republic*, ICSID Case No ARB/15/50, Decision on Italy's Request for Immediate Termination and Italy's jurisdictional Based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes (7 May 2019).

[24] See *Green Power K/S and Obton A/S v Kingdom of Spain,* SCC Case No V 2016/135, Award (16 June 2022) 79 ff.

regarding autonomy but rather one of primacy of EU law. It stated that BITs were contrary to EU law and should be terminated only 'in so far as the matters under the [BITs] fall under Community competence' and that such termination could not have retroactive effect.[25] This position is the reverse from the one subsequently advocated by the EC and retained by the Member States that concluded the Intra-EU BIT Termination Treaty.[26]

Even more interestingly, in its *amicus curiae* to the *Electrabel* tribunal, the EC did not argue, as it did subsequently, that the ECT does not apply between Member States and that such application would be contrary to EU law. Instead, it argued that Hungary was simply the wrong respondent because its decision to terminate Electrabel's long term power purchase agreement was taken in compliance with an EC State aid decision.[27] By implication, the Tribunal lacked jurisdiction not because the ECT does not apply between Member States but because an EU investor cannot bring a claim against the EU.

Second, several of the tribunals of the pre-*Achmea* judgment era acknowledged that EU law was part of the law applicable to the merits either as international law applicable between the Contracting Parties or as part of the general principles of international law and/or as part of the domestic law of the State party to the dispute.[28] While these tribunals' intention may have been a noble one aiming at offering assurances that they will do their utmost to respect substantive EU law,[29] the fact is that the tribunals' ability to apply EU law without being able to refer questions for preliminary rulings to the CJEU would seal the fate of ISDS in *Achmea*.[30]

In 2013, while there were still very few (publicly) available arbitral decisions on the compatibility of ISDS with EU law,[31] the CJEU delivered its Opinion 2/13 regarding the EU's second,

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[25] *Eastern Sugar v Czech Republic* (n 20) 20, para 119.

[26] See Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union (signed on 5 May 2020) [2020] OJ L61/1, art 4.

[27] See *Electrabel v Hungary* (n 23) V:8-9, para 5.20.

[28] See *Achmea v Slovakia* (n 19) para 289; *Electrabel v Hungary* (n 23) para 4.195. While other tribunals remained silent on this point, only the *AES v Hungary* tribunal explicitly denied that EU law was part of the law applicable to the merits under ECT art 26(6) (see *AES Summit Generation Limited and AES-Tisza Erömü Kft v The Republic of Hungary*, ICSID Case No ARB/07/22, Award (23 September 2010) paras 7.6.4 and 7.6.6).

[29] See eg *Electrabel v Hungary* (n 23) para 4.189 ('if the ECT and EU law remained incompatible notwithstanding all efforts at harmonisation, that EU law would prevail over the ECT's substantive protections and that the ECT could not apply inconsistently with EU law to such a national's claim against an EU Member State').

[30] See C-284/16, *Achmea*, Judgment (6 March 2018) EU:C:2018:158, paras 39-49 and 58.

[31] See *Eastern Sugar v Czech Republic* (n 20); *Rupert Joseph Binder v Czech Republic*, UNCITRAL, Award on Jurisdiction (6 June 2007); *Jan Oostergetel & Theodora Laurentius v Slovak Republic*, UNCITRAL, Decision on Jurisdiction (30 April 2010); *AES v Hungary* (n 28);

failed attempt to accede to the ECHR. In that Opinion, it undertook the first detailed and comprehensive analysis of the principle of autonomy by giving it a prominent position amongst the EU's constitutional principles.[32] By linking the principle of autonomy to the constitutional structure of the EU, the nature of EU law, the principle of mutual trust, the system of fundamental rights protection provided for by the EU Charter of Fundamental Rights, the fundamental provisions of substantive law of the EU that directly contribute to the implementation of the process of European integration, the principle of sincere cooperation, and the EU judicial system – the keystone of which is the preliminary reference procedure laid down in Article 267 TFEU –[33] the CJEU identified the principle of autonomy as the glue that holds the EU edifice together.

2.2. The Confrontation of Intra-EU ISDS with the Principle of Autonomy in *Achmea* and *PL Holdings*

It has been argued with the benefit of hindsight that following Opinion 2/13, the CJEU could not have decided *Achmea* in any other way than to declare, as it did, the ISDS provisions of intra-EU BITs incompatible with EU law.[34] Indeed, if the arbitral tribunals had the power to apply EU law but were not empowered to submit preliminary references to the CJEU, there could be little doubt that the autonomy of EU law would be threatened.

It is precisely these two points that Advocate General Wathelet addressed to argue in favour of the compatibility of ISDS with EU law in *Achmea*. While acknowledging that, according to the *Achmea* and *Electrabel* tribunals, EU law would be part of the law applicable to the dispute, this would not mean that a tribunal would review Member State conduct with a view to identify breaches of EU law. This was clearly outside its jurisdiction. All a tribunal could do would be to take EU law into account to assess whether the respondent State had breached the provisions of the BIT at issue.[35] AG Wathelet also sought to use the particularly untidy CJEU case law on the notion of 'court or tribunal' under Article 267 TFEU to argue that, in any event, arbitral tribunals were capable of referring questions of

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Achmea v Slovakia (n 19); *European American Investment Bank AG v Slovak Republic*, UNCITRAL, PCA Case No 2010-17, Award on Jurisdiction (22 October 2012); *Electrabel v Hungary* (n 23).

[32] See Lenaerts (n 4) 7-8.

[33] See Opinion 2/13 (Accession of the EU to the ECHR), (18 December 2014) EU:C:2014:2454, paras 165-76.

[34] See Vassilios Skouris, 'Recourse to International Arbitration as a Means of Settlement of Disputes to which EU Law May Be Applicable' in Hélène Ruiz-Fabri and Emmanuel Gaillard (eds), *EU Law and International Investment Arbitration: IAI Series on International Arbitration No 11* (Juris 2018) 191-201, 201.

[35] See C-284/16, *Achmea*, Opinion of Advocate General Wathelet (19 September 2017) EU:C:2017:699, paras 174-78.

interpretation of EU law to the CJEU as courts or tribunals common to the Member States that had concluded the BIT.[36] If, however, there was one point on which both arbitral tribunals and the CJEU agreed, it was precisely this: ISDS tribunals are not courts or tribunals of a Member State.[37]

In finding ISDS to be incompatible with EU law, it is noteworthy that the CJEU referred to the principle of mutual trust only twice in its judgment,[38] focusing its reasoning on the principle of autonomy. This meant that ISDS was perceived as something more serious than a mere failure of the Member States to trust each other's judicial system. Rather, the CJEU described ISDS as an existential menace to the EU legal order insofar as two Member States install, through a binding promise to arbitrate an indefinite number of investment disputes with an indefinite number of qualified investors. According to the CJEU's reasoning, this creates a parallel and competing system of justice to that established by Article 19 TEU, according to which the national courts in cooperation with the CJEU ensure the full effectiveness of EU law through the preliminary reference procedure.[39]

The perception of ISDS as a threat was the result of the fact that *Achmea* arrived at the CJEU at a time when it was clear that the judiciary in certain Member States was going to come under considerable political pressure, especially in the Member States where the executive was actively undermining the rule of law. In a case referred to the CJEU by the Portuguese Supreme Administrative Court regarding the reduction of the remuneration of judges, an issue that did not *prima facie* come into the competences of the EU, the CJEU seized the opportunity to indicate, with an eye to the developing situation in Poland and Hungary, that EU law had a say on the status of national judges because they are the gatekeepers of the EU legal order. Indeed, national judges ensure, through the preliminary reference procedure, effective judicial protection for individual parties in the fields covered by EU law.[40] In other words, the judges of the Member States are also EU judges to the point where, in 2021, faced with the Hungarian Supreme Court's decision that a preliminary reference to the CJEU made by a lower court was unlawful, the CJEU held that a lower court must 'disregard a decision of the supreme court of the Member State concerned if it considers that the latter is prejudicial to the

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[36] See ibid paras 84-131. See also to that effect, Jürgen Basedow, 'EU Law in International Arbitration: Referrals to the European Court of Justice' (2015) 32(4) J Int'l Arb 367-86; Paschalis Paschalidis, 'Arbitral tribunals and preliminary references to the EU Court of Justice' (2016) 33(4) Arb Int'l 663-85; Maciej Szpunar, 'Referrals of Preliminary Questions by Arbitral Tribunals to the CJEU' in Franco Ferrari (ed), *The Impact of EU Law on International Commercial Arbitration* (Juris 2017) 85-123.

[37] See *Eastern Sugar v Czech Republic* (n 20) paras 135-36; *Achmea* (n 30) paras 43-49.

[38] ibid paras 34 and 58.

[39] See ibid para 55; C-741/19, *Republic of Moldova*, Judgment (2 September 2021) EU:C:2021:655, paras 45, 59-60; C-109/20, *PL Holdings*, Judgement (26 October 2021) EU:C:2021:875, para 45.

[40] See C-64/16, *Associação Sindical dos Juízes Portugueses*, Judgment (27 February 2018) EU:C:2018:117, para 34.

prerogatives granted to that lower court by Article 267 TFEU and, consequently, to the effectiveness of the cooperation between the Court and the national court and tribunals established by the preliminary ruling mechanism'.[41] The fact that the CJEU considered itself able to release a lower court of its obligation to obey the country's supreme court illustrates the CJEU's perception of a direct organic link between itself and the courts of the Member States.

It is, therefore, no coincidence that in *Achmea*, the CJEU placed this debate about the role of national judges in the EU legal order at the heart of its reasoning.[42] The *Achmea* ruling can be thus understood as a vote of confidence in the Member States' judiciaries, and therefore the EU's judiciary. Upholding ISDS would demonstrate a lack of faith in the EU's ability to deliver justice, a stance that the CJEU could not afford to take nor be seen to be taking. It, therefore, backed Poland in the *PL Holdings* case despite the fact that Poland had manifestly mistreated the investor by expropriating its investment while also effectively barring the investor from challenging the expropriatory measures before the Polish courts.[43] To justify its unwillingness to accept that there may be exceptional circumstances where recourse to ISDS may be the only option left, the CJEU asserted that any breach of PL Holdings' right to an effective judicial protection could and should be remedied by the Polish courts,[44] despite the lack of any remedy.

Nevertheless, the CJEU did not 'outlaw' all forms of arbitration in the EU. The CJEU safeguarded commercial arbitration and thus any arbitration agreement entered into on the basis of 'the freely expressed wishes of the parties', i.e. not on the basis of a standing offer concluded by two Member States.[45] For the moment, it can be safely assumed that this also includes arbitration agreements entered into by Member States in an *ad hoc* manner. Indeed, in *PL Holdings*,[46] the EC argued that the principle of autonomy precluded Member States from entering into arbitration agreements with economic operators with respect to matters or disputes where they acted as public

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[41] See C-564/19, *IS (Illegality of the order for reference)*, Judgment (23 November 2021) EU:C:2021:949, para 81.

[42] See *Achmea* (n 30) para 55. See also *Republic of Moldova* (n 39) para 59; *PL Holdings* (n 39) para 45.

[43] See *also PL Holdings S.à r.l. v Republic of Poland*, SCC Case No V 2014/163, Partial Award (28 June 2017) para 408.

[44] See *PL Holdings* (n 39) para 68.

[45] *Achmea* (n 30) para 55. See also *Republic of Moldova* (n 39) para 62; C-741/19, *Republic of Moldova*, Opinion of Advocate General Szpunar (3 March 2021) C:2021:164, paras 60-62.

[46] In the *PL Holdings v Poland* arbitration, Poland had not raised the intra-EU jurisdictional objection by its Statement of Defence as it was required to do under the SCC Rules. When it challenged the awards, the Swedish Supreme Court considered that although the ISDS provision was null due to its incompatibility with EU law, it could be said that by failing to raise the intra-EU objection in a timely manner, Poland had tacitly entered into an *ad hoc* arbitration agreement with PL Holdings on the basis of Swedish private law. See *Republiken Polen v PL Holdings*, T 1569-19, Supreme Court, Decision (27 February 2020) para 55.

authority (*imperium*).[47] This would significantly compromise the ability of Member States to enter into commercial arbitration agreements. The CJEU, however, did not adhere to the EC's request. Rather, it held that the *ad hoc* arbitration agreement at issue in *PL Holdings* was contrary to EU law for the sole reason that it sought to replace an ISDS-based arbitration agreement.[48] The question whether the subject-matter of the dispute was *jure imperii* or *jure gestionis* was simply irrelevant.

2.3. The Conditional Approval of the Investor Court System for Extra-EU Investor-State Disputes in Opinion 1/17

The CJEU's ruling in *Achmea* cast uncertainty over the compatibility of extra-EU ISDS and Article 26 ECT with EU law. The CJEU dealt with these aspects of investment treaty arbitration in Opinion 1/17 regarding the EU-Canada Comprehensive and Trade Agreement (CETA) and *Republic of Moldova* and Article 26 ECT.

The CJEU's findings in these cases must be placed in their context. When these cases were lodged, ISDS had become even more controversial than it was in the beginning of the 2010s.[49] The EU's attempts to conclude trade and investment agreements with third countries, including in particular the TTIP with the USA,[50] had met considerable popular resistance even in the capital exporting States. Several high-profile arbitrations in which investors sought to challenge non-discriminatory measures of general application (policy changes), such tobacco packaging laws,[51] had given ISDS a bad name,[52] despite the fact that the investors were ultimately unsuccessful. In Europe, the attempt of the Swedish investor Vattenfall to arbitrate its dispute with the German Government arising out of the latter's decision to terminate the production of nuclear energy[53] galvanised

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[47] See C-109/20, *PL Holdings*, Opinion of Advocate General Kokott (22 April 2021) EU:C:2021:321, para 54.

[48] See *PL Holdings* (n 39) paras 65 and 67.

[49] For the charting of the ISDS's crisis of legitimacy, see Malcolm Langford and Daniel Behn, 'Managing Backlash: The Evolving Investment Treaty Arbitrator?' (2018) 29(2) EJIL 551-80, 554-58.

[50] See Joseph Weiler, 'European Hypocrisy: TTIP and ISDS' (*EJIL:Talk!*, 21 January 2015) https://www.ejiltalk.org/european-hypocrisy-ttip-and-isds/ (accessed on 2 February 2023).

[51] See *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7; *Philip Morris Asia Limited v The Commonwealth of Australia*, UNCITRAL, PCA Case No 2012-12.

[52] See eg Anthony Depalma, 'Nafta's Powerful Little Secret; Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say' (*The New York Times*, 11 March 2001); Pia Eberhardt and Cecilia Olivet, 'Profiting from Injustice' (Corporate Europe Observatory and the Transnational Institute, 2012); Elisabeth Warren, 'The Trans-Pacific Partnership clause everyone should oppose' (*The Washington Post*, 25 February 2015).

[53] See *Vattenfall v Germany* (n 23).

opposition to ISDS amongst laypersons and non-ISDS lawyers alike,[54] despite the fact that, ultimately, the investor's right to compensation was recognized by the German Constitutional Court.[55] The more recent claims brought by RWE[56] and Uniper[57] against the Netherlands for its decision to phase out the production of energy from coal by 2030 further denigrated the image not only of ISDS but also of international investment law by tagging the ECT as a 'fossil fuel treaty' that prevents the EU from meeting its emission targets and obligations under the Paris Climate Accords.[58] This was an unjustified accusation as most of the ECT cases, both in absolute terms and by reference to the damages awarded,[59] concern investments in the renewable energy sector.[60] It nonetheless gained traction as the investors' claims were directed *en masse* against Western European and capital exporting States.[61]

Precisely because the political context at the time was not favourable to investment treaty arbitration, the kind of extra-EU investment treaty arbitration proposed in CETA was not ISDS. Instead, the EU institutions and Canada put forward a hybrid dispute settlement mechanism known as the Investor Court System (ICS),[62] pending the creation of the so-called Multilateral Investment Court.

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[54] See eg Juliane Kokott and Christoph Sobotta, 'Investment Arbitration and EU Law' (2016) 18 Cambridge Yearbook of European Legal Studies 3-19.

[55] See German Federal Constitutional Court, First Senate, *Vattenfall Europe Nuclear Energy GmbH and Others*, Case No 1 BvR 1550/19, Order (29 September 2020). The case was settled in 2021. See *Vattenfall AB and Others v Federal Republic of Germany*, ICSID Case No ARB/12/12, Order of the Tribunal Taking Note of the Discontinuance of the Proceeding (9 November 2021).

[56] *RWE AG and RWE Eemshaven Holding II B.V. v Netherlands*, ICSID Case No ARB/21/4.

[57] *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v Kingdom of the Netherlands*, ICSID Case No ARB/21/22.

[58] See Frédéric Simon, 'France puts EU withdrawal from Energy Charter Treaty on the table' (*Euractiv*, 3 February 2021) https://www.euractiv.com/section/energy/news/france-puts-eu-withdrawal-from-energy-charter-treaty-on-the-table/; Juan Cruz Peña, 'El Gobierno valora sacar a España del Tratado de la Carta de la Energía' (*El Confidencial*, 31 December 2021) https://www.elconfidencial.com/economia/2021-12-31/gobierno-valora-sacar-espana-tratado-carta-energia_3351333/ both accessed 2 February 2023.

[59] Excluding the three arbitrations initiated by the former majority shareholders of Yukos Oil Company.

[60] See Energy Charter Secretariat, 'Distribution of Arbitration Cases under the ECT by Energy Sources' https://www.energychartertreaty.org/cases/statistics/ accessed 2 February 2023.

[61] See Jennifer Rankin, 'Why activists fear little-known treaty could slow fossil fuel phase-out' (*The Guardian*, 3 November 2021) https://www.theguardian.com/environment/2021/nov/03/why-activists-fear-little-known-treaty-could-slow-fossil-fuel-phase-out accessed 2 February 2023. Spain alone was hit by more than 40 of these arbitrations.

[62] See European Commission, 'Concept paper: Investment in TTIP and Beyond the Path for Reform' (5 May 2015) https://trade.ec.europa.eu/doclib/press/index.cfm?id=1396 accessed 2 February 2023. For a detailed presentation of the ICS, *see* Colin M Brown, 'The EU's Approach to Multilateral Reform of Investment Dispute Settlement' in Ana Stanič and Crina Baltag (eds), *The Future of Investment Treaty Arbitration in the EU: Intra-EU BITs, the Energy Charter Treaty, and the Multilateral Investment Court* (Kluwer 2020) 219-36.

While the CJEU favoured ICS in Opinion 1/17, the fact is that its approval was conditional and subject to stringent requirements that the old extra-EU BITs and the ECT would not be able to satisfy.[63] Therefore, the contours of the CJEU's reasoning should be underestimated.

Unlike in *Achmea*, the CJEU did not limit its analysis of the principle of autonomy to the question of the applicable law.[64] Indeed, unlike the BIT at issue in *Achmea*, the CETA did not allow tribunals to apply or interpret EU law as part of the applicable law but only to take it into account as a fact.[65] The CJEU seized the opportunity to develop the functional aspect of the principle of autonomy that guarantees the EU's ability to function in accordance with its constitutional framework.[66] Thus, the principle of autonomy does not safeguard only the autonomy of the EU's judicial system but also the EU's ability to decide and implement policy decided through a democratic process.[67]

The CJEU first drew a distinction between measures of general application – essentially legislation and other regulatory acts – that restrict an investor's freedom of enterprise and individual measures that can form the subject of a claim under the CETA.[68] This distinction was crucial for the CJEU's reasoning because a claim for compensation regarding an individual measure implementing a measure of general application would allow the CETA tribunals to call into question the level of protection of a public interest that led to the introduction of the measure of general application. Deeply concerned by the perceived risk of regulatory chill,[69] the CJEU stated that if the CETA tribunals had such power, the EU could be compelled to abandon its policy measures in order to avoid being repeatedly compelled to pay damages to each investor who would bring a claim in respect of the

[63] See Opinion 1/17 *(EU-Canada CET Agreement),* (30 April 2019) EU:C:2019:341; Emmanuel Gaillard, 'CJUE. – ass. plén. – 30 avr. 2019. – avis 1/17. – JCP G 2019, 493' (2019) Journal du Droit international 845-53.

[64] See Koen Lenaerts, 'Le cadre constitutionnel de l'Union et l'autonomie fonctionnelle de son ordre juridique' in David Petrlík and others (eds), *Évolution des rapports entre les ordres juridiques de l'Union européenne, international et nationaux : Liber amicorum Jiří Malenovský* (Bruylant 2020) 285-306, 296.

[65] See Opinion 1/17 (n 63) paras 126-27. The principle of mutual trust was not relevant as the ICS mechanism created by the CETA did not apply in relations between Member States (ibid para 128).

[66] See ibid paras 137-61.

[67] See Lenaerts (n 64) 298-306.

[68] See Opinion 1/17 (n 63) para 143.

[69] There is no empirical research suggesting that exposure to liability through international claims has forced States to abandon a policy change. For example, Spain did not withdraw the reduction of incentives for the production of renewable energy despite being hit by more than 40 ECT arbitrations.

individual measure implementing the general one.[70] In these circumstances, the EU's functional autonomy would be compromised.[71]

The CJEU's reasoning was informed by cases like *Vattenfall* or the numerous ECT claims against Spain regarding policy changes in the renewable energy sector. This does not mean that measures of general application must be immune from the arbitrators' jurisdiction but that they must be *per se* arbitrary or discriminatory to fall within such jurisdiction.[72] By contrast, only the judiciary has the institutional legitimacy necessary to grant compensation for measures of general application that are not arbitrary or discriminatory.[73]

Opinion 1/17 is significant also insofar as it accepts the premise that any mechanism for the resolution of investor-State disputes must satisfy the requirements of the right to an independent and impartial tribunal guaranteed by Article 47 of the EU Charter of Fundamental Rights.[74] If the CETA tribunals passed this test, it is because ICS introduced significant changes to the ISDS model as regards the rules on the composition of the tribunals and on dealing with the cases brought before them.[75] ICS provides for two instances with panels chaired by third State nationals and whose composition is random and unpredictable for the parties.[76] Moreover, in addition to respecting the IBA Guidelines on Conflict of Interests, panel members must refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under any international agreement.[77] These features, together with the legal aid mechanism to be created in favour of small and medium-sized investors, were indispensable for the CJEU's approval of the ICS mechanism provided for by the CETA.[78]

It must be underlined that the CJEU's approval of the ICS is not unconditional but relies on the assumption that the CETA tribunals will respect the CJEU's interpretation of their jurisdiction.[79] If

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[70] See Opinion 1/17 (n 63) para 149.

[71] See ibid para 148.

[72] See ibid para 159; Lenaerts (n 64) 302.

[73] See Paschalis Paschalidis, 'CETA : une nouvelle ère pour la protection des investissements' (2019) 260 JD eur 241.

[74] See Opinion 1/17 (n 63) paras 205-44.

[75] See Christopher Vajda and Sabine Mair, 'Applicability of Article 47 of the Charter of Fundamental Rights to International Agreements to which the Union is a Contracting Party' in Petrlík and others (eds) (n 64) 551-72, 557.

[76] See Opinion 1/17 (n 63) para 238.

[77] See CETA art 8.30.1.

[78] See Opinion 1/17 (n 63) para 221.

[79] See Didier Reynders, 'Speech at the High Level Seminar on Opinion 1/17 of the European Court of Justice and the Reform of Investment Protection' (Brussels, 6 September 2019) 3; Gaillard (n 63) 853.

that proves not to be the case, the CETA's ICS will cease to be compatible with EU law.[80] The new standard set for extra-EU investor-State dispute resolution casts the compatibility of the ISDS provisions of the old extra-EU BITs and the extra-EU aspect of the ECT into doubt. Indeed, given that they were negotiated and concluded several decades ago, they are likely not to respect the principle of autonomy, either with respect to the applicable law or with the functioning of the EU in accordance with its constitutional framework.[81] Article 26 ECT may also face additional hurdles with respect to Article 47 of the EU Charter of Fundamental Rights.[82] So would the ISDS provisions of the extra-EU BITs of the Member States insofar as they involve the implementation of EU law, thereby rendering Article 47 applicable.[83]

Spain's cross-appeal in *European Food* is a first indication that the argument according to which the ISDS provisions of extra-EU BITs may be incompatible with EU law is not outlandish. The General Court had annulled the EC's decision declaring the payment of the amount of damages awarded by the *Micula* tribunal in favour of the investors to constitute State aid incompatible with the internal market that Romania should not satisfy.[84] The General Court relied on the fact that, in its view, *Achmea* was not applicable to intra-EU arbitrations that were initiated prior to accession as an element to prove that EU law was not applicable to the dispute between the Miculas and Romania and that the award did not fall within the Commission's competence *ratione temporis* in State aid matters.[85] Both the EC and several Member States contested this finding.

However, in its cross-appeal, Spain – supported by the EC – went a step further arguing that in any event, even if the ISDS provision of the Sweden-Romania BIT were deemed to be an extra-EU ISDS provision, it would still be contrary to the principle of autonomy because it 'is capable of

[80] See Lenaerts (n 64) 306.

[81] See Friedrich Erlbacher and Tim Maxian Rusche, 'Article 207 TFEU' in Manuel Kellerbauer and others (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (OUP 2019) para 62.

[82] See Vajda and Mair (n 75) 566-67.

[83] To decide whether a Member State's measure involves the implementation of EU law, it is necessary to determine, inter alia, whether that national legislation is intended to implement a provision of EU law; the nature of the legislation at issue 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 rules which are capable of affecting it. See C-189/13, *Julian Hernández and Others*, Judgment (10 July 2014) EU:C:2014:2055, para 37.

[84] See General Court, *European Food and Others v Commission*, Judgment (18 June 2019) EU:T:2019:423 that annulled Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania — Arbitral award *Micula v Romania* of 11 December 2013 [2015] OJ L 232, 43.

[85] See *European Food and Others v Commission* (n 84) para 87.

compromising the democratic-making process in the State parties' thereby adversely affecting the EU's functional autonomy.[86]

The CJEU did not, however, examine Spain's cross-appeal because, having accepted the EC's main appeal, it found that the General Court had erroneously considered *Achmea* to be irrelevant. The CJEU held that as of the date of Romania's accession to the EU, Romania's consent to arbitration 'lacked any force'.[87] Thus, the question of the compatibility of the extra-EU BITs' ISDS provisions with EU law remains open.

2.4. The Radical Re-interpretation of Article 26 ECT in *Republic of Moldova* and Opinion 1/20

In the jurisprudential context created by *Achmea* and Opinion 1/17, Article 26 ECT posed a particular difficulty in that it applies indistinctly to intra-EU and extra-EU investment disputes pertaining to the energy sector. Given the very clear signs against intra-EU ISDS given in *Achmea*, the real question ought not to have been whether the intra-EU application of Article 26 ECT is compatible with EU law but the manner in which this incompatibility should affect past, pending and future intra-EU ECT arbitrations. Indeed, if Article 26 ECT is incompatible with EU primary law because of its intra-EU application, the CJEU would have to declare the (at least partial) invalidity of the EU act approving the conclusion of the ECT[88] and rule on the temporal effects of such declaration.[89] In the field of international relations, temporal limitation normally takes the form of a CJEU order preserving the act declared invalid until the EU institutions are able to cure the defect identified by the CJEU.[90]

This, however, was not the route taken by the CJEU. Instead, it saw in *Republic of Moldova* an opportunity to avoid the declaration of incompatibility of Article 26 ECT by re-interpreting it in

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[86] C-638/19 P, *Commission v European Food and Others*, Opinion of Advocate General Szpunar (1 July 2021) EU:C:2021:529, para 109 ('The Kingdom of Spain, supported in that respect by the Commission, claims that the BIT is contrary to EU law from its conclusion, in that the arbitral tribunal constituted on the basis of the BIT is capable of compromising the democratic-making process in the State parties since it deprives a Romanian law of the desired economic effect, and of having an adverse effect on the State aid legislation in Sweden and Romania, and that the BIT therefore affects the functioning of the institutions of the European Union in accordance with its constitutional framework.').

[87] C-638/19 P, *Commission v European Food and Others*, Judgment (25 January 2022) EU:C:2022:50, para 145.

[88] See Council and Commission Decision 98/181/EC, of 23 September 1997, on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects [1998] OJ L69/1.

[89] See Paschalis Paschalidis, '*Komstroy*: constitutional, procedural and substantive Implications' (*EU Law Live*, 27 September 2021) https://eulawlive.com/op-ed-komstroy-constitutional-procedural-and-substantive-implications-by-paschalis-paschalidis/ accessed on 2 February 2023.

[90] See eg C-180/20, *Commission v Council (Agreement with Armenia)*, Judgment (2 September 2021) EU:C:2021:658, paras 60-64.

conformity with EU primary law in order to eliminate its intra-EU application. Rather than dealing with this matter in the context of the preliminary reference made by the Svea Court of Appeal in *Athena Investments and Others*,[91] which is an intra-EU case, the CJEU did so in *Republic of Moldova* at the instigation of the German, Spanish and Polish governments, despite the fact that the question bore no relevance to the case at hand which opposed a third country, Moldova, to a non-EU investor. The CJEU thus put itself in a position where it would rule on a highly complex matter without the benefit of written observations including on the interpretation of the ECT in accordance with Articles 31 and 32 VCLT. In an *obiter dictum*, arguably the longest in its history, the CJEU ruled that the arbitration clause contained in Article 26(2)(c) ECT 'must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State'[92] on the ground that 'preservation of the autonomy and of the particular nature of EU law precludes the same obligations under the ECT from being imposed on Member States as between themselves'.[93] Through this interpretation, the CJEU denied the intra-EU application of Article 26(2)(c) ECT despite the fact that this is the correct interpretation of this provision pursuant to Articles 31 and 32 VCLT that has been sanctioned by all arbitral tribunals established under the ECT,[94] and more recently the Federal Court of Australia.[95] This interpretation constitutes an unprecedented departure from the CJEU's own case law, which requires that international agreements to which the EU is party be interpreted in accordance with the VCLT.[96] By relying on internal norms of EU law, such as the principle of autonomy, the CJEU performed an interpretation of an international treaty in disregard of the relevant rules of international law and of Article 3(5) TEU, which requires the EU and its institutions to strictly observe international law.[97] The fact that the ECT is also an act of EU law does not mean that it can be interpreted like an internal act

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[91] See C-155/21, *Athena Investments and Others*. The Svea Court of Appeal withdrew its reference following the CJEU's judgment in *Republic of Moldova*.

[92] See *Republic of Moldova* (n 39) para 66.

[93] See ibid para 65.

[94] See amongst many *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v Italian Republic*, ICSID Case No ARB/14/3, Final Award (27 December 2016) paras 279-284.

[95] See, *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l. (No 3)*, Federal Court of Australia (Full Court) [2021] FCAFC 112, where the Federal Court of Australia declared the ECT award at issue binding on Spain, despite Spain and the Commission's objections.

[96] See C-386/08, *Brita*, Judgment (25 February 2010) EU:C:2010:91, paras 42-43 and C-464/14, *SECIL*, Judgment (24 November 2016) EU:C:2016:896, para 94.

[97] See Paschalis Paschalidis, 'The Inta-EU Application of the Energy Charter Treaty: A Critical Analysis of the CJEU's Ruling in *Republic of Moldova*' (2022) 7 EILA Rev 3-35; Alan Dashwood, 'Republic of Moldova v Komstroy LLC (Case C-741/19): Arbitration under Article 26 ECT outlawed in intra-EU disputes by *obiter dictum*' (2022) 47 EL Rev 127-10; Jonas Hallberg and Allison Östlund, 'And Now For Something Completely Different… Disposing of pacta sunt servanda through an obiter dictum' (2022) University of Gothenburg School of Public Administration Working Paper 2022:34, 9-10.

of EU law, especially in a case like *Republic of Moldova* where neither party to the arbitration, and least of all Moldova as a non-EU State, expected that EU law would be relevant to the interpretation of the ECT. For these reasons, it is highly unlikely that arbitral tribunals or the courts of third countries will give effect to this attempt to unilaterally modify the ECT without the consent of all the Contracting Parties.[98]

In light of its *Republic of Moldova* judgment, there can be no doubt as to what the outcome of Opinion 1/20 would have been had the CJEU not dismissed Belgium's request as premature and, therefore, inadmissible. Indeed, in another *obiter dictum*, the CJEU wondered about the purpose of Belgium's request given that the CJEU had already clarified in *Republic of Moldova* that 'compliance with the principle of autonomy of EU law, enshrined in Article 344 TFEU, requires Article 26(2)(c) of the ECT to be interpreted as meaning that it is not applicable to [intra-EU investor-State] disputes'.[99] Thus, the CJEU dissipated any doubt that its interpretation of Article 26 ECT did not comply with the VCLT rules, but was, rather, an *interprétation conforme* based on domestic norms of EU law.[100] The ECT Contracting Parties seized the opportunity offered by the ECT's modernisation negotiations to translate the CJEU's rulings into binding international law. They, therefore, agreed in principle that Article 26 will not apply to intra-REIO disputes.[101] According to the European Commission, '[t]*his shall finally bring an end to the intra-EU applications under the ECT that are contrary to the EU law and recent judgments by the Court of Justice of the EU*'.[102]

Of all the cases discussed above, it is perhaps the *Republic of Moldova* judgment that should stand out in terms of its long-term consequences. If the flawed methodological approach to treaty interpretation adopted in *Republic of Moldova* were to be confirmed in subsequent cases, the CJEU would contribute significantly to the erosion of international law and of the international legal order as a rules-based system. It is thus hoped that a future case will offer the CJEU the opportunity to

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[98] The tribunal in *Green Power v Spain* is the only one to have thus far given effect to the *Republic of Moldova* judgment. See *Green Power K/S and Obton A/S v Kingdom of Spain,* SCC Case No V 2016/135, Award (16 June 2022) 79 ff.

[99] CJEU, Opinion 1/20 *(Modernised Energy Charter Treaty)* (16 June 2022) EU:C:2022:485, para 47.

[100] This clarification must be somewhat embarrassing for the *Green Power* tribunal that correctly decided to interpret Article 26 ECT in accordance with Article 31 VCLT. By giving effect to the CJEU's interpretation of Article 26 ECT, it actually gave effect to an interpretation that is contrary to the rules of treaty interpretation under international law and, therefore, contrary to the interpretative task that it undertook. See Paschalidis (n 97).

[101] See Energy Charter Secretariat, 'Decision of the Energy Charter Conference' (Brussels, 24 June 2022) CCDEC 2022 10GEN, point 6.

[102] See European Commission, 'Agreement in principle reached on Modernised Energy Charter Treaty' (Brussels, 24 June 2022) https://policy.trade.ec.europa.eu/news/agreement-principle-reached-modernised-energy-charter-treaty-2022-06-24_en accessed 2 February 2023.

correct this glitch by reverting to its mainstream position that international treaties to which the EU is party must be interpreted in accordance with the rules of treaty interpretation of international law and that *interprétation conforme* is not possible. *Republic of Moldova* illustrates that despite earnest attempts to convince that '[the] concept of autonomy in no way implies that the EU and its law are euro-centric and that the Court of Justice seeks to insulate EU law from external influences',[103] the CJEU's vision of the EU legal order on the world stage is guided by a spirit of intense isolationism.

3. Conclusion

The line of CJEU case law starting with *Achmea* and ending with Opinion 1/20 leaves a question mark. Why would two legal systems which were intended to purse the same aim, namely promote peace and prosperity through economic development and cross-border investments, be in conflict?

The truth is that this commonality of aims distracts attention from the fundamental antinomy that opposes EU law and international investment law. EU law serves a project of political necessity, namely the unification of Europe, through the extension of national treatment to other EU nationals.[104] The political objective is the creation of a Europe where national difference does not give rise to differentiation of treatment, and therefore foreigners are treated like nationals. It is no accident that EU law does not recognize and provide for 'most favoured nation' (MFN) treatment, which implies that a State must treat a *foreigner* as *another foreigner*, not as a national.[105]

By contrast, international investment law and ISDS in particular revolve around the idea that a French investor in Poland is a *foreigner* and as such is entitled to receive different, often better, treatment than a Polish investor. While other protection standards of international investment law may find equivalents in the domestic legal order, such as the prohibition of unlawful expropriation, ISDS is the one treatment that benefits foreigners only. This is what makes ISDS repulsive to the EU legal order to the point that it must be eliminated.

Indeed, if the aim of European integration is – as enunciated by the preamble of all EU Treaties since 1957 – the creation of an 'ever closer union' of peoples, the CJEU and other EU

[103] See Lenaerts (n 4) 4.

[104] See eg C-186/87 *Cowan*, Judgment (2 February 1989) EU:C:1989:47, para 10 ('[Article 18 TFEU] requires that persons in a situation governed by [EU] law be placed on a completely equal footing with nationals of the Member State.')

[105] See C-376/03, *D.*, Judgment (5 July 2005) EU:C:2005:424; Opinion of Advocate General Wathelet in *Achmea* (n 35) paras 66-72.

institutions could not perceive ISDS as anything else but an anomaly. ISDS interfered with the backbone of the EU's constitutional arrangement and specifically, its judicial architecture, whose mission is to safeguard the 'ever closer union of peoples' by ensuring the uniform application of EU law. Advocate General Bobek aptly expressed the direct link between the integrity of the EU's judicial system and the European integration model in the following terms:

> In a system such as that of the European Union, where the law is the main vehicle for achieving integration, the existence of an independent judicial system (both centrally and nationally), capable of ensuring the correct application of that law, is of paramount importance. Quite simply, without an independent judiciary, there would no longer be a genuine legal system. If there is no 'law', there can hardly be more integration. The aspiration of creating 'an ever closer union among the peoples of Europe' is destined to collapse if legal black holes begin to appear on the judicial map of Europe.[106]

Bearing this mind, it becomes clear why ISDS was bound to fail in the European Union. Its very existence is premised on the existence of nation States and not of supra-national, post-imperial polities such as the European Union.[107] The fact, however, that the promise of an 'ever closer union' seems, at present, to be more distant than ever raises other questions about the concrete achievements (if any) resulting from the elimination of investment treaty arbitration in the European Union.

[106] C-748/19 to C-754/19, *Prokuratura Rejonowa w Mińsku Mazowieckim*, Opinion of Advocate General Bobek (20 May 2021) EU:C:2021:403, para 138.

[107] See Paschalis Paschalidis, 'Europe Day and the Fable of the Wise Nation' (*EU Law Live*, 9 May 2022) https://eulawlive.com/op-ed-europe-day-and-the-fable-of-the-wise-nation-by-paschalis-paschalidis/ accessed 2 February 2023.

Chapter 4

Stone Soup, or How to Rely on Article 47 of the EU Charter of Fundamental Rights 'as Such' before National Courts

Anna Wallerman Ghavanini[*]

1. Introduction

Procedural law is sometimes referred to as lawyer's law. Not only is it a part of the law that mainly applies to, and is applied by, lawyers, but it is also a part that is often perceived as technical, detail-oriented, and formalist. While at least in civil procedure, the courts are not strictly bound by the principle of legality and thus permitted to embark upon more adventurous interpretations, the interpretation and application of the law of procedure is often concerned with the textual niceties and nitty-gritty of legislation.

In EU law, as is well known, procedures and remedies, as a rule of thumb, fall under the principle of the procedural autonomy of the Member States. While this autonomy is far from unlimited – indeed, some authors have argued that it is so limited as to be non-existent[1] – it remains true that there is relatively little legislation at EU level concerned with procedural questions. The EU law requirements on procedural law are instead typically expressed as general principles, either unwritten, codified in directives, or laid down as fundamental rights.

The integration of national and EU law in the field of procedure is thus a meeting of extremes; the often highly specific rules of national procedural codes, laying down time limits in days and hours or admissibility criteria in elaborate detail, meet lofty principles such as the EU requirement to ensure effectiveness or to guarantee a party's judicial protection. In some respects, this should cushion the

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[1] See eg Daniel Halberstam, 'Understanding National Remedies and the Principle of National Procedural Autonomy: A Constitutional Approach' (2021) 23 Cambridge Yearbook of European Legal Studies 128–58; Michal Bobek, 'Why there is no principle of "procedural autonomy" of the Member States' in Hans-W Micklitz and Bruno de Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia 2012) 305–22; Diana-Urania Galetta, *Procedural Autonomy of EU Member States: Paradise Lost?* (Springer 2010).

impact. The risk of clear and undeniable conflicts between a national and a Union rule is relatively small – although, of course, once the Court of Justice (CJEU) has interpreted a general principle in light of the circumstances of a specific case referred to it, the conflict may become explicit enough. Besides from being a meeting of rules, however, this integration also includes a collision of mindsets, where the national tradition of safeguarding procedural fairness by the foreseeable application of detailed rules is confronted with the CJEU's focus on the enforcement of substantive rights through effective judicial remedies, shifting the purpose of judicial proceedings from a means of settling disputes between parties to one of providing relief (especially) to one of them.

This collision of traditions becomes perhaps most visible when national procedural rules are to be set aside in favour of general principles of Union law, such as the principles of effectiveness and equivalence or the right to effective judicial protection as laid down in Article 47 of the EU Charter of Fundamental Rights (CFR). In its recent case law, the Court has held that the latter Article 'confers upon individuals rights which they may rely on as such' – a statement that has been taken in literature to mean that it has direct effect – even in disputes between individuals.[2] While, especially against the background of the *Mangold* line of cases in which the Court established that unwritten general principles of Union law may take such effects,[3] this new line of case law is perhaps not surprising, it does give rise to a number of questions.

First, can we conclude that conferring on individuals a right which they may rely on as such means the same as having direct effect? If so, what is the significance, if any, of the Court's change of locution, and why is the traditional test for direct effect – in particular the criterion of being sufficiently clear and precise – not carried out by the Court in relation to Article 47? Second, what does it mean that a national provision conflicting with Article 47 should be set aside, and that Article 47 should be applied in its place? How is Article 47 to be 'applied' in a technical question of civil procedure, on which it at least explicitly contains no rules? And third, what (if anything) do the answers to these questions entail for the effect of the closely related principles of effectiveness and equivalence before national courts? These questions will be examined in Sections 3, 4, and 5, respectively, of the present article.

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[2] See eg Case C-414/16, *Vera Egenberger v Evangelisches Werk fuïr Diakonie und Entwicklung e.V.*, EU:C:2018:257; Case C-68/17, *IR v JQ,* EU:C:2018:696; Joined Cases C-569/16 and C-570/16, *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn*, EU:C:2018:871; Case C-684/16 *Max-Planck-Gesellschaft zur Foïrderung der Wissenschaften eV v Tetsuji Shimizu*, EU:C:2018:874; and further Eleni Frantziou, 'The Horizontal Effect of the Charter: Towards an Understanding of Horizontality as a Structural Constitutional Principle' (2020) 22 Cambridge Yearbook of European Legal Studies 208–32; Elise Muir, 'The Horizontal Effects of Charter Rights Given Expression to in EU Legislation, from Mangold to Bauer' (2019) 12 Review of European Administrative Law 185-215.

[3] Case C-144/04, *Werner Mangold v Rüdiger Helm*, EU:C:2005:709; Case C-555/07, *Seda Kücükdeveci v Swedex GmbH & Co., KG* EU:C:2010:21.

Before that, Section 2 will provide a background to the 2021 judgment in C-30/19 *Braathens,*[4] which will serve as an example and form the basis of the analysis. Finally, Section 6 summarises the conclusions.

2. Background

The 2021 *Braathens* case provides a useful illustration of the problems outlined above, as it brought to light a conflict between, on the one hand, long-standing, clear, and specific national procedural rules and, on the other, Article 47 CFR, which the Court ordered the national court to resolve relying directly on the latter provision. The case concerned an allegation of discrimination on the basis of ethnicity in a consumer relationship. The applicant, a natural person represented in court by the Swedish Equality Ombudsman, had been subjected to an additional security check and subsequently was refused boarding on a flight with the defendant airline, which throughout the proceedings in the district court, the court of appeal and the EU Court of Justice denied wrongdoing, but eventually admitted to having discriminated against the defendant prior to the final decision in the Supreme Court.

The main legal problem facing the Swedish courts, however, was not whether the applicant's allegations were well founded or not, but rather whether they were a matter suitable for litigation at all. The applicant had initially requested compensation from the airline in the amount of SEK 10,000 (approximately EUR 1,000), and while the defendant airline maintained that it had not in fact discriminated against the defendant and therefore was not legally obliged to pay, it nevertheless agreed to pay the sum requested, as a sign of its 'good will' – or more likely, in the hope of settling the matter quickly and without drawing too much attention.

The effect of this admission regarding the requested compensation was that the defendant had no right of standing before the Swedish courts to have his allegation examined. Under Swedish civil procedure, the court may not give judgments over something 'else or more' than what the parties have requested (Swedish Code of Judicial Procedure (SCJP) 17:3). If an applicant has sued for SEK 10,000, this sum is consequently the highest that can be awarded. Correspondingly, the agreement of the defendant sets the lower threshold for the award, meaning that when the defendant in turn agreed to pay the sum requested, that sum became not only the highest but also the lowest sum that the court could award. In this situation, and as the case was one where the parties could have entered into a legally binding settlement without ever involving the courts, there was no need to examine the

[4] Case C-30/19, *Diskrimineringsombudsmannen v Braathens Regional Aviation AB,* EU:C:2021:269.

claim on the merits, and judgment for the applicant could be given without any other reasons than the agreement of the defendant.

Faced with this prospective of a judgment that did not examine the claim in substance, the Equality Ombudsman requested, in addition to the monetary compensation, a declaratory judgment to the effect that the applicant had indeed been subject to unlawful discrimination by the defendant. Actions for declaratory rulings are permissible under Swedish law, but subject to a number of criteria (SCJP 13:2). Among them, the most important one for the purposes of this case is that the uncertainty that the action seeks to eliminate must be such as to cause the applicant harm. Additionally, an action for a declaratory judgment is not available to an applicant as a matter of right, but is admissible only at the discretion of the court. On this basis, the applicant's request for a declaration was dismissed by the district court as unsuitable, as it could lead to no other consequence than the compensation, the payment of which was undisputed. The court of appeals upheld this ruling, observing that compensation constitutes an effective, proportionate, and dissuasive sanction sufficient to satisfy the requirements of EU law and that a declaration as to whether or not discrimination had occurred was therefore not needed in order to ensure effective judicial protection for the applicant.

The CJEU, who ruled on the case following appeal and a preliminary reference from the Supreme Court, disagreed, holding that meaningful compensation requires not only a monetary payment but also a recognition, either by the defendant or by the court, that discrimination has indeed taken place.[5] This, it furthermore noted in response to an objection from the defendant, does not amount to the creation of a new remedy under national law, but merely requires the setting aside of any national rule preventing a court hearing a claim for compensation for a victim of discrimination from also examining the underlying claim that discrimination had indeed occurred. This followed, the Court observed, not only from the national rule's incompatibility with Articles 7 and 15 of the Racial Equality Directive, but also from its incompatibility with Article 47 of the Charter of Fundamental Rights.[6]

The latter observation was crucial for the effect of the ruling. According to the Court's case law in *Poplawski II,* national law must be disapplied only where it is incompatible with an EU provision

[5] ibid para 44.

[6] ibid para 56.

with direct effect. [7] A directive, as follows from a long line of cases starting from the seminal *Faccini Dori* ruling,[8] cannot take direct effect in disputes between individuals. Therefore, had the national provision been found to be in conflict only with the Directive, the judgment could not have taken effect in the individual case pending before the referring court (unless it could have been resolved by means of harmonious interpretation, which arguably it could have – but that is the subject for another article[9]). It was thus crucial in order for the judgment to become operable for the referring court in the case at hand, that a conflict existed also between the national rule and Article 47 CFR – a provision which, as the Court recalled, is 'sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such'.[10] This seemed to clinch it – not only was the national provision incompatible with EU law, but it was to be set aside in casu by the referring court before deciding the case.

3. The (Forgotten?) Test for Direct Effect

The CJEU in *Braathens* did not explicitly state that Article 47 CFR has direct effect, but that it is capable of being relied upon as such before national courts. This is consistent with the language it has used previously about the effect of Article 47 CFR, as well as about other Charter rights capable of taking such effects.[11] It seems reasonable to conclude that this locution is nothing more than another way of stating that the Article has direct effect.[12] Aside from the fact that it appears to be an adequate description of the substance of the doctrine of direct effect, the conclusion is further supported by two observations. First, the CJEU has used the same language in relation to directives when recalling their lack of direct effect in horizontal relationship. For instance in *Bauer and Willmeroth,* the Court observed that a directive 'cannot of itself impose obligations on an individual and cannot therefore be

[7] Case C-573/17, *Criminal proceedings against Daniel Adam Popławski*, EU:C:2019:530, paras 60–62. This has subsequently been confirmed inter alia in Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Criminal proceedings against PM and Others,* EU:C:2021:1034, para 252; Case C-430/21 *Proceedings brought by RS,* EU:C:2022:99, para 53.

[8] Case C-91/92, *Paola Faccini Dori v Recreb Srl,* EU:C:1994:292.

[9] For readers of Swedish, see Henrik Bellander and Johanna Munck af Rosenschöld, 'Flygpassageraren och rättegångsbalken: Omkullkastade grundprinciper eller business as usual?' (2022) *Svensk juristtidning* 942.

[10] C-30/19, *Braathens,* para 57, with reference to C-414/16, *Egenberger*.

[11] See C-569/16 and C-570/16, *Bauer and Willmeroth*, para 89; C-414/16, *Egenberger*, para 78; Joined Cases C-585/18, C-624/18, and C-625/18, *A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy*, EU:C:2019:982, para 162; Case C-193/17, *Cresco Investigation GmbH v Markus Achatzi,* EU:C:2019:43, para 76; Case C-243/19, *A v Veselības ministrija*, EU:C:2020:872, para 36; Case C-824/18, *A.B. and Others v Krajowa Rada Sądownictwa and Others*, EU:C:2021:153, para 145; Case C-233/19 *B. v Centre public d'action sociale de Liège (CPAS)*, EU:C:2020:757, para 55.

[12] This is also supported by the Court's president Lenaerts, writing in his extra-judicial capacity (Koen Lenaerts, 'Limits on Limitations: The Essence of Fundamental Rights in the EU' (2019) 20 German Law Journal 779–93; 788).

relied upon as such against an individual',[13] citing its ruling in *Smith* which, in turn, refers to the classical cases on direct effect of directives: *Marshall*, *Faccini Dori*, and *Pfeiffer*.[14] Second, in *Braathens,* the remark on Article 47 being applicable 'as such' was immediately followed by a recollection of the national court's duty to disapply any national provision contrary to a Union rule with direct effect,[15] and in *UY,* the Court outright observed that '*like Article 47 of the Charter*, … Article 6 of Directive 2012/13 must be regarded as having direct effect.'[16] Against this background, it seems safe to conclude that being applicable as such is the same as having direct effect.

Still, the direct effect of Article 47 CFR, and perhaps of Charter rights in general, appears to follow slightly different rules than that of other types of provisions. In particular, in none of the cases where the Court has found a Charter provision to be directly effective has it carried out the classical test of whether the provision is sufficiently clear and precise to take such effect, even though that test clearly is still in use – and indeed has been used in the very cases where direct effect of Charter provisions were discussed – for other types of legal provisions.[17] When it comes to the rights to paid annual leave (Article 31(2) CFR), the Court has instead examined whether these provisions are mandatory and unconditional, finding in the affirmative in the former regard and noting concerning the latter that derogations are strictly circumvented by the conditions laid down in Article 52(1) CFR.[18] For Article 21 CFR on the right of non-discrimination, the Court at least asserted the provision to be of mandatory character before declaring for the first time that it could take direct effect.[19] For Article 47 CFR, no test of any kind appears to have been carried out before the Court declared the Article to be capable of taking direct effect.[20]

In the established doctrine on the effect of EU legal provisions before national courts, only regulations are directly applicable without any additional test being necessary. However, this is based on Article 288 of the Treaty on the Functioning of the EU (TFEU), and it is difficult to find similar support

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[13] C-569/16 and C-570/16, *Bauer and Willmeroth*, para 76.

[14] Case C-122/17, *David Smith v Patrick Meade and Others*, EU:C:2018:63, para 42 with references.

[15] C-30/19, *Braathens,* paras 57–58. See also C-233/19, *B*, paras 54–55.

[16] Case C-615/18, *UY v Staatsanwaltschaft Offenburg,* EU:C:2020:376, para 72 (emphasis added).

[17] See eg Case Case C-176/12, *Association de médiation sociale v Union locale des syndicats CGT and Others,* EU:C:2014:2, 31; C-569/16 and C-570/16, *Bauer and Willmeroth*, paras 70–75.

[18] C-569/16 and C-570/16, *Bauer and Willmeroth*, para 84–85; C-684/16, *Max-Planck-Gesellschaft,* paras 73–74.

[19] C-414/16, *Egenberger*, para 77.

[20] ibid para 78; C-585/18, C-624/18, and C-625/18, *A. K.,* para 162; C-824/18, *A.B. and Others*, para 145; C-30/19, *Braathens*, para 57; C-233/19, *B*, para 55.

for the direct applicability of the Charter. Article 51 CFR rather speaks in the opposite direction, identifying the institutions and bodies of the Union as well as the Member States as the Charter's addressees. The direct effect of Charter rights therefore does not appear to be comparable with the direct applicability of regulations.

A more promising approach would be to place the Charter rights in the same category as treaty provisions. This is supported by Article 6(1) of the EU Treaty (TEU), and would naturally entail that the Charter can take direct effect in both horizontal and vertical relationships. However, treaty provisions have ever since *Van Gend en Loos* been subject to the test of clarity and unconditionality in order to be able to take on direct effect. While that test has undergone some revisions over the years, it still largely stands, as evidenced by the Court's ruling as late as February 2022 regarding the direct effect of Article 19(1) TFEU, subject to having been found to be 'formulated in clear and precise terms and … not subject to any conditions'.[21] The comparison with treaty provisions thus does not explain why Charter articles appear to be able to take direct effect regardless of whether they are clear and precise or not.[22]

One explanation would of course be that the CJEU *has* carried out the test for direct effect, but for some reason – for instance because the results would be obvious – has omitted to make it explicit in its rulings.[23] This, however, appears unlikely and unsatisfactory, in particular as it is highly doubtful whether the provisions in question would indeed pass the test for direct effect; for instance, Advocate General Trstenjak explained in detail why the right to annual paid leave was not sufficiently precise to take direct effect unless significantly developed by the CJEU.[24] This argument could partially be countered by the suggestion, raised in literature, that codification in secondary law giving 'specific expression' to the fundamental right contributes to rendering the right itself justiciable.[25] This explanation however not only entails a troubling measure of circularity,[26] but also seems particularly

[21] Case C-430/21, *R.S.,* para 58. Cf also Case C-402/14, *Viamar – Elliniki Aftokiniton kai Genikon Epicheiriseon AE v Elliniko Dimosio*, EU:C:2015:830, paras 24–27.

[22] Cf Dorota Leczykiewicz, 'Horizontal Application of the Charter of Fundamental Rights' (2013) 38 European Law Review 479–97, 485.

[23] Cf CJEU president Lenaerts (n 12*,* 288), who appears to consider the assertation that the rights are 'sufficient in themselves' to produce direct effect (cf C-30/19, *Braathens,* para 57; C-414/16, *Egenberger,* para 78) as implying a statement as to their unconditional and mandatory nature.

[24] Opinion of AG Trstenjak in Case C-282/10, *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*, EU:C:2011:559, paras 135–42.

[25] Muir (n 2).

[26] As Muir herself recognises (ibid 202 ff.).

difficult to justify as regards Article 47 CFR, as the 'specific' expressions in these secondary legal acts are often almost as broadly framed as the Charter right itself.[27]

A more attractive explanation is that the direct effect of Charter rights is something new and slightly different from that of treaty provisions, inter alia in that they are able to take such effect even without passing the test for clarity and precision.[28] Possibly, this could be explained and justified by their status as just fundamental rights and their centrality in the EU legal order; since these are highly important provisions in the EU legal order, they should be able to take effect even though by nature they are less than clear and precise. The hypothesis gains some support from the reasoning in *Bauer and Willmeroth,* in which the Court devoted several paragraphs to the argument that the right to paid annual leave laid down in Article 31 CFR constitutes an 'essential principle' of EU social law.[29]

In vertical relations, where the rights are being exercised against the state or a state-controlled actor, this explanation can perhaps be accepted, even though the direct textual support remains rather weak. Where Member States set aside the fundamental rights that they have agreed to protect, there appears to be little harm done and significant gains to be had by allowing individuals to rely on the rights even where they are somewhat indeterminate. This is parallel to the Court's reasoning as regards the vertical direct effect of directives. However, in horizontal relationships such as *Braathens,* the problem becomes more pressing.[30] On what grounds does the Court make exception from the requirement that clarity and precision is necessary for an EU law to take direct effect against a private party, who has legitimately relied on the (probably more precise) national legislation to be disapplied?

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[27] For instance, Articles 7 and 15 of the Racial Equality Directive, which in *Braathens* were said to give specific expression to Article 47 CFR, provide that Member States must 'ensure that judicial and/or administrative procedure … are available' and that 'effective, proportionate and dissuasive' sanctions are provided and enforced. This does not appear to render any significant clarity or precision to the last-mentioned Article (especially not on the question of whether and under what circumstances declaratory actions should be allowed). Cf Elise Muir, 'The fundamental rights implications of EU legislation: Some constitutional challenges' (2014) 51 Common Market Law Review 219–46, 224 f, who describes how this Directive specifies the principle of equal treatment by eg defining the concept of discrimination and its scope.

[28] Cf Frantziou (n 2) 218, who argues that *unconditionality* constitutes the general test for direct effect for Charter provisions. However, as observed above, not even this simplified test appears to have been carried out in relation to Article 47 CFR.

[29] C-569/16 and C-570/16, *Bauer and Willmeroth*, paras 80–83. Similarly, in *Egenberger*, the Court observed that the principle of non-discrimination is not only a general principle of EU law but has a history in international treaties as well as in the constitutional traditions of the Member States (C-414/16, *Egenberger*, paras 75–76).

[30] For a criticism of the Court's case law on horizontal direct effect in this context, see Eleni Franziou, 'The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality' (2015) 21 European Law Journal 657–79, 663.

This problem appears to be closely related to that of the direct effect of general principles,[31] which has been debated ever since the 2007 ruling in *Mangold*, when the Court for the first time held that a general principle of EU law can take horizontal direct effect.[32] For the purposes of this paper, it could however be noted that the concern is perhaps of relatively lesser relevance in relation specifically to Article 47 CFR. While Article 47 can clearly, as it was in both *Braathens* and *Egenberger,* be invoked in horizontal disputes, the obligation to provide effective judicial protection does not in itself rest upon the individual counterparty. The employer is the one who must refrain from discrimination (thereby upholding Article 21 CFR) and the one who must pay for the annual leave (thereby upholding Article 31(2) CFR), but in the case of a dispute, it is not the employer who is expected to provide effective judicial protection pursuant to Article 47 CFR– it is the Member State.[33] Article 47 CFR therefore, by definition, applies in what literature has termed 'triangular' situations, in which the direct effects produced are 'incidental' in relation to the right-holder's counterpart. While this doctrine has been rightly criticized for 'opening up the path to a[n] absurd reduction',[34] it does seem to entail that the problem of horizontal direct effects has additional precedent in relation to Article 47 CFR.

In sum, it is difficult to find a satisfactory explanation for the lack of a test for the criteria for direct effect. Nevertheless, it appears rather clear that Charter provisions, like general principles, are indeed capable of taking such effects without first passing the test for sufficient clarity and precision. This suggests, perhaps, that the direct effect enjoyed by Charter provisions is its own subcategory of direct effect, to which not all the normal rules apply. It does however also inescapably entail that national courts may sometimes be faced with the obligation of applying directly a provision or principle in an individual dispute, despite the provision in question not being sufficiently clear and precise in its bearing on the situation. The next section will therefore examine how such application may be carried out.

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[31] On the relation between Charter rights and general principles, see Emily Hancox, 'The Relationship Between the Charter and General Principles: Looking Back and Looking Forward' (2020) 22 Cambridge Yearbook of European Legal Studies 233–57.

[32] See eg Mustafa T Karayigit, 'The Five Shades of the Interplay in Horizontal Litigation Between the General Principles of EU Law on Non-discrimination and Directives' (2022) 30 European Review of Private Law 481–504; Leczykiewicz (n 22) 480; Michael Dougan, 'In Defence of *Mangold*?' in Anthony Arnull and others (eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart 2011) 219–44.

[33] Similarly see Marek Safjan and Dominik Düsterhaus, 'A Union of Effective Judicial Protection: Addressing a Multi-level Challenge through the Lens of Article 47 CFREU' (2014) 33 Yearbook of European Law 3–40, 17.

[34] Michael Dougan, 'When Worlds Collide! Competing visions of the relationship between direct effect and supremacy' (2007) 44 Common Market Law Review 931–63, 960. See also Paul Craig, 'The Legal Effect of Directives: Policy, Rules and Exceptions' (2009) 34 European Law Review 349–77, 363.

4. Exclusionary and Substitutionary Effects of Article 47

Since, as was concluded in the previous section, Article 47 CFR seems to be able to take direct effect without passing the 'sufficiently clear and precise' threshold, the inevitable risk is that it will at least sometimes have to be applied by national courts despite lacking prerequisite clarity for effective justiciability. The *Braathens* situation appears to be one such example. Article 47 CFR patently says nothing about the conditions under which national courts must issue a declaratory judgment – yet it forms the legal basis upon which the national court was supposed to issue such a judgment, having set aside the contrary provision(s?) of national law. How is that interpretation and application of Article 47 CFR to be carried out?

In our example deriving from the *Braathens* ruling, the referring Supreme Court of Sweden was spared from ruling on these questions. By the time adjudication was resumed there the defendant had already conceded the applicant's claim and admitted that it had indeed discriminated against him. Since that concession fulfilled the same compensatory function as a declaratory judgment would, the court was relieved from its obligation to render judgment to that effect.[35] It therefore decided in favour of the claimant on the basis of the defendant's admission, which now included not only the payment but also the grounds for it, while again refusing to entertain the action for declaration (but observing *obiter dictum* that the CJEU ruling had demonstrated 'tensions' between Swedish and EU law, which it called upon the legislature to address).[36]

Let us assume, however, that the defendant had not relented, and the national court would have had to find a way to comply with EU law through its judgment. The first task for it would have been to identify the provision of national law that was at the root of the incompatibility and needed to be set aside. Section 2 above identified two provisions of particular interest in the case: SCJP 13:2 on the admissibility of declaratory actions and SCJP 17:3 on the binding effect of the parties' claims.[37]

Disapplying SCJP 17:3 would handle the problem. In this option, the applicant's action for a declaratory ruling would still be inadmissible, but the disapplication of SCJP 17:3 would allow the court to render judgment on whether discrimination had occurred even without an explicit action to this effect. This alternative, however, would seem to create quite far-reaching effects for Swedish civil

[35] C-30/19, *Braathens,* para 46; see also Opinion of Advocate General Saugmandsgaard Øe in C-30/19, *Braathens*, EU:C:2020:374, para 41.

[36] See Ö 2343-18, Supreme Court of Sweden, Decision (21 December 2021) NJA 2021 s 1093.

[37] As hinted above, both provisions arguably lend themselves to harmonious interpretations. However, as this question is of little interest to lawyers outside of Sweden, it will not be discussed here.

procedure, disrupting the principle of party autonomy, and effectively give the courts the right to raise ex officio any issue that they consider relevant. Even if the effects of disapplication were lessened by the subsequent direct application of Article 47 CFR, which presumably protects not only the applicant's right to be heard but also the defendant's right to mount an effective defense, it would seem that disapplying this cornerstone of the national procedural order could likely create more problems than it solves.

The better option would therefore be to identify SCJP 13:2 as the provision to be set aside, thus removing the limits placed by Swedish law on access to justice for declaratory claims. While disapplying these limitations might increase the number of actions for declaration, this would not systematically disrupt the principles of civil procedure the way a disapplication of 17:3 would.

On the basis of this brief analysis, let us assume that SCJP 13:2 is identified as the provision incompatible with EU law. It is thus to be disapplied. Doing so, the national court would encounter the next question: What, precisely, is to be set aside? The whole section? A particular subsection? Or perhaps merely the part of it where the particular problem seems to be allocated? And what, precisely, is to be applied in its place?

In order to answer these questions, it is useful to have a closer look at the provision in question. Chapter 13, Section 2, subsection 1 of the Swedish Code of Judicial Proceedings reads as follows: 'An action for a declaration of whether or not a certain legal relationship exists may entertained on the merits if an uncertainty exists as to the legal relationship, and the uncertainty exposes the plaintiff to a detriment.'[38] The rule is thus that actions for declaratory rulings *may* (i.e., subject to the court's discretion) be allowed, if they concern a legal relationship (i.e., not a matter of fact), are disputed between the parties, and the applicant suffers harm (by which primarily economic harm is intended) as a result. In *Braathens*, it appears that the stumbling block for the claimant was mainly the discretionary assessment as to whether the claim was suitable; the district court argued and the appeals court agreed that, since the eventual outcome would be the same in either case, namely the order for payment of the SEK 10,000 that the defendant had already agreed to pay, it would be unnecessary and a waste of resources to examine the action for declaration.[39] The claim

[38] Anders Bruzelius and others, 'The Swedish Code of Judicial Proceedings' https://www.regeringen.se/49bb67/contentassets/5503f73d320b4de5bb521dd7ee07500a/the-swedish-code-of-judicial-procedure accessed 17 June 2022.

[39] For more detail on the assessments of the various claims presented in the case, see Torbjörn Andersson, 'Narrative Lost: Civil Procedure and Protection of Individual Rights' in Vittoria Barsotti and Alessandro Simoni (eds), *Procedure and legal culture*: *Scritti per gli 80 anni di Vincenzo Varano* (G Giappichelli Editore 2020), 175–90, 188.

was therefore rejected as a matter of judicial discretion. (This also entails that the entire situation could have been avoided if the court had simply decided to exercise their discretion in the other direction. On the other hand, this would still not have meant that the applicant had access to justice as a matter of right, which arguably is required by the *Braathens* ruling.)

The national court seeking to address the situation could choose to set aside 13:2 in its entirety. Doing so would leave Swedish civil procedure entirely without provisions on declaratory actions, and the new basis for bringing such actions would have to be provided by the direct, substitutionary effect of Article 47 CFR. This poses something of an interpretational challenge, since, as has been already pointed out, that Article does not (explicitly) say anything at all about declaratory actions or the conditions under which they may be brought. The simplest solution to this problem would be to interpret it as a catch-all statement to the effect that declaratory actions are allowed, regardless of circumstances. This, however, would seem to cause some problems. First, but perhaps not all too importantly, it would create a strange contrast from actions for specific performances, which are, as a rule, allowed but regulated in some detail in SCJP 13:1. Second, the underlying purpose of limiting the availability of declaratory actions appears overall justifiable; as declaratory judgments are not enforceable and therefore may lead to further litigation, they risk causing increased costs for both the other party and the court organization. Although in the case of discrimination proceedings, they may have had unfortunate effects, the general interest of not burdening the courts and defendants unnecessarily with actions that do not result in enforceable judgments seems one worth upholding.

In that case, Article 47 CFR would have to be interpreted in a way that replaces the admissibility criteria of the disapplied provision with other, better balanced criteria that shut out illegitimate or unnecessary claims while allowing those that, like in *Braathens*, pursue an interest deserving of judicial protection. Considering that the wording or history of Article 47 CFR provide no clues as to how to strike that balance, this seems to place a significant burden and responsibility upon judges, essentially putting them in the shoes of the legislature. If this is to be done in casu by individual national judges – which is how direct effect typically works – there seems to be a significant risk of diverging practices arising across the Union, not to mention that national judges would have to reinvent some presumably quite different-looking wheels, using time that could instead have been spent on their core task of adjudicating individual disputes. The alternative is that the issue is referred to the Court of Justice, but this would meet with either one of two problems. If the Court were to take

on such a question and give a detailed interpretation of Article 47 CFR, answering the question of when an action for a declaration must and must not be allowed to proceed, this would seem to amount to European harmonization of civil procedure at the hands of the CJEU judges, for which the Union has no conferred powers and the judiciary has no legitimacy. The more likely alternative is that the Court would refuse to take on such an abstract and general task and would instead resolve the question in a piecemeal fashion over many years and a large number of preliminary references, of which *Braathens* might in retrospect come to be seen as the first. In that case, the end result might be the same, but it would presumably be preceded by a decade or so of uncertainty during which national courts would waste time and effort trying to apply the unfinished, directly effective Article 47 CFR rule on declaratory actions.

It is however not necessary to assume that disapplication affects the provision in its entirety. A second and more attractive option is that only part of the provision is disapplied. In this case, for instance, disapplication could affect only the problematic criteria for admissibility, or only the discretionary nature of the rule. In this case, the substitution effects required from Article 47 CFR would be more limited, and therefore more easily supplied. However, the question of striking a balance would persist. If, for instance, the discretionary character of the rule – specifically, in the example of SCJP 13:2, the word 'may' – is disapplied, should it be replaced with a general obligation to entertain all declaratory claims fulfilling the admissibility criteria? This again risks overshooting the target and disturbing the national procedural order more than what is necessary to achieve the aim. Alternatively, the substitutionary rule could be designed in a more nuanced way that, for instance, preserves discretion in the cases where Article 47 CFR does not establish a right to a declaratory judgment – but how to identify those? – and replaces it with an obligation to allow the action only where required in order the fulfil Article 47 requirements.

Indeed, this effect would also be possible to obtain without necessarily going through the mental exercise of disapplication. In this third option, deviation from the national rule would be ensured not by disapplying the provision causing the problem, but by introducing Article 47 as a directly effective *exception* to that rule. Assume, for instance, that instead of disapplying any part of SCJP 13:2 as reproduced above, a new sentence is introduced along the following lines: 'In cases of moral damage where a declaration forms an integral part of an effective remedy, an action for declaration mentioned in paragraphs 1 and 2 must be entertained.'

Of course, one might argue as to whether this is a wide enough, or too wide, interpretation of the ruling in *Braathens*. For instance, it is not limited to the field of discrimination, which the Court's

heavy reliance on Articles 7 and 15 of the Racial Equality Directive in that judgment arguably suggests that its ruling might be. In that case, the exception could however easily be amended to reflect that fact. On the other hand, the fact that the Court described Articles 7 and 15 as merely specific expressions of a general principle codified in Article 47 CFR arguably suggests that the ruling might have consequences going beyond non-discrimination law, which might speak in favour of a somewhat more extensive interpretation.[40]

Out of these three possibilities, the first-mentioned alternative of full exclusion of the national rule can be rejected; Article 47 simply is not able to bear, in any meaningful way, the burden of that sort of full substitution in detailed procedural law questions. The two remaining options are closely related and probably both workable. However, the third, exception-based approach appears to have some advantage over the second option of partial exclusion. Specifically, if the whole point is to apply Article 47 CFR directly, there is no real reason to be so tightly tied to the wording and design of the national rule to be disapplied. As the example above has shown, the risk when labouring with this kind of detailed remake of a national rule is that, in order to bring within its scope the situations that need to fall there, it instead becomes overinclusive. The third option of not actually disapplying the national rule but furnishing it with a new exception appears to meet these difficulties. First, this option does not create a lacuna in the national legislation but preserves all the detail already there. Second, it gives liberty to tailor the exception as broadly or narrowly as needed in order to remedy the breach of EU law in the case at hand as well as to avoid similar breaches in future situations. Third, the technique is actually not unknown to the application and interpretation of law, but follows quite closely the treatment of precedent in e.g. Austria, where highest court rulings are condensed into *Rechtssätze,* which then come to function as complementary legal dicta.[41]

A formalist reader of the CJEU's ruling in *Braathens* may perhaps protest that the ruling explicitly states that the national rule should be disapplied. This, however, should not be considered a major obstacle. It is highly doubtful that the Court of Justice has strict opinions on the technical ways in which a national legal order ensures enforcement of its rulings. Indeed, its frequent practice,

[40] I have elaborated on this point elsewhere, see Anna Wallerman Ghavanini, 'Remedies for non-material damages: Striking out in a new direction? *Braathens*' (2022) 59 Common Market Law Review 151–70, 167.

[41] See Julius Schumann, 'Precedents – A Question of Memory' in Amalie Frese and Julius Schumann (edes), *Precedents as Rules and Practice: New Approaches and Methodologies in Studies of Legal Precedents* (Hart-Nomos 2021) 157–94, 164.

exercised also in *Braathens*,[42] of advocating direct effect only as a subordinate alternative to harmonious interpretation demonstrates that the Court has no independent interest in the disapplication of national law or the direct application of Union legal provisions.[43] Furthermore, arguably, the introduction of an exception that is then applied instead of the offending original provision does entail the disapplication of the latter, albeit in casu as a matter of application of law rather than more definitively as a matter of judicial law-making.

One might also wonder whether this kind of analysis does not make the problem more difficult than it needs to be. Why would a national court, whose main task is to settle the dispute in a way that upholds the right of effective judicial protection, have to decide what particular part of national law is being disapplied, and what the precise formulation of the substitutionary rule should be? In casu, it is often relatively clear what effects are needed in order to ensure compliance with Article 47 CFR without the need to spell out a specific *Rechtssatz*. However, the analysis conducted above is necessary in order to preserve transparency and legal certainty, which in turn are fundamental components of equality before the law. The duty to give objective, legal reasons for a judgment must be considered to include an explanation of the rules that were – or were not, as the case may be – applied. Certainly, a satisfactory solution in an individual case could be achieved without the national court indicating which precise rule or part of a rule was disapplied, and what rule was applied in its place. But if it does, how are the presumptive and future parties of similar cases to know what procedural requirements they must fulfil to have their cases heard? How are other judges to understand what that court did, in order to do the same when similar cases occur before their courts – indeed, how are they even to identify the right cases as 'similar' in a legally relevant sense? These considerations apply *in forte* when the court in question is, as in *Braathens*, a supreme court, whose judicial and constitutional function is precisely to provide useful guidance to courts throughout the entire judiciary.

5. Spillover Effects: What About the Principles of Effectiveness and Equivalence?

Finally, we turn to the question of whether the case law on the direct effect of Article 47 CFR has any bearing on the principles of effectiveness and equivalence. First established in the 1976 *Rewe* and

[42] C-30/19, *Braathens,* para 58; and further eg Case C-282/10, *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*, EU:C:2012:33, para 44; Case C-441/14 *Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen*, EU:C:2016:278, paras 42–43; C-146/19, *SCT, d.d v Republic of Slovenia*, EU:C:2020:464, para 51.

[43] Cf Frantziou (n 2) 217.

Comet judgments, the twin principles have long formed the main basis for CJEU scrutiny of national procedural law. Although some commentators have claimed that the principles of effectiveness and equivalence are in the process of being rendered obsolete by Article 47,[44] the Court's continued practice of referring to them even in its most recent case law suggests that they still have a function to fulfil in EU law.

The Court has so far not stated that the principles of effectiveness and equivalence have direct effect. Still, the development of the *Rewe* principles is closely intertwined with the principle of effective judicial protection, and both literature and the Court itself have recognised a close, if muddled, kinship between Article 47 CFR and the principles of effectiveness and equivalence.[45] If so, it would make sense to assume that the principles also have the same ability to produce direct effects. Furthermore, as noted above, the direct effect of general principles seems to follow a pattern similar to that of the direct effect of Charter rights. So, considering that Article 47 CFR is capable of taking direct effect, does the same apply to the principles of effectiveness and equivalence?

Systematically, there seems to be no reason why these principles should not be able to take on direct effect on the same grounds as Article 47 CFR or the principle of non-discrimination. The principles have been well-established in EU law since the mid-1970s, have had a consistent expression with very few alterations since the 1980s (after the addition of the alternative criterion of 'or excessively difficult' in the 1982 *San Giorgio* ruling) and been subject to a test that has remained more or less constant since the late 1990s (the *Palmisani* ruling concerning the principle of equivalence and the *Van Schijndel* ruling for the principle of effectiveness). As general principles go, these must be considered among the most fleshed out and well-established in the Union acquis. As the Court has now established that both general principles as such, and the closely related right to effective judicial

[44] Rob Widdershoven, 'National Procedural Autonomy and General EU Law Limits' (2019) 12 Review of European Administrative Law 5–34.

[45] See eg Case C-268/06, *Impact v Minister for Agriculture and Food and Others*, EU:C:2008:223, para 47; Case C-61/14, *Orizzonte Salute - Studio Infermieristico Associato v Azienda Pubblica di Servizi alla persona San Valentino – Città di Levico Terme and Others*, EU:C:2015:655, para 48; Opinion of AG Bobek in Case C-89/17, *Banger*, EU:C:2018:225, 99; and further Allison Östlund, 'Effective judicial protection - to what effect and at whose service?' (2022) 47 European Law Review 175–99, 184 f.; Francesca Episcopo, 'The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law Before National Courts' in Paul Craig and Gráinne de Búrca, *The Evolution of EU Law* (3rd edn, OUP 2021) 275–306, 303 f.; Jasper Krommendijk, 'Is there light on the horizon? The distinction between "Rewe effectiveness" and the principle of effective judicial protection in Article 47 of the Charter after *Orizzonte*' (2016) 53 Common Market Law Review 1395–1418; Sacha Prechal and Rob Widdershoven, 'Redefining the relationship between "*Rewe*-effectiveness" and effective judicial protection' (2011) 4 Review of European Administrative Law 31–50.

protection in particular, are capable of taking direct effect, there seems to be no reason why the principles of effectiveness and equivalence should not be given the same effect.[46]

Granted, this would not be without its own problems; albeit well established, the formulation of the principles of effectiveness and equivalence still do not give particularly clear a priori guidance as regards their specific effects on various procedural problems. Commentators have often expressed surprise or annoyance at the CJEU's interpretation of them and their implications, and it is highly questionable if they are sufficiently clear and precise to be applicable in themselves to detailed procedural questions. As has been noted above, however, the same could be said about Article 47 CFR, which nevertheless is, according to the CJEU, to take direct effect before national courts. If the Court were to hold that the principles of effectiveness and equivalence had the same qualities, it is likely that they would take on the same kind of direct effect, i.e. the one that is not dependent on the EU provision being sufficiently clear and precise.

Although this reasoning appears to hold water on a principled level, one merit that it does not possess is that of textual support in the Court's case law. The CJEU has never ruled that the principles of effectiveness and equivalence are capable of taking direct effect. Additionally, the language of its description of the effects they do have is typically that the principles of effectiveness and equivalence *preclude* the application of a national rule that runs counter to them,[47] whereas Charter rights have been deemed directly effective, with the Court typically obliging national courts to *disapply* the conflicting national provision.[48] While it is difficult to understand the difference between precluding the application of a national provision and obliging a national court to disapply it, it must be considered whether the Court's consistent (or at least so common as not to be discarded as an occasional slip of the pen) use of different locutions should be taken to indicate different meanings. Especially, the fact that the language of preclusion has been used by the CJEU in its post-*Poplawski II* case law without the Court recognizing any tension between the effect of preclusion on the one hand and the dictum that exclusionary effects must be accompanied by direct effect and substitution, on

[46] Cf Karayigit (n 32) 501 ff., who discusses the possibility that 'direct effect is inherent in the nature of the general principles'.

[47] For example Case C-114/08, *Transportes Urbanos y Servicios Generales SAL v Administración del Estado,* EU:C:2010:39, para 46; Case C-536/11, *Bundeswettbewerbsbehörde v Donau Chemie AG and Others,* EU:C:2013:366, para 49; Case C-166/14, *MedEval - Qualitäts-, Leistungs- und Struktur-Evaluierung im Gesundheitswesen GmbH*, EU:C:2015:779, para 44; Case C-429/15, *Evelyn Danqua v Minister for Justice and Equality and Others*, EU:C:2016:789, para 49.

[48] C-569/16 and C-570/16, *Bauer and Willmeroth*, para 91; C-414/16, *Egenberger*, para 79; C-68/17, *I.R.,* para 71; C-193/17, *Cresco Investigation*, para 80; C-233/19, *CPAS de Liège*, para 57.

the other,[49] suggests that at least in the Court's thinking, the preclusionary effect of the principles of effectiveness and equivalence differs from the exclusionary effect of Article 47 CFR.[50]

A possible distinction would be that the preclusionary effect is addressed to the legislature; if EU law precludes a national provision, the legislature is prevented from introducing or keeping it in the national code. However, this interpretation is difficult to reconcile with a long line of cases in which it is rather obvious that the Court expects the national referring court to address the issue of incompatibility in casu. Furthermore, the interpretation becomes less tenable even on textual grounds when it is not the rule itself, but its *application* that is ruled to be precluded.[51] In these cases, the statement is clearly directed to the actor charged with applying the rule – that is, the national court. Here, again, preclusion appears to come very close to exclusion.

Possibly, a solution could be read into the choice of the word *preclude* as such. Preclusion is in itself a procedural law concept, denoting that something – a claim, a fact, or a piece of evidence – that usually would be perfectly admissible before court has now, because of some previous development in the case – typically a previous judgment with the quality of *res judicata*, or the passing of a time limit – lost its legal relevance. This analogy suggests two things: first, that the issue of preclusion must be assessed separately in every individual case; second and relatedly, that an issue that is precluded under certain circumstances may still be admissible under others.

This suggests a softer and more limited effect than the language of incompatibility, which is associated with direct effect and the duty to set aside national legislation. This appears to be well in line with the established test for the principle of effectiveness, which according to the Court's settled case law requires that a national rule be judged on a case by case basis taking into account its effects under the specific legal and factual circumstances in which it is to be applied.[52] This would entail that, when the principle of effectiveness prevents a national provision from being applied, this does not necessarily suggest that the provision is problematic per se; it is quite possible that the circumstances

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[49] See eg Case C-676/17, *Oana Mădălina Călin v Direcţia Regională a Finanţelor Publice Ploieşti – Administraţia Judeţeană a Finanţelor Publice Dâmboviţa and Others*, EU:C:2019:700, para 57; Case C-501/18, *BT v Balgarska Narodna Banka*, EU:C:2021:249, para 127; Case C-3/21, *FS v Chief Appeals Officer and Others*, EU:C:2022:737, para 48.

[50] Cf also C-824/18, *A.B. and Others,* para 150, where the Court clearly distinguishes between preclusion and disapplication, the latter appearing to be an effect of, or perhaps remedy against, the former.

[51] See eg C-2/08, *Amministrazione dell'Economia e delle Finanze and Agenzia delle entrate v Fallimento Olimpiclub Srl*, EU:C:2009:510, paras 31–32; C-114/08, *Transportes Urbanos,* para 46, C-3/21, *FS*, para 48.

[52] Case C-312/93, *Peterbroeck, Van Campenhout & Cie SCS v Belgian State*, EU:C:1995:437, para 14; Joined Cases C-430/93 and C-431/93, *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten,* EU:C:1995:441, para 19; Case C-473/00, *Cofidis SA v Jean-Louis Fredout*, EU:C:2002:705, para 37; and further Episcopo (n 45) 283 f.

of the case and the individual claimant are exceptional, prompting an exceptional response from the courts. In that case, the problem of creating a lacuna in national law and refilling it with another rule of EU origin does not present itself with the same strength, as the precise requirements of the EU rule in the case at hand are often obvious from the CJEU's ruling and the need for a generalizable rule for the future does not arise; future cases need to be assessed after their own unique features.

This interpretation is not, of course, free from its own problems. In the first place, the distinction between a collision of norms, where a national rule is judged to be incompatible as such with Article 47 CFR, and the mere unfortunate occasion of a national rule under certain factual circumstances giving rise to effects conflicting with the principle of effectiveness, is fuzzy. Certainly, the assessment of incompatibility under Article 47 CFR takes into consideration the effects of the national rule in a particular case; the CJEU famously refuses to rule on preliminary references in the abstract (i.e., without sufficient details of the case at hand), and it cannot be concluded from *Braathens* that Section 13:2 SCJP is always or even generally contrary to Article 47 CFR. The difference between abstract interpretation of law and assessment of the effects of a legal provision in casu is one of degree rather than of kind. Nevertheless, differences of degree are still differences, and in fact the most common ones in law (and probably beyond).

In the second place, the explanation is significantly more convincing as regards the principle of effectiveness than that of equivalence. The test of effectiveness, as was noted above, is carried out in casu and with reference to circumstances particular to the case, thus supporting the notion that a conflict with the principle of effectiveness need not give rise to any more generalized effects. The test of equivalence, on the other hand, is carried out as a comparison between the *type of action* brought in the case under scrutiny and the alternative types of actions available for comparative claims based on national law.[53] Thus, if a national provision is found to be incompatible with the principle of equivalence, this typically indicates that the incompatibility is not limited to the individual case, and that the less favourable rules need to be set aside not only in that case but also in all other cases following the same procedural track. On the other hand, the question of substitution is in practice significantly less problematic when it comes to the principle of equivalence, as there is no risk of a lacuna; the very fact that there has been a violation necessarily entails that a comparable rule already exists and can be applied in place of the less favourable one. Possibly, this entails that there is no need

[53] See eg Case C-78/98, *Shirley Preston and Othes v Wolverhampton Healthcare NHS Trust and Others and Dorothy Fletcher and Others v Midland Bank plc,* EU:C:2000:247, paras 48–63; C-118/08, *Transportes Urbanos,* paras 35–46; Cf Episcopo (n 45) 295, who observes that the principle of equivalence has the potential of 'questioning the overall coherence of national judicial systems'.

to rely on the principle of equivalence as such; one can merely rely indirectly on that principle in order to secure the applicability of an alternative national rule that already exists, in something akin to consistent interpretation (but perhaps, on the strength of the principle's preclusionary effect, going beyond the limit of *contra legem* if necessary).

6. Conclusion

In the story about the stone soup, a wanderer arrives to a poor village and offers to cook a soup for the inhabitants, using only water and a stone as ingredients. Little by little, however, he convinces the villagers to each add a little something from their own lands or pantries to the pot, in order to improve the flavour. In the end, the stone is discarded, and the villagers and wanderer together enjoy what has at this point become a rich vegetable soup.

Much like the stone in the folk tale, Article 47 appears to be a necessary ingredient in the adjudication of cases like *Braathens* – the catalyst without which the process of enforcement would not be allowed to commence. Looking to the eventual result, however, it appears that Article 47 as such adds rather little to the final product. Instead, a number of national and EU secondary provisions have to be relied upon in order to fill the obvious lacunae left by Article 47 CFR when put to this kind of concrete use in relation to specific procedural problems. In the end, one might question whether Article 47 really adds any flavour at all. Still, without it, there would be no soup.

This article started from the puzzling premise that the CJEU has held, repeatedly and in various circumstances, that Article 47 CFR creates rights for individuals that they may rely on as such before national courts, yet it has not examined whether that Article is sufficiently clear and precise to be applied directly by national courts in this manner. Indeed, the article has argued that on many occasions, Article 47 CFR is in fact *not* clear enough in itself to be applied directly.

Under the case law of the CJEU, a directly effective rule of Union law has both exclusionary and substitutionary effects; i.e., it results first in the disapplication of a national rule contrary to EU law, and then in the introduction of the superior EU legal rule as a replacement. This article has shown that in the case of Article 47 CFR, the exclusionary effects are of lesser importance. The disapplication of a specific national procedural rule will cause a lacuna in national law, which Article 47 CFR is ill equipped to refill. Instead, this article has argued that a better approach to the direct effect of Article 47 is to formulate, on the basis of the CJEU's interpretations in conjunction with more detailed national legislation, a judge-made rule or *Rechtssatz* catering to the rights identified in the ruling, that can subsequently be introduced before the national court as an exception to the national provision found

to be incompatible with EU law, while the latter retains its position as a valid, workable, and applicable legal provision.

Finally, the article considered whether the direct effect of Article 47 entails that the principles of effectiveness and equivalence should also be considered capable of taking direct effect. It argued that although the same arguments as those used concerning Article 47 could be adduced in support of that conclusion, there is nothing in the CJEU's case law suggestive of direct effect for the principles of effectiveness and equivalence. Indeed, the Court's language in cases of infringements of these principles suggests that their effects are of a different, if related, kind, and importantly that they do not appear to be able to take on substitutionary effects. The paper suggested that the effects of, in particular, the practically more important principle of effectiveness could be considered limited to the unique circumstances of an individual case, which lessens the risk for legal lacunae as well as the need for predictable and generalizable replacement rules.

Section III
EU Remedies / CJEU Litigation

Chapter 5

Drawing the Lines between Validity and Bindingness in EU Law: The *FBF* Case

*Giulia Gentile**

1. Introduction

The *Fédération Bancaire Française* (FBF) case[1] adds significant insights into the role of EU soft law in the EU governance system and the avenues available to challenge these instruments.

The case has already attracted academic attention[2] for the (novel and less novel) constitutional principles on EU soft law it established. First, starting with the 'less innovative' principles, EU soft law acts such as guidelines issued by the European Banking Authority (EBA) are not reviewable through an action for annulment because of the lack of legally binding effects. In *Commission v Belgium*,[3] the Court of Justice (CJEU) had already indicated that another type of EU soft law, that is EU recommendations, cannot be challenged via an action for annulment. Second, and more innovatively, *FBF* posited that EU soft law can be challenged by way of a preliminary ruling on validity, notwithstanding the absence of legally binding effects.

Yet the judgment in *FBF* also has a broader consequence for the functioning of the EU judicial review model: that of rescinding questions on validity from those on bindingness. *Prima facie*, this may be a dictum affecting only EU judges' activity. Indeed, as a result of this decision, in the context of actions for annulment, EU courts should first assess the bindingness of an EU act as a matter of admissibility, and – only if the act is binding and thus reviewable – then consider its validity on the

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[1] Case C-911/19, *Fédération bancaire française (FBF) v Autorité de contrôle prudentiel et de résolution (ACPR)* EU:C:2021:599.

[2] M Chamon and N de Arriba-Sellier, 'FBF: On the Justiciability of Soft Law and Broadening the Discretion of EU Agencies: ECJ (Grand Chamber) 15 July 2021, Case C-911/19, *Fédération Bancaire Française (FBF) v Autorité De Contrôle Prudentiel Et De Résolution*, EU:C:2021:599' (2022) 18 European Constitutional Law Review 286; G Gentile, 'To be or not to be (legally binding)? Judicial review of EU soft law after BT and Fédération Bancaire Française' (2021) 70 Revista de Derecho Comunitario Europeo 981; P Hubkova, 'Judicial Review of EU Soft Law: A Revolutionary Step Which Has Not Fully Happened (Case Note on *BT v Balgarska Narodna Banka*, C-501/18)' (2021) 55 Revista general de Derecho Europeo.

[3] Case C16/16, *Kingdom of Belgium v European Commission*, EU:C:2018:79

merits. Such distinction *de facto* reflects the current interplay between questions of admissibility and substance in the context of judicial review of EU acts.[4]

However, stark bifurcation of the question of validity from that of bindingness in EU law has implications concerning the effects of EU law, as well as its application. As this paper will demonstrate, the production of legal effects by an EU act (bindingness) is part of the broader assessment of validity. Therefore, it is conceptually and legally flawed to separate enquiries on the bindingness and the validity of an EU measure in the context of judicial review. Additionally, the distinction between validity and bindingness may complicate the way in which EU law's effects may be understood at the national level and, in particular, how national authorities apply EU law.

This paper contributes to the existing literature on EU soft law and judicial review by analysing the *FBF* judgment and reflecting on the rationales underlying its outcome. It then critically assesses the soundness of the bifurcation between validity and bindingness, and explores its implications for the EU model of judicial review and, more broadly, the EU legal landscape.

2. The *FBF* Case

The *FBF* case originated following the publication by the French *Autorité de contrôle prudentiel et de résolution* (ACPR) of a notice stating that it complied with the EBA Guidelines of 22 March 2016 on product oversight and governance arrangements for retail banking products. The ACPR also added that the EAB guidelines applied to the credit institutions, payment institutions and electronic money institutions under its supervision. FBF, which represents the interests of banking institutions in France, lodged an action seeking the annulment of the ACPR's notice before the French Council of State. The latter found that the notice adversely impacted the legal position of FBF, but raised doubts regarding the effects and the reviewability of the EBA guidelines. The Council of State submitted three questions to the CJEU. First, it questioned whether the EBA guidelines should have been subject to an action for annulment before the EU judicature. In the negative, second, the Council of State was unsure whether the applicant was entitled to challenge by way of objection the validity of those guidelines insofar as it was not directly and individually concerned by the guidelines. Third, if the validity of those guidelines could be tested via a plea of illegality before national courts, whether the guidelines exceeded the powers conferred to the EBA under Regulation No 1093/2010.

[4] ibid. See also K Lenaerts, I Maselis and K Gutman, *EU Procedural Law* (OUP 2015) 314 ff.

3. The Opinion of Advocate General Bobek

AG Bobek firstly assessed the nature of the guidelines. Under the consolidated EU case law, he submitted, the EBA guidelines would not be considered as having legally binding effects. Yet the established test on the production of legally binding effects presented, according to him, some flaws.[5] The consolidated case law focuses on substance of the act, the context of its adoption, and the powers of the author, but fails to take into consideration the *perceived* effects of EU law. Those perceived effects may, however, be crucial in cases involving acts of EU soft law (such as guidelines) issued by an EU institution, especially because of their effects at the national level. In *FBF*, the contested EBA guidelines were addressed to national authorities,[6] and the latter could decide to comply or to explain to the EBA the reasons for non-compliance. When deciding to abide by the EBA guidelines, the national authorities transformed these instruments into binding ones, not only for themselves but also for the financial institutions. However, the perceived effects of those guidelines were automatically excluded from the established jurisprudence on the production of legally binding effects. The AG's opinion therefore advanced the view that 'the test to determine whether an EU-law act is reviewable ought to focus on whether the act can reasonably be perceived as inducing (or even effectively imposing) compliance on the part of its addressee.'[7]

Subsequently, he analysed the compatibility of the contested guidelines with Regulation No 1093/2010; in particular, whether the EBA had exceeded its competence by adopting those guidelines. To carry out this evaluation, the opinion suggested that the level of scrutiny should be 'normal', so as to ensure that the EU judicature could perform the appropriate leve of scrutiny of EU soft law, especially on matters of competence.[8] In his assessment, AG Bobek emphasised that, although the guidelines rightly referred to a series of legislative bases that were implemented through the contested guidelines, the subject matter of those legislative bases and that of the guidelines were different. It was observed that the EBA guidelines detailed rules on product governance, while the legal bases only conferred powers on that authority to adopt guidelines in the field of corporate governance. This distinction was not purely theorical but practical. In the words of AG Bobek, 'corporate governance rules relate to the quality of internal processes and mechanisms which are

[5] Opinion of AG Bobek in Case C-911/19, *Fédération bancaire française (FBF) v Autorité de contrôle prudentiel et de résolution (ACPR)*, EU:C:2021:294, para 52.

[6] ibid para 53.

[7] ibid para 53.

[8] ibid para 94.

there to ensure the smooth functioning of the company. Product governance rules concern business choices that are there, essentially, for the marketing of cars.'[9] It followed that adoption of the guidelines exceeded the competence of the EBA and they were thus invalid.

The opinion then turned to the issue of the reviewability of the EBA guidelines via a preliminary ruling on validity. In AG Bobek's view, that legal avenue had to be available for scrutinising EU soft law, including the contested guidelines, for two reasons. First, in the context of a preliminary ruling on interpretation the EU judicature cannot assess whether an EU institution had respected the limits of its competence when adopting the EU soft law measure.[10] Second, disguising preliminary rulings on validity as preliminary rulings on interpretation could blur the division of labour between the EU and national judicatures, since only the EU courts are entitled to review the effects and the validity of EU law.[11]

The question then arose on the relationship between the action for annulment and the preliminary ruling on validity. According to the *TWD* jurisprudence,[12] a preliminary ruling on the validity of an EU measure cannot be submitted if the interested parties manifestly have standing before EU courts to bring an action for annulment. Applying that principle, the opinion remarked that FBF did not manifestly fulfil the requirements of individual and direct concern which were necessary for the purposes of the admissibility of a potential action for annulment. Consequently, FBF was entitled to challenge, by means of a plea of invalidity raised before national courts followed by a preliminary ruling request, the validity of the EBA guidelines.

AG Bobek then discussed the applicability of the *Foto-Frost* decision,[13] according to which national courts are under the obligation to request a preliminary ruling on the validity of an EU law measure unless they consider that the grounds put forward in support of invalidity are unfounded. This case law, according to AG Bobek, was created with the view to ensuring the uniform application of EU law.[14] In the *FBF* case, and particularly with regard to the contested EBA guidelines, there was no

[9] ibid para 68.

[10] ibid para 97.

[11] ibid para 106 ff.

[12] Case C-188/92, *TWD Textilwerke Deggendorf*, EU:C:1994:90.

13 Case C-314/85, Foto-Frost, EU:C:1987:452.

[14] Opinion of AG Bobek in Case C-911/19 (n 5) para 121.

obligation of compliance, so there was no need to ensure uniform application. For these reasons, the *Foto-Frost* case law could not apply.

In light of his detailed analysis, AG Bobek proposed that a preliminary ruling on validity should be a possible route to challenge the contested EBA guidelines, and that the EBA guidelines at stake were invalid for excess of competence.

4. The Judgment

The first issue addressed by the CJEU concerned the availability of an action for annulment to challenge the contested EBA guidelines.[15] The Court applied the consolidated case law and assessed the following elements: the substance, the context and the powers of the institution adopting the guidelines.[16] It remarked that, although the national competent authorities had a duty to notify the EBA on whether they complied with those guidelines and, if not, had to state the reasons for their non-compliance, the EBA guidelines were similar to recommendations, which are not binding upon their addressees.[17] The absence of legally binding effects was linked to the fact that national authorities were not obliged to comply with the guidelines, but instead had the choice to comply (or not). The CJEU argued that the EU legislator intended to confer on the EBA 'a power to exhort and to persuade, distinct from the power to adopt acts having binding force.'[18] It followed that the contested guidelines could not be challenged by an action for annulment before the EU courts under Article 263 TFEU.

The judgment then considered whether the preliminary ruling procedure could be used to assess the validity of non-legally binding acts. The Court recalled the *Belgium v Commission* judgment,[19] in which it was held that the preliminary ruling allows the Court to interpret and assess the validity of all EU acts without exception. Subsequently, the Court assessed the possibility to raise a plea of illegality in the context of national proceedings and the rules on standing governing this action. According to the established case law, it is a matter for national authorities to establish standing rules concerning pleas of illegality of EU law. Specifically, 'it does not follow from Art. 267 TFEU that that

[15] *FBF* (n 1) para 35.

[16] ibid para 37.

[17] ibid para 42.

[18] ibid para 48.

[19] *Belgium v Commision* (n 3), para 44.

article precludes national rules from allowing individuals to rely on the invalidity of an EU act of general application, by way of an objection, before a national court other than in a dispute relating to the application to them of such an act.'[20] This is because, as a matter of principle, individuals should have access to national courts to challenge the legality of any decision or other legal measure related to an act of the Union. Since the CJEU is the sole interpreter of EU law, then national courts doubting the interpretation of EU law *should,* in principle, submit a preliminary ruling request to the CJEU.[21] Hence, the Court maintained that a preliminary ruling on validity should be admissible where it is made in the course of a genuine dispute in which a question on the validity of an EU act is raised indirectly, 'even if that act has not been the subject of any implementing measure with regard to the individual concerned in the main proceedings.'[22] It followed that a preliminary ruling of validity should be a possible avenue to verify the lawfulness of EU soft law, including the contested EBA guidelines.

Finally, the judgment explored the validity of the EBA guidelines. The CJEU observed that Regulation No 1093/2010 laid down the powers of that authority in great detail. Therefore, siding with AG Bobek, the Court argued that the scrutiny of the EU judicature should be strict in this respect, regardless of the fact that these measures did not possess legally binding effects. Moving on to the assessment of the EBA's powers in the light of Regulation No 1093/2010, the Court found that there were no elements capable of disclosing that the guidelines did not fall within the scope of the competences of the EBA as outlined by the EU legislature. Therefore, the guidelines in question were valid and the plea of illegality had to be dismissed.

5. Separating Validity from Bindingness: Exploring Rationales

As mentioned above, the *FBF* judgment has confirmed *Belgium v Commission*,[23] in which the CJEU held that an act with no legally binding effects, such as a recommendation, could not be challenged via an action for annulment. It also reinforced the principle, established since *Grimaldi,*[24] that national courts should take EU soft law instruments such as guidelines into account. More innovatively, *FBF* indicates that EU acts not producing legally binding effects, such as guidelines, may nevertheless be contested via a preliminary ruling on validity. The rationale is that the preliminary ruling procedure may concern

[20] *FBF* (n 1) para 63.

[21] The obligation to submit a preliminary ruling request arises only for courts of last instance, see TFEU art 267(3).

[22] ibid para 64.

[23] *Belgium v Commission* (n 3).

[24] Case C-322/88, *Grimaldi*, EU:C:1989:646, para 18.

the interpretation or validity of any EU act *regardless* of the production of binding legal effects. Although clearly established for the very first time in *FBF*, this principle may be seen as a natural evolution of pre-existing EU jurisprudence. For instance, in *Kotnik*,[25] the CJEU reviewed the validity of an EU communication via a preliminary ruling action and admitted the preliminary ruling request without considering the presence of legally binding effects – although it did not explicitly exclude or evaluate the production of legal binding effects.

However, on a more systemic level, *FBF* also has crucial procedural consequences. Firstly, because the production of legal effects is part of the question of bindingness of an EU act, it should be a preliminary matter for the purposes of the admissibility of an action for annulment. Such an evaluation is separate from the scrutiny over the substance of an EU act, including its validity. But secondly, and by contrast, the validity of an EU act can always be contested via a preliminary ruling procedure, without the obligation for the EU judicature to assess whether the EU act produces legally binding effects.

In this sense, in *FBF* the CJEU has carefully not overruled the *TWD* jurisprudence.[26] As mentioned, this case law provides that a preliminary ruling on the validity of an EU measure cannot be submitted if the interested parties undoubtedly have standing before EU courts for the purposes of an action for annulment. By excluding the production of legally binding effects – a *sine qua non condicio* admissibility issue for the action for annulment –, the tension between the action for annulment and the preliminary ruling on validity to review the EBA guidelines fell apart. Conversely, in the presence of a legally binding EU act, the *TWD* case law would apply and – if the standing of the applicant were manifest – a preliminary ruling on validity would not be an option.

I have analysed elsewhere some of the implications of the *FBF* judgment, especially from the angle of the distinction between exhortation and legally binding effects, as well as the challenges for national courts in taking EU soft law into account.[27] In the following section, I will instead critically analyse three possible rationales for divorcing validity from bindingness in the context of EU law direct and indirect judicial review. I then reflect on the soundness of this CJEU's approach, and its implications for the EU model of judicial review and the broader EU legal landscape.

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[25] Case C-526/14, *Kotnik and Others*, EU:C:2016:767.

[26] *TWD* (n 12), para 17.

[27] Gentile (n 2), p 994 and ff.

5.1. Rationale 1: Decentralisation

The first rationale for the CJEU's decision to distinguish bindingness and validity is one based on decentralisation. By opening access to the preliminary ruling on validity regardless of the production of legally binding effects, all national courts become co-responsible with the CJEU for verifying the validity of EU soft law measures. This approach has several advantages. First, preliminary ruling requests arise in the context of disputes in which EU soft law may be of relevance. When that occurs, this action offers the opportunity to test the effects and implications of EU soft law *on the ground*. It is in the context of concrete circumstances that *de facto* the effects and implications of the law, including soft law, manifest themselves. Therefore, a concrete review in the context of a dispute pending before national courts may prove more effective than an abstract review carried out by the EU judicature *before* an EU act comes into operation. Second, the preliminary ruling procedure may be triggered even after the time limit of two months allowed for actions for annulment. In this sense, the preliminary ruling can offer wider protection compared to the action for annulment, which is subject to more a stringent time limit. It follows that the decentralised nature of the preliminary ruling procedure contributes toward enhancing the ability of individuals to challenge EU soft law. Third, and finally, by relaxing the availability of the preliminary ruling procedure on validity for EU soft law, the *FBF* decision reinforces the traditional approach of avoiding a flood of litigation before the EU courts. The restrictive interpretation of standing requirements under what is currently the action for annulment is linked to a narrative of restraints of the EU judicature and the need to triage litigation that could potentially overwhelm the administration of justice at the EU level.[28]

However, several observations reduce the soundness of the decentralisation rationale. First, although the CJEU would not be flooded with direct actions concerning EU soft law, the delegation of the scrutiny to national courts could create another type of litigation flood made by preliminary ruling requests. Indeed, the likelihood of an increased number of preliminary ruling requests concerning soft law is higher because these actions have no strict time limits and their admissibility requirements are lower compared to actions for annulment, as mentioned. In addition, several EU acts having the form of guidelines or recommendations are extensively applied at the national level, so questions on their

[28] See for instance M Rhimes, 'The EU Courts Stand Their Ground: Why are the Standing Rules for Direct Actions Still So Restrictive?' (2016) 9(1) European Journal of Legal Studies 156.

effects are likely to arise. Examples are provided in the fields of insurance[29] and competition[30] law. These two externalities could significantly augment the risk of preliminary ruling requests on validity regarding EU soft law, which, in turn, could overburden the activity of the EU judicature. Second, although the preliminary ruling can afford broader protection precisely because it can be triggered beyond the two-month time limit applicable for actions for annulment, a judgment declaring the invalidity of an EU soft law may arrive at a point in time where the effects of that act have consolidated themselves across the EU legal order.[31] The delivery of an invalidity decision could bring challenges from the perspective of legitimate expectations and legal certainty for national administrations and individuals. Such consequences to the decentralised model of validity review via the preliminary ruling procedure appear to be one of the reasons for the *TWD* case law and, in general, the scarcity of decisions declaring the invalidity of EU law delivered via preliminary rulings. Third, there is no individual right to obtain a preliminary ruling request.[32] Hence, especially when a case involving EU soft law is pending before a lower court, there is no obligation for the hearing judge to submit preliminary ruling requests to the CJEU. Therefore, there is no guarantee that EU soft law can be effectively scrutinised by the EU judicature.

5.2. Rationale 2: Applying and Reinforcing the Established Case Law

Another possible rationale for the decision in *FBF* concerns legal certainty and continuity with the EU established case law on judicial review of EU soft law. A case in point is *Commission v Belgium*,[33] in which the Court had excluded recommendations from the list of EU acts producing legally binding effects. As a result, the recommendation contested in *Commission v Belgium* could not be challenged via an action for annulment. The assessment of the Court in that case is of interest. The judgment devised a hierarchy of methods for assessing the production of legal effects by EU acts. First, adopting a formalist approach, the CJEU should verify whether or not the form of the act as chosen by its author falls within

[29] See European Insurance and Occupational Pensions Authority (EIOPA), 'Guidelines' https://www.eiopa.europa.eu/document-library/guidelines_en accessed 2 February 2023.

[30] See Communication from the Commission's Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons: Commission, 'Antitrust: Commission adopts Guidelines on collective agreements by solo self-employed people' (29 September 2022) 2022/C 374/02 C/2022/6846, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5796 accessed 2 February 2023.

[31] Gentile (n 2), p. 999.

[32] For a discussion on this topic, please see C Lacchi, *Preliminary References to the Court of Justice of the European Union and Effective Judicial Protection*, (Larcier, 2020).

[33] *Commission v Belgium* (n 3), para 26 and ff.

the list of acts producing legally binding effects under Article 288 TFEU.[34] Recommendations are excluded from the list of acts having 'binding force'[35] under that provision. Second, under a substantive approach, the CJEU should also evaluate whether the content, context and powers of the adopting institution[36] suggest the production of legally binding effects. In *FBF*, the Court followed the substantive approach. Indeed, it could not rely on formalistic approach based on the wording of Article 288 TFEU, since that provision does not mention guidelines.

However, the aspiration of continuity and legal certainty in light of the previous case law is in tension with compliance with other judgments, such as the *AETR* decision.[37] That judgment established an essential tenet of the judicial review model before EU courts: the form of the act should not determine its reviewability.[38] This decision therefore gives ample margin of discretion to the EU judicature to identify the acts that may be subject to an action for annulment. It should be remarked that, although issued before the Lisbon Treaty, the *AERT* judgment remained an authoritative precedent after the Treaty's entry into force.[39] Nevertheless, *Commission v Belgium* and *FBF* ultimately depart from that precedent: these two decisions strengthened the importance of the wording of Article 288 TFEU, which mentions that recommendations do not have binding force, and thus abandoned the broad leeway recognised to the EU judicature in carrying out judicial review of EU measures. What is more, in *FBF* the Court automatically assimilated the EBA guidelines to recommendations because the former were subject to the same regime of adoption as the EBA recommendations. It follows that both *Commission v Belgium* and *FBF* have at least partially overruled the EU case law established since the *AETR* judgment, which adopted a much broader approach to judicial review notwithstanding the absence of the wider opportunities for judicial review currently existing under Article 263 TFEU.[40] As a result, the rationale of respecting the established case law does not appear to stand on solid ground.

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[34] ibid para 26 ff.

[35] The CJEU seems to use a slightly different wording compared to Article 288 TFEU, in so far as it refers to *legally binding* effects. One may wonder whether the nuances in the wording are voluntary and thus the concepts of 'binding force' and 'legally binding effects' are different.

[36] C-599/15 P, *Romania v Commission*, EU:C:2017:801; *Commission v Belgium* (n 3).

[37] Case C-22/70, *AETR*, EU:C:1971:32.

[38] *AETR* (n 37) para 42.

[39] See recently Case C-59/18, *Italian Republic et al v Council of European Union*, EU:C:2022:567.

[40] TFEU art 263 introduced the concept of 'regulatory act' which should (allegedly) broaden the opportunities for judicial review. See C Werkmeister, S Pötters and J Traut, 'Regulatory Acts within Article 263(4) TFEU–A Dissonant Extension of Locus Standi for Private Applicants' (2011) 13 Cambridge Yearbook of European Legal Studies 311.

5.3. Rationale 3: A Less Confrontational Scrutiny over EU Institutions' Powers

The final rationale for bifurcating validity and bindingness of EU acts could be one of 'constitutional politics', that of avoiding direct confrontational scrutiny over the activity of EU institutions when adopting EU soft law. By clarifying that the bindingness of EU law is a prerequisite for actions for annulment, and by fostering the availability of preliminary ruling requests on validity concerning EU soft law, the EU judicature did, to a certain extent, square the circle of EU constitutional politics.

On the one hand, it excluded itself from the duty of carrying out in-depth, direct scrutiny over the bindingness of EU soft law. In so doing, the CJEU also avoided the risk of going against the intention of the authors of EU acts who, in adopting acts such as guidelines and recommendations, had allegedly issued measures deprived of binding force. On the other hand, the CJEU confirmed its role as guardian of the Treaties and sole interpreter of the validity of EU law by asserting the availability of the preliminary ruling procedure on validity for all EU acts, including guidelines. However, as is well known, this action can be triggered only by national judges, who have the monopoly on the initiation of this procedure.[41] What is more, the intervention of the EU judicature in preliminary ruling requests only concerns the interpretation of EU law, without providing a final decision on the litigation pending before national courts. It is therefore a form of 'softer' judicial review, which smoothens confrontation with EU institutions and *de facto* leaves national judges with the task of making more substantive and challenging decisions on the application of EU law. Accordingly, the CJEU can carry its scrutiny in a more indirect, less confrontational, way.

This rationale appears convincing. However, one may wonder whether the approach of the Court speaks common sense and achieves effective judicial protection in the EU. Indeed, the distinction between bindingness and validity entails several problems and challenges, as will be explored in the next section.

6. Can Validity and Bindingness be Separated?

This paper has thus far explored some possible rationales for the decision in *FBF* and the distinction that emerged therefrom between questions of validity and bindingness. One issue that has not been

[41] TFEU art 267.

analysed in EU scholarship is whether the separation of the assessment of the bindingness from that of validity is conceptually and legally sound.

In order to answer this question, we should consider the 'object(s)' of the validity evaluated in the context of an action for annulment before EU courts. Some reflections on the *types* of judicial review existing in the EU constitutional space were provided by Advocate General Bobek in his opinion on the case *Asociaţia 'Forumul Judecătorilor din România*.[42] Namely, he identified *abstract* and *concrete* forms of judicial review. The former entails an assessment of the law *in abstract*, even before a law becomes applicable; the latter is the result of a challenge brought by an individual in the context of pending litigation. Although helpful, this distinction does not deal with the *object(s)* of the validity assessment by EU courts, in other words, that the EU judicature verifies in the context of judicial review.

I would like to suggest instead a tripartite content of the validity assessment for the judicial review of EU measures: *procedural compliance*, meaning the respect of procedural rules applicable for the adoption of the act;[43] *normative compliance* with constitutional principles of the EU legal order;[44] and, finally, *validity of an act by reference to its practical legal effects*, concerning how an act shapes the social reality and therefore exercises an impact 'on the ground'.[45] The validity of an EU act should be tested by reference to these three facets. These elements of the validity of EU acts are a reflection of the grounds for judicial review included in Article 263 TFEU, which refers to 'lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.' The grounds of lack of competence, violations of essential procedural requirements and misuse of powers belong to procedural compliance, in so far as they all pertain to the rules governing the way in which competences by EU institutions should be exercised; infringement of Treaties relates to normative compliance; and the ground of infringements of rules of law in the application of Treaties corresponds to the practical legal effects of an act (that is, the effects of an EU act once it is applied).

In this sense, the bindingness evaluation, which concerns the legal effects of an EU act, appears to be a part of the validity assessment, and, in particular, the practical legal effects

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[42] Opinion of AG Bobek in Case C-83/19, *Asociaţia "Forumul Judecătorilor din România"*, EU:C:2021:393 para 200 and ff.

[43] See Case C-482/17, *Czech Republic v European Parliament*, EU:C:2019:1035.

[44] See Case C-584/10 P, *Commission and Others v Kadi*, EU:C:2013:518.

[45] See *Belgium v Commission* (n 3).

assessment. As a matter of fact, whether an act is valid is to be assessed also in light of its effects and implications *on the ground*, in the context of its application. Let us consider the following example. The wording of an act may not disclose any *prima facie* invalidity. Yet, following applications to a specific set of circumstances, that same act may reveal that unlawful consequences are involved *in practice*. Therefore, separating the evaluation of the bindingness of an EU act from the rest of the validity examination seems conceptually and legally flawed. In other words, the production of legal effects by an EU act is itself an aspect of the validity of that same act. It follows that the assessment of the legal effects of an EU act should be part of the parameters determining the validity of an EU act, and not, as occurs under the EU case law, the threshold for admitting an action for annulment. Excluding the production of legal effects from the requirements of validity of an EU act undermines the ability of EU courts to capture crucial aspects of the lawfulness (or potential unlawfulness) of EU acts.

Beyond conceptual and legal issues concerning the EU model of judicial review, the distinction between bindingness and validity also adversely impacts the national level of governance, which is tasked with the duty to apply EU law.

7. Complicating the Application of EU Law at the National Level: A Court-Centric View?

The distinction between validity and bindingness leads to further consequences at the national level of governance. As mentioned, in *FBF* the CJEU confirmed *Grimaldi*,[46] in which it was established that national courts should take into account EU soft law measures when solving disputes. In addition, the CJEU held that the interplay between Articles 267 and 263 TFEU is so that national courts should admit claims to challenge the legality of any decision or other national measure relative to the application to them of a European Union act of general application. From this perspective, the CJEU imposed specific duties over national courts in order to compensate the absence of direct review at the EU level when it comes to EU soft law. As argued elsewhere, the lack of binding effects of EU soft law may be complex for national courts: what weight should be given to a non-binding EU law instrument in solving a dispute?[47] This is a question to be answered by national courts without clear guidance from the EU that may potentially have the adverse effect of hindering the uniform application of EU (hard) law.

[46] *Grimaldi* (n 24) para 18.

[47] Gentile (n 2) p 997 and ff.

Yet this approach is highly court-centric, and does not take into account the reality of the application of EU soft law. As a matter of fact, while national courts are the ultimate interpreters of national law and crucial enforcers of EU law, the latter is also applied by national administrations. Following *FBF*, as well as the *BT* judgment[48] in which an EBA recommendation was annulled, national authorities may find themselves on ever shakier ground. How should these entities apply EU measures such as guidelines or recommendations? They cannot directly access the jurisdiction of the EU courts via a preliminary ruling, but could benefit from the interpretation of those instruments by the EU judicature only by initiating litigation before national courts. And the latter should be willing to trigger the preliminary ruling procedure to obtain the interpretation of EU law measures by the CJEU. Consolidated practices and modes of enforcement of those instruments could be potentially subject to reconsideration and review via preliminary ruling requests. But in the absence of clear guidance on the issue, national authorities in charge of applying EU soft law may be currently groping in the dark concerning the effects of EU measures such as EU guidelines.

8. Conclusion

FBF adds important pieces to the puzzle of the effects of EU soft law. It also offers interesting findings on the relationship between validity and bindingness under EU law. For these two reasons, the judgment has a constitutional relevance that should not be underestimated. As discussed in this paper, there may be at least three rationales underlying the bifurcation between validity and bindingness under EU law entailed by *FBF*. These are decentralisation; continuity and compliance with previous jurisprudence; and constitutional politics. Of the three, the latter rationale appears the most convincing one: by relaxing the availability of preliminary rulings on validity concerning EU soft law, the EU judicature has shouldered national courts with a central role in patrolling the enforcement of those instruments, while still ensuring that the EU judicature's monopoly on the interpretation of EU law is respected. However, the distinction between validity and bindingness in EU law appears contrary to the very purpose of the action for annulment, which seeks to review the effects of EU acts also in the context of their application under Article 263 TFEU. In other words, the way in which an EU act shapes legal reality (i.e. produces legal effects) is an intrinsic element of the validity of that same measure. Furthermore, the bifurcation between validity and bindingness has adverse effects for national authorities, being unable to grasp the way in which EU measures such as guidelines should be

[48] Case C-501/18, *Balgarska Narodna Banka (BT)*, EU:C:2021:249.

employed at the national level. Indeed, the decision in *FBF* as well as the *BT* judgment have made clear that EU soft law can be invalid, while not being binding. As a result, one may wonder whether current practices by national authorities concerning EU soft law could be challenged by way of preliminary rulings in the coming years, thus overwhelming the EU judicature with ad hoc, specific questions on the effects of EU soft law.

Chapter 6

C-872/19, *Venezuela v Council* (22 June 2012)

*Olivier Baillet**

Introduction

The European Union's restrictive measures[1] have in many ways reflected and sometimes provoked the evolution of internal constitutional[2] dynamics within the framework of the Treaties, oscillating between the community method and intergovernmentalism, and politics versus legalisation[3].

Their mere existence is the product of a tortuous, but so far constant, desire on the part of Member States to act increasingly as a common entity both within the international sphere and beyond common commercial policy. As a consequence, they are a somewhat 'recent creation'. The first sanctions were adopted in 1982 against the USSR regarding the imposition of martial law in Poland, and Argentina following its invasion of the Falkland Islands[4] within the loose and then *praeter legem* framework of the European Political Cooperation. The Maastricht Treaty then created a Common Foreign and Security Policy ('CFSP'), which institutionalised earlier practice but left intact the dualism between Community Action and External Action, which remained subject to different rules. Though Lisbon brought an end to the pillar structure, the CFSP remains subject to exceptional procedures, ranging from decision-making to judicial review[5].

Whether or not one considers that the CSFP constitutes a delegation, transfer of sovereignty or the European Union ('EU') acting on behalf of its Member States[6], or whatever this may indicate

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[1] The terms sanctions and restrictive measures will be used interchangeably in this paper.

[2] Understood as the rules governing the existence and functioning of powers within the EU's legal and political order, without any judgment on the nature of the European Union.

[3] Paul James Cardwell, 'The Legalisation of European Union Foreign Policy and the Use of Sanctions' (2015) 15 Cambridge Yearbook of European Legal Studies 287.

[4] Council Regulations 596/82 and 597/82 (EC) of 15 March 1982, [1982] OJ L72/15-19 and Council Regulation 877/82 of 16 April 1982 OJ L102/1.

[5] Peter van Elsuwege, 'EU External Action After the Collapse of the Pillar Structure: In Search of a New Balance Between Delimitation and Consistency' (2010) 47 Common Market Law Review 987.

[6] Charlotte Beaucillon, *Les Mesures Restrictives de l'Union Européenne* (Bruxelles: Bruylant, 2014) 70.

about the nature or the actual power of the EU in the conduct of its international relations[7], the fact remains that Member States do act in common within this framework and impose restrictive measures on various entities. Some restrictive measures, especially in the field of counter-terrorism, are not geographically framed and target individuals because of their own doings, such as those which led to the *Kadi* litigation[8]. Others target third States and are for that reason generally referred to as 'regime sanctions'[9]. Regime sanctions can target individuals or legal entities deemed to participate in or to finance the targeted regime, especially in the form of asset freezing, travel bans or prohibition of transactions. They can also, however, be of a general character and prohibit certain transactions with all or designated entities or people located in the jurisdiction of the targeted regime. Arms embargos are probably the most typical example of this and are some of the most frequently adopted restrictive measures[10].

Whenever sanctions formally target individuals, the EU is potentially infringing the rights that those concerned may hold under international and EU law, especially fundamental rights. When indirectly or directly targeting third States, the EU is also potentially infringing rights that third States hold under general or conventional public international law, or to put it another way, breaching its international obligations. These obligations can be the right of third States to see their nationals treated according to the relevant obligations of international law – in a logic close to the diplomatic protection as established by the Permanent Court of International Justice in *Mavrommatis*[11] – but this issue does not only concern these kinds of obligations. In fact, third States often complain, through more or less formal means, that the authors of sanctions breach international obligations stemming

[7] Both issues are linked, as the legal nature of the EU directly shows and interacts with the question of whether it has a will and interests of its own; see for an exploration U. Khaliq, 'The European Union's foreign policies: an external examination of the capabilities-expectations gap' *in* Steven Blockmans, Panos Koutrakos (eds), Research Handbook on the EU's Common Foreign and Security Policy (Edward Elgar Publishing, 2018) 459, ff462-470; see for an analysis depending on the type of sanction, Kevin Urbanski, *The European Union and International Sanctions. A Model of Emerging Actorness* (Elgar, 2020).

[8] C-584/10, *European Commission and Others v Yassin Abdullah Kadi*, (18 July 2013) ECLI:EU:C:2013:518.

[9] Christina Eckes, 'EU Restrictive Measures Against Natural and Legal Persons: From Counterterrorist to Third Country Sanctions' (2014) 51 Common Market Law Review 869, 874.

[10] Iain Cameron, 'Introduction' in Ian Cameron (eds), *EU Sanctions: Law and Policy Issues Concerning Restrictive Measures* (Intersentia Publishing, 2013) 1, 9.

[11] *Case concerning Mavrommatis Palestine Concessions, Greece v United Kingdom*, PCIJ Rep (Jurisdiction), Series A no 2.

from customary rules of public international law such as respect for sovereignty[12], international human rights, trade law[13], and all branches of international law in general[14].

From this perspective, the situation at play in the *Venezuela v Council* case (C-872/19P) is not new. The impugned measures were adopted in response to the dramatic unfolding of Venezuela's internal political situation after December 2015. Opposition parties had allegedly won the general elections, but President Nicolas Maduro declared a national state of emergency in January 2016. This prompted well-documented demonstrations and their repression by the Venezuelan police resulting in many deaths and casualties. In July 2016, the Council of the EU called for 'the government and the opposition to engage in a genuine dialogue' and 'urge[d] all institutions and political players to engage in this process in full respect of the democratic and constitutional framework, rule of law and human rights and fundamental freedoms, including those of jailed opponents who cannot exercise their rights'[15]. On 1 May 2017, Maduro called for the election of a 'Constituent Assembly', which the EU regretted but did not go as far as to expressly state that it breached the Constitution of Venezuela[16].

With the situation worsening, on 13 November 2017, the Council adopted CFSP Decision 2017/2074 and Regulation 2017/2063. This two-tier system came into being as a way of granting legal effect to non-enforceable common decisions in external affairs first of all in the context of European Political Cooperation[17]. It was later institutionalised by the Maastricht Treaty and maintained by Lisbon. The CFSP decision was adopted on the basis of Article 29 of the Treaty on the European Union ('TUE')[18] and designated the targeted entities and persons, as well as the content of the measures. A regulation intended to implement the decision at EU level, within its areas of competence was then adopted by

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[12] See for instance Venezuela's press communiqué on 11 November 2022, which condemned the renewal of coercive sanctions as being 'a dangerous practice and contrary to the principles of international law and peaceful coexistence between states' (https://mppre.gob.ve/comunicado/venezuela-rechaza-decision-ue-renovar-medidas-coercitivas-unilaterales-contra-pueblo-nacional); Iran often mentions when denouncing Western sanctions 'intervention in [its] internal affairs' (Statement of Iran's Ministry of Foreign Affairs on EU and UK sanctions (15 November 2022) https://en.mfa.gov.ir/portal/newsview/699810 both accessed 31 January 2023).

[13] See regarding US sanctions on Venezuela the request for consultations concerning Venezuela's breaches of mainly GATT, but also GATS, provisions, see *United States – Measures Relating to Trade in Goods and Services*, in consultations (28 December 2018) WT/DS574/1.

[14] See for detailed analyses, Charlotte Beaucillon (eds), *Research Handbook on Unilateral and Extraterritorial Sanctions* (Edward Elgar, 2021).

[15] Council of the EU, 'Conclusions on Venezuela' (18 July 2016) CFSP/PESC 624, 11264/16, paras 2 and 4.

[16] See the Council of the EU, 'Declaration by the High Representative on behalf of the European Union on the situation in Venezuela' (Press Release, 30 July 2017).

[17] Cardwell (n 3) 296.

[18] 'The Council shall adopt decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the Union positions'.

the Council on the basis of Article 215 of the Treaty on the Functioning of the European Union ('TFUE') and mainly reproduces the initial decision[19], a practice the Court of Justice held is not an encroachment of the non-affectation clause of general EU procedures by specific CSFP procedures[20]. In the Venezuelan situation, Decision CSFP 2017/2074 declared that targeted restrictive measures were needed 'against certain natural and legal persons responsible for serious human rights violations or abuses or the repression of civil society and democratic opposition and persons [...]'[21] and that other measures 'in the form of an arms embargo' were rendered necessary 'in view of the risk of further violence, excessive use of force and violations or abuses of human right' in Venezuela[22].

Regulation 2017/2063 largely reproduced the regime thus defined. The core of the measures can be summarised as follows. First, the supply of technical, financial and brokering services related to certain military equipment was prohibited (Article 2) as well as the sale of 'equipment which might be used for internal repression listed in Annex I' and associated 'financial, brokering and technical services' (Article 3) to 'any natural or legal person, entity or body in, or for use in, Venezuela' *(*identical wording in both articles). Neither ban was absolute, as Member States were able to authorise transactions under certain strict conditions (Article 4). Second, a similar ban was established on supplying surveillance technology and software, as well as regarding associated financial services (Article 6 and 7), subject again to prior authorisation by Member States (forbidden if there were 'reasonable grounds to determine [that] it would be used for internal repression'; Articles 6 (1) and 7(1)). Lastly, the regulation established several lists of natural and legal persons whose 'funds and economic resources' (Article 8) were to be frozen, subject to some derogations again by Member States (Articles 9 and 10).

Regulation 2017/2063 also determined the scope of the restrictive measures. According to Article 20, they also applied *ratione loci* to the 'territory of the Union, including its airspace' despite extraterritorial outreach, 'to any legal person, entity or body in respect of any business done in whole or in part within the Union'. They further applied *ratione personae* 'on board any aircraft or any vessel under the jurisdiction of a Member State', 'to any person inside or outside the territory of the Union who is a national of a Member State', 'to any legal person, entity or body, inside or outside the territory

[19] The notable exception concerns travel bans, which are not implemented at the EU level but at State level and therefore are not reproduced in EU regulations.

[20] C-72/15, *PJSC Rosneft Oil Company' v Her Majesty's Treasury*, Judgment (28 March 2017), ECLI:EU:C:2017:236, para 90.

[21] Council Decision (CFSP) 2017/2074 concerning restrictive measures in view of the situation in Venezuela, (2004) OJ L 295 recital, para 7.

[22] idem para 8.

of the Union, which is incorporated or constituted under the law of a Member State'. Both the category of sanctions and their scope of application are fairly common in the practice of EU regime sanctions[23]. That such sanctions trigger litigation is not novel either. In fact, they have become a structural subject matter of litigation before the General Court, which holds jurisdiction as first-instance[24] and where they represented between 3.8% and 6.3% of actions between 2017/2021, usually more than competition cases[25]. Both Decision 2017/2074 and Regulation 2017/2063 were also contested by private parties [26]. But for the first time in the history of the Court, the third State itself, Venezuela, chose to lodge her own application for annulment with the General Court on 23 March 2018 and challenged the legality of Articles 2, 3, 6 and 7 of Regulation 2017/2063, as well as two subsequent acts which had extended the application in time[27].

This unprecedent situation is all the more remarkable given that it arose within a well-known difficult jurisdictional and procedural landscape. According to Article 263(1) TFEU, '[t]he Court of Justice of the European Union shall review the legality of acts (…) of the Council', but the admissibility criteria of applications vary according to the nature of the applicants. While EU Member States and most institutions can lodge applications with the Court without being subject to other requirements, other legal subjects are. Article 263(4) only allows '[a]ny natural or legal person [to], under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures'.

Furthermore, the field of CFSP is not subject to ordinary jurisdictional rule. While the treaty of Lisbon ended the formal separation between the Communities and the EU and integrated the CFSP within both the TUE and the TFUE, it also sought to establish a jurisdictional bar, or circumscription, in matters of CFSP. As a derogation to the general principle of judicial review enshrined in Article 19 TEU, Article 24(1) TEU states that as a matter of principle 'the Court of Justice of the European Union shall not have

[23] See for instance Council Regulation (EU) 267/2012 concerning restrictive measures against Iran (2012) OJ L 88 24.3.2012 and repealing Regulation (EU) 961/2010 OJ L 281, especially arts 2 to 15 a), 23 to 19 and 49.

[24] As the competent court in first instance for annulment proceedings in general. See Article 256(1) TFEU.

[25] Ratio calculated from statistics available in CJUE, 'Annual Report 2021 – Judicial Activity' (2022) 381 ff. State aid cases were however counted separately.

[26] See cases T-247/18, 248/18, 249/18, 550/18, 551/18, 552/18, 553/18, T-554/18, T-32/19, T-35/19.

[27] Namely Decision 2018/1656 amending Decision (CFSP) 2017/2074 concerning restrictive measures in view of the situation in Venezuela (2018) L 276/10 and Implementing Regulation 2018/1653 implementing Regulation (EU) 2017/2063 concerning restrictive measures in view of the situation in Venezuela (2018) OJ L 276.

jurisdiction with respect to these provisions', with two exceptions. First, the so-called 'non-affectation clause' in Article 40 TEU, by virtue of which CFSP decisions should not hinder the 'the application of the procedures and the extent of the powers of the institutions' in the general system of competences established by the Treaties. Second, 'proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council'[28].

The Court has repeatedly interpreted the ban and its exceptions in an increasingly broader way. It accepted that CFSP decisions on EU personnel could be subject to judicial review[29], that judicial review of CFSP's compliance with the non-affectation clause could be exercised through preliminary proceedings[30], and even that it had jurisdiction to hear actions in reparation for non-contractual liability caused by restricted measures adopted within the CFSP framework[31].

These changes, however, provoked mixed reactions. For some, the Court was judicially troubling the constitutional equilibrium designed by the drafters[32]; for others, the case law reconciled the CFSP with this constitutional framework, which is based on the rule of law and has seen the rise of effective judicial protection as one of its foundational principles[33]. It appears hardly deniable that the scope of review was at least interpreted in a *pro homine* way. However, both treaty provisions and the Court rely on additional procedural factors to maintain a form of equilibrium, such as other restrictive admissibility criteria or the intensity of review, which the Court has repeatedly held to remain wide in this field[34]. It is therefore against this backdrop that the Venezuela decision has to be examined.

The Council had raised three inadmissibility grounds before the General Court. Venezuela allegedly i) lacked standing ii) lacked interest in bringing the proceedings and iii) that it was not directly concerned by the impugned provisions. Sitting in an extended formation, the General Court had avoided the issue of Venezuela's standing as a third State and dismissed the claim on account of lack

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[28] See also Article 275(2) TFEU.

[29] C-455/14 P, *H v Council*, Judgment (19 July 2016) ECLI:EU:C:2016:569.

[30] *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* (n 20).

[31] C-134/19 P, *Bank Refah Kargaran v Council*, Judgment (6 October 2020) ECLI:EU:C:2020:793.

[32] Luigi Lonardo, 'Law and Foreign Policy Before the Court: Some Hidden Perils of Rosneft' 2018 3(2) European Papers 547.

[33] Advocate General Hogan mentioned in his conclusions in the *Bank Refah Kargaran* case 'indefensible anomalies' that would arise out of more restrictive interpretations (C-134/19 P, *Bank Refah Kargaran v Council*, Opinion of Advocate General Hogan (28 May 2020) ECLI:EU:C:2020:396, para 39).

[34] C-440/14 P, *National Iranian Oil Company v Council*, Judgment (1 March 2016) ECLI:EU:C:2016:128, para 77.

of direct concern[35]. Venezuela appealed this finding before the Court of Justice. The Court, having referred the case to the Grand Chamber, decided to examine *proprio motu* the issue of her qualifying as a 'legal person' within the meaning of Article 263(4) TFUE, and not only the issue of 'direct concern' which the General Court had examined, but also all admissibility criteria. The appeal attracted much attention, as eleven Member States and the Commission intervened.

Indeed, the first issue of the standing of a third State appeared as a personality test for the EU and its system of remedies (1). The acceptance of the application on this ground was further enhanced by a loosened, more material approach to sanctions in the light of other admissibility criteria (2). The case would be judged on the merits by the General Court, but consequences of the decision extend beyond this particular litigation (3).

1. Third States as Applicants: A Personality Test for the EU System of Remedies?

Personality ordinarily refers to the distinction and constitutive elements of a being. The general debate about the 'personality' of the EU within the international landscape also resonates on the CJEU. The relation of this system of remedies to international law has been extensively discussed, and often linked to the question of what this indicates about the nature – domestic or international law – of the Court[36]. The application of international law is equated with the CJEU as an international court, while refusal or application of different or domestic rules supposedly demonstrates its internal nature. The rationale is that domestic courts see international law as an external body of law, which they are reluctant to apply, while international courts are created and entrusted with its application. It however overlooks that this is, in the end, a common issue to every so called 'sub-system' of international law, and that domestic courts can have interests in applying international law. The present case shows that the role of international law is, in fact, anything but linear. While it was rather extensively discussed by parties and all interveners in the determination of Venezuela's standing, the Court of Justice only partly engaged in the discussion (1) and chose instead to rely on internal dynamics of its case law in the context, mostly of CFSP, to justify its decision to grant standing to third States in all annulment proceedings (2). This case does not contribute to the debate about the nature of the Court with regard

[35] T-65/18, *Venezuela v Council*, Judgment (20 September 2019) ECLI:EU:T:2019:649, paras 23-51.

[36] See for instance Jean Allain, 'The European Court of Justice Is an International Court' (1999) 68(2) Nordic Journal of International Law 249; Jared Odermatt, 'The Court of Justice of the European Union: International or Domestic Court' (2014) 3(3) Cambridge Journal of International and Comparative Law 696.

to international law, but the decision is largely founded on an unprecedented value-based approach to international relations (3).

1.1. A Selective Engagement with International Law

The Court did engage with the necessary recognition of the international personality of third States (1), but avoided most of the controversies regarding the consequences of the relations between third States and the EU governed by international law (2).

1.1.1. The Necessary Recognition of the International Personality of Third States

That Venezuela enjoys international legal personality seems hard to contest. States are (the main) subjects of contemporary international law. As Advocate General Hogan pointed out, Venezuela's existence as a State was objectively hardly disputable[37] and indeed not in dispute between the parties[38] or the interveners. Having to determine whether a State qualifies as a 'legal person' almost goes against the flow of the history of international legal thought. The recognition of the international personality of States, under the influence of writers like Emer De Vattel and, more tangibly, 19th century German public law, in fact eclipsed other potential subjects for a long time [39]. From this perspective, relying on international law leads to the conclusion that Venezuela is a 'legal person' within the sole wording of Article 263 TFEU. The Court therefore expressly qualified Venezuela as 'a legal person governed by public international law'[40].

It is, however, precisely the consequences of the legal personality of Venezuela stemming from public international law that had led to diverging views. Most parties, implicitly or explicitly, agreed that the relation between Venezuela and the EU is governed by international law. To those denying her standing, this entailed two consequences. First, that Venezuela enjoyed no substantive obligations

[37] C-872/19, *Venezuela v Council*, Opinion of Advocate General Hogan (20 January 2021) ECLI:EU:C:2021:37, para 83: 'it is not disputed that the appellant has legal personality and is undoubtedly a legal person for the purposes of international law. It was, after all, a founding member of the United Nations in 1945'.

[38] The Council 'accepted that the appellant has international legal personality and is a legal person in accordance with the relevant rules of public international law and domestic law' (ibid para 32), and no intervening Member State or the Commission disputed this.

[39] See inter alia Roland Portmann, *Legal Personality in International Law* (CUP 2010) 42ff.

[40] C-872/19 P, *Venezuela v Council*, Judgment (22 June 2021) ECLI:EU:C:2021:507, para 50; see also para 53.

and/or rights under EU law, and therefore could not qualify as 'legal person' within this system[41]. Second, that the settlement of a dispute regarding these rights would also be subject to general international law, which they contended implied consent from the EU, whether to the jurisdiction of the CJEU as an international dispute settlement mechanism, or the protection of immunity from jurisdiction before the CJEU seen this time as a domestic court[42].

The Court implicitly rejected the first claim by stating that a third State is 'equally likely as any another person or entity to have its rights or interest adversely affected by an act of the European Union and must therefore be able, in compliance with those conditions, to seek the annulment of that act'[43]. In fact, the argument was rather unconvincing. That Venezuela, as a non-EU sovereign State is not legally subject to EU jurisdiction precisely stems for her being a sovereign State. The fact that the relations between her and the EU is governed by public international law stems from this, and the EU is another subject of international law. This, however, does not mean that Venezuela's legal situation cannot be affected by EU sanctions. On the contrary, it is precisely the object of regime sanctions – and the reason for their success within the EU – to channel economic strength through legal instruments to force a change in the action of a third State despite this State by definition escaping the jurisdiction of the author of sanctions. Arguably, such a determination would need to be assessed at the merits stage, or through the lens of other admissibility criteria; otherwise the analysis of standing precludes the substantial question of whether the applicant had rights[44].

1.1.2. The Seemingly Limited Relevance of the Nature of the CJEU

The Court however did not engage with the second argument, and avoided the structural question about its nature and function as an international or internal, not to say domestic, court. In fact, the argument seems undecisive. This is a typical situation where 'applying international law' could either reveal an international or a domestic nature, depending on the content of the rule applied. In any event, international law could not play the role contended by opponents of standing in either case.

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[41] *Venezuela v Council*, Opinion of Advocate General Hogan (n 37) para 35; see also the arguments made by Slovakia para 45.

[42] *Venezuela v Council*, Judgment (n 40), para 27.

[43] ibid para 50.

[44] Such a kind of interaction between procedural and substantive law is far but rare, but can prove problematic.

It is true, as the Council pointed out, that no general subjective right to a judicial remedy exists in the international realm[45], and that adjudication, and more generally recourse to any dispute settlement mechanism, is necessarily based on the consent of the parties involved[46]. It is also true that this translates two-fold regarding judicial remedies. States have to consent to the jurisdiction of international courts and tribunals, which are often organised in such a way that spontaneous application to that international court and tribunal is not sufficient to express that consent[47]. The decision of the European Court of Human Rights ('ECtHR') in the *Congo* case must be understood in this sense, with its procedural provisions leaving no leeway to third States[48]. On the contrary, Article 263 TFEU paves the way for Member States on the one hand, and for 'legal persons' generally on the other. The situation contrasts with the European Convention on Human Rights (ECHR) where only State parties or private individuals and entities are entitled to lodge applications[49]. There is thus a textual entry for the expression of consent by Venezuela, despite her not being a Member State and the asymmetry or jurisdiction of the Court in her regard. On the contrary, even if one assumes that the CJEU is international in nature, the EU cannot withdraw consent, or does not have to, since it is consubstantial to the framework of EU treaties.

Even if the CJEU is to be considered, by analogy with States, as a 'domestic court' or 'internal court'[50], arguments based on international law again appear to be misplaced. States have traditionally been recognised as having standing before domestic courts, on considerations of comity or by law[51] and, in any case, international law does not stand in the way of recognition. Immunity of jurisdiction of the appellant State is usually deemed to having been withdrawn whenever they initiate the proceedings[52]. On the other hand, the defendant State cannot assert immunity from jurisdiction as it

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[45] *Venezuela v Council*, Opinion of Advocate General Hogan (n 37), para 37.

[46] Except individuals before international criminal systems, though even there individuals are prosecuted because of the consent of states or because of a resolution of the Security Council.

[47] The clearest, but rare, example of this is the *forum prorogatum* mechanism before the International Court of Justice, by which States can express consent by initiating proceedings.

[48] *Congo v Belgium*, Decision (ECtHR, 29 October 2020) ECLI:CE:ECHR:2020:1006DEC001655419.

[49] Articles 33 and 34, at least in their French version, combine in a very different way from Article 263 TFEU; applicants can only be either State parties – Article 33 – or a physical person (in French '*personne physique*', whilst the English version only mentions 'a person'), a 'non-governmental organisation' or a 'group of individuals'.

[50] This was the term used by Poland before the Court; see *Venezuela v Council*, Opinion of Advocate General Hogan (n 37) para 39.

[51] See for instance William S Dodge, 'International Comity in American Law' (2015) 115(8) Columbia Law Review 2071, 2116-19.

[52] See for instance Article 6 a) of the Spanish organic law on privileges and immunities of Foreign States: 'Article 6. Tacit consent. The foreign State may not assert immunity from jurisdiction before a Spanish court in relation to a specific proceeding: a) When this has been initiated by means of the filing of a lawsuit or complaint by the foreign State itself' (translation by the author) (original Spanish: '*El Estado extranjero no podrá hacer valer la inmunidad de jurisdicción ante un órgano jurisdiccional español en*

stems from the international legal order before its own courts. As the case on *Jurisdictional Immunities of the State* before the International Court of Justice exemplified, immunity from jurisdiction is the translation of sovereign equality[53] and means that a foreign State cannot judge another State through the action of its domestic courts. Assuming EU as a legal entity should enjoy immunity from jurisdiction, when its existence as a sovereign State is more than doubtful, it could therefore not have protected the EU from proceedings instituted by third States before its 'internal' courts, contrary to what the Council seemed to imply[54]. The distinction between *acta jure imperii* and *acta jure gestionis*, mentioned by the Commission in its conclusions[55] therefore also appears unnecessary, since immunity does not apply at all. Annulment proceedings, allow 'natural or legal person' to seek not the determination of international responsibility but the annulment of an internal act. In that sense, the EU system of remedies probably functions like a domestic system,but the conclusion remains that this cannot bar the application of third States.

This does not mean that acts relating to foreign policy cannot, or should not, enjoy immunity from judicial review, but merely that the immunity would stem from the act itself rather than the nature of the applicant and the international legal relation that links it to the author of the act. In fact, as Advocate General Hogan pointed out, several domestic systems have excluded judicial review regarding acts deemed 'too political', amongst which acts relating to foreign policy and international relations most often feature. In the United-States, the Supreme Court argued that 'the conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision'.[56] It later applied this doctrine to suits brought by third States, and more recently a federal court of appeal rejected an application by the Republic of Maldives against the United States based on an international treaty because of such doctrine, where the district court had applied the doctrine of State immunity[57]. Similarly, the French Council of State has developed the category of 'actes de gouvernement', which include acts relating to

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relación con un determinado proceso: a) Cuando este haya sido iniciado mediante la interposición de demanda o querella por el propio Estado extranjero').

[53] *Case of Jurisdictional Immunities of The State (Germany v Italy: Greece Intervening*) (Judgment) (3 February 2012) [2012] ICJ Rep 99, para 57.

[54] *Venezuela v Council*, Opinion of Advocate General Hogan (n 37) para 36; *Venezuela v Council*, Judgment (n 40) para 27.

[55] *Venezuela v Council*, Opinion of Advocate General Hogan (n 37) para 54.

[56] *Oetjen v Central Leather Company*, SCOTUS, 246 US 297 (1918) 11 March 1918, 246.

[57] *Republic of The Marshall Islands v United States of America*, Court of Appeals for The Ninth Circuit (31 July 2017) 15-15636, 23 ff and following.

the conduct of foreign relations. It recently repeated that 'a court has no jurisdiction to hear' of such decisions because they 'cannot be detached from the conduct of [a State]'s international relations'[58]. Doubts have been raised as to the validity of such immunity doctrines, especially vis-à-vis fundamental rights, something domestic courts can be reluctant to acknowledge.[59]

Considerations of appropriate separation of powers in the exercise of judicial review are not absent in the international realm. In fact, it might be argued that they are even structural[60]. In the EU's case as well, the treaty-based limitations to the jurisdiction of the Court regarding CFSP acts can and have been analysed as textual translations of considerations regarding the establishment of a satisfactory 'separation of powers'[61] between the different branches of EU government, even though, the ban was established by the Member States as drafters of the treaties rather by the Court itself[62]. By not even addressing the issue, the Court consciously, or not, refused to endorse a similar exception. In fact, though the Court here ruled on the scope of Article 263 TFEU, it seems undeniable that this Venezuelan case is another piece of the well-documented tendency of reduction of exceptions to the Court's jurisdiction in the field of the CFSP, in light of both the motives and the outcome of the decision.

1.2. The Centrality of EU Constitutional Dynamics and System of Remedies

The Court relied mostly on internal constitutional dynamics regarding an 'exhaustive system of remedies' that it has been building, especially, though not exclusively, within the field of CFSP. To that end, it underlined a purposive interpretation of Article 263 TFEU. Affirmation of a discourse specific to the EU is abundant in the reasoning of the Court. It established, in light of previous case law, that the wording did not bar granting standing to third States (1). More decisively, the Court reasserted its – at least perceived – specificity by upholding the idea that granting standing is necessary to contribute to the rule-of-law-based structure of exhaustive legal remedies which exists within the EU (2). The most

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[58] French Council of State, Order (23 April 2019) no 429668.

[59] In the previously cited case, the Council of State used this formulation while the applicants had, unsuccessfully, asked the Council to refer the question of the compatibility of the doctrine with Articles 6 and 13 ECHR and 47 of the Charter to either the ECtHR or the CJEU, which it refused to do; S Slama, 'L'Acte de Gouvernement à l'Epreuve du Droit Européen. Non-Rapatriement des Femmes Françaises et de leurs Enfants des Camps du Kurdistan Syrien' (2019) 28 Actualité du droit administratif 1644.

[60] See on the question of deference, one of its main features: Johannes Hendrik Fahner, *Judicial Deference in International Adjudication A Comparative Analysis* (Hart 2020).

[61] C-72/15, *Rosneft Oil Company v Her Majesty's Treasury and Others*, Opinion of Advocate General Wathelet, (31 July 2016) ECLI:EU:C:2016:381, para 52.

[62] P van Elsuwege, 'EU External Action after The Collapse of the Pillar Structure: In Search of A New Balance Between Delimitation And Consistency' (2010) 47(4) Common Market Law Review 987, 999-1000.

remarkable, and unprecedented, argument lies in the decision to let value-based considerations on the rule of law prevail over policy-based considerations of reciprocity in the conduct of international relations (3).

1.2.1. The Absence of Obstacle from the Wording

That this judgment is a principled decision also shows in the absence in the Court's judgment of reference to precedents of third States directly initiating actions in annulment, which had all been analysed by Advocate General Hogan. Arguably, as he had pointed out, most were not fully conclusive, since they either concerned future Member States[63] or only consisted of an order by the General Court[64]. The Court, however, also chose not to mention cases concerning actions initiated by entities of third States. EU courts had previously held that since 'other provision of EU primary law excludes non-Member States from that right of action, a legal person which is an emanation of a non-Member State cannot be deprived of the right to bring an action against a fund-freezing measure adopted against it in order to obtain review of the legality of that measure'[65]. They had accepted, after having first examined the question as a substantive issue of fundamental right holding[66], actions from third States' central banks[67] or even ministers representing third governments[68]. In between the decision of the General Court in the Venezuelan case and that of the Court of Justice, another composition of the General Court had even granted standing to the Kingdom of Cambodia[69]. Instead, the Court of Justice

[63] T-257/04, *Poland v Commission*, Judgment (10 June 2009) ECLI:EU:T:2009:18, para 52: 'Although non-member countries, including new Member States before accession, cannot claim the status of litigant conferred on the Member States by the Community system, they may bring proceedings under the right of action conferred on legal persons'.

[64] T-319/05, *Swiss Confederation v Commission*, Order (7 July 2006) ECLI:EU:T:2006:195: the General Court had deemed (para 21) that Switzerland could not be considered a Member State for the purpose of applying Article 40 of the statute, which only permits the intervention of other Member States in cases initiated by Member States. In the judgment, the Court avoided the issue of admissibility because of lack of standing by rejecting the claim as unfounded on the merits (T-319/05, *Swiss Confederation v Commission*, Judgment (9 September 2010), ECLI:EU:T:2010:367, paras 54-55). In any case, there existed an international treaty applicable between the EU and the applicant State.

[65] T-5/13, *Iran Liquefied Natural Gas Co v Council*, Judgment (18 September 2015) ECLI:EU:T:2015:644, para 48.

[66] T-13/11, *Post Bank Iran v Council of the European Union*, Judgment (6 September 2013) ECLI:EU:T:2013:402, para 54; T-262/12, *Central Bank of Iran v Council*, Judgment (18 September 2014) ECLI:EU:T:2014:777, para 60.

[67] C-266/15 P, *Central Bank of Iran v Council*, Judgment (7 April 2016) ECLI:EU:C:2016:208 where the issue is not even raised by the Court.

[68] T-564/12, *Ministry of Energy of Iran v Council*, Judgment (8 September 2015) ECLI:EU:T:2015:599, paras 21-27: in this instance the Court relied on the absence of legal personality exception, but it did not seem to see a problem in the fact that the ministry did 'not have separate legal personality from that of the government'.

[69] T-246/19, *Kingdom of Cambodia and Cambodia Rice Federation*, Judgment (10 September 2020), ECLI:EU:T:2022:694, paras 44-51.

limited itself to repeating settled and general solutions about public entities in general. First, that local or regional entities are not barred from applying for annulment, but that they do so only as 'legal persons', and then ordinary applicants, within the meaning of the fourth paragraph of Article 263 TFEU[70]; second that the public nature of a legal entity more generally is not a bar[71]. Both points, framed by the Court as a part of the analysis of the 'wording' of Article 263 TFEU, are meant to demonstrate that the standing of third countries *can* be accepted.

1.2.2. Desirability of Admissibility: Building a Comprehensive System of Remedies

The idea that standing of third countries *should* be accepted builds on the general trend of the Court to have 'filled the gap' within the context of the CFSP[72]. It has been demonstrated that the right to effective judicial protection and discourse on the 'rule of law' had been mobilised by the Court to expand its jurisdiction in spite of the restrictions of the treaties[73]. CFSP cases have contributed to the establishment of jurisdiction of the Court as the principle within the EU's legal order on the basis of Article 19 TEU. Restrictions laid down in Articles 24 TEU and 275(1) TFEU are therefore exceptions and the so-called 'clawback clauses' in Articles 24 TEU and 275(2) TFEU exceptions to the exception and a return to the principle[74]. The way the Court built its reasoning in the Venezuela case followed a largely analogous framework.

The Court started by acknowledging, in substance if not in words, the maxim '*ubi ius ibi remedium*' to which Venezuela had directly referred in its application[75]. It opined that 'if the EU legislature takes the view that an entity has an existence sufficient for it to be subject to restrictive measures, it must be accepted, on grounds of consistency and justice, that that entity also has an existence sufficient to contest those measures'[76]. This stance is not new. The Court had relied on the same reasoning to admit that the Kurdistan Workers' Party or PKK could, despite being devoid of legal

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[70] *Venezuela v Council*, Judgment (n 40), para 45.

[71] ibid para 46.

[72] Peter van Elsuwege, 'Judicial Review and the Common and Foreign Security Policy: Limits to the Gap-Filling Role of the Court of Justice' (2021) 58(6) Common Market Law Review 1731.

[73] Sara Poli, 'The Right to Effective Judicial Protection with Respect to Acts Imposing Restrictive Measures and its Transformative Force for the Common Foreign and Security Policy' (2022) 59(4) Common Market Law Review 1045.

[74] Van Elsuwege (n 72) 1731ff.

[75] *Venezuela v Council*, Opinion of Advocate General Hogan (n 37) para 32.

[76] *Venezuela v Council*, Judgment (n 40) para 47.

personality under international law, EU law or the domestic law of a third State, be considered to be a 'person' within the meaning of Article 263(4) TFEU[77]. Though worded as 'consistency and justice', the argument only works within a system within which a remedy must exist when an infringement of rights occurs[78]. This postulate partly distinguishes the EU system of remedies from general public international law and even many institutionalised sub-systems of dispute settlement[79]. In this sense, it echoes the statement the Court made when it decided that it can entertain actions in damages allegedly caused by restrictive measures 'in order to avoid a lacuna in the judicial protection of the natural or legal persons'[80].

This postulate is further strengthened by reference to its textual translations: the subjective right to an effective judicial remedy[81] as a component of the 'rule of law'[82]. The Court explicitly referred to both as part of the 'contextual and teleological' elements of interpretation of Article 263 TFEU. In its view, 'the very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law', enshrined in Article 2 TEU and contributes to the edification of 'a society in which, inter alia, justice prevails'[83]. The Court recalled that the values enshrined in Article 2 TEU also guide the conduct of external relations in general by virtue of Article 21 TEU and the conduct of the CFSP in particular by the express reference made by Article 23 TEU[84]. Again, this line of reasoning was used extensively by the Court in previous judgments regarding the scope of judicial review in the context of the CFSP[85], and appears to have influenced the decision here despite the legal question exceeding the specific field of the CFSP and CFSP-related measures.

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[77] C-229/05, *PKK and KNK v Council*, Judgment (18 January 2007) ECLI:EU:C:2007:32, para 112.

[78] In the *PKK and KNK* case, the Court had expressly judged that 'The effect of any other conclusion would be that an organisation could be included in the disputed list without being able to bring an action challenging its inclusion' (ibid).

[79] See supra; arguably this can always be interpreted as possible developments for any international judicial system as long as state consent is present in the sense developed by Allain (n 36).

[80] *Bank Refah Kargaran v Council*, Judgment (n 31) para 39; Thomas Verhellen, 'In the Name of the Rule of Law? CJEU Further Extends Jurisdiction in CFSP (Bank Refah Kargaran)' (2021) 6(1) European Papers 17.

[81] This right is primarily enshrined in Article 47 of the Charter of Fundamental Rights of the European Union.

[82] The notion appears several times in the recitals, Articles 2 and 21 TEU and in Protocol No 4 On the Statute Of The European System Of Central Banks And Of The European Central Bank.

[83] *Venezuela v Council*, Judgment (n 40) para 48.

[84] ibid para 49.

[85] To justify admitting applications regarding staff management decisions in the context of the CFSP (*H v Council*, Judgment (n 29) para 41), judicial review through preliminary proceedings when Article 272(2) TFEU apparently only refers to annulment proceedings (*Rosneft Oil Company v Her Majesty's Treasury and Others* (n 20) para 43) and actions in damages allegedly resulting from the adoption of restrictive measures (*Bank Refah Kargaran v Council*, Judgment (n 31) para 35).

The existence of such a trend should not lead to overlooking the deliberate choices made by the Court in this judgment. Effective judicial protection and the notion of rule of law is used strategically by the Court, which is ready to discard them when it does not suit its judicial policy. It is well-known that it has for instance repeatedly refused to modify its case law on the other admissibility criteria laid down in Article 263 in light of Article 47 of the Charter[86]. It is even more remarkable that here the Court gave precedence to the notion of rule of law over that of reciprocity in the conduct of international relations.

1.2.3. A Real Axiological Stance on International Relations: Value and Rule of Law over Policy and Reciprocity

Evidence of a proactive understanding of the rule of law is to be found in the rejection of the 'reciprocity argument'. The Council[87] and every intervening Member State that opposed standing of third States[88] had pointed to the risk that, should standing be granted, the EU would place itself at a disadvantage in the conduct of its international relations. It would allow third States to challenge the EU's foreign policy decisions before the CJEU while the EU, or its Member States for that matter, would not be able to do the same before the domestic courts of third States. The claim of absence of reciprocity *per se* is probably not without merit if only because of the widespread existence of the 'political question' doctrine on these matters, as seen above. Contrary to what some intervening States seemed to imply[89], it is however not a legal claim but a policy-related one, since no customary, conventional or principle of international law requires reciprocity in the matter.

The Court decided to reject it on the basis of an actual axiological stance. It held that 'it is irrelevant that the European Union may not be able to access the courts of third States which do not allow decisions relating to their own international relations to be challenged before those courts, whether or not they are commercial in nature' because 'the obligations of the European Union to ensure respect for the rule of law cannot in any way be made subject to a condition of reciprocity as regards relations between the European Union and third States'[90].

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[86] See for a recent example: C-565/19 P, *Armando Carvalho, residing in Santa and Others v Parliament and Council ('The People's Climate Case')*, Judgment (25 March 2021) ECLI:EU:C:2021:252.

[87] *Venezuela v Council*, Opinion of Advocate General Hogan (n 37) para 38.

[88] ibid Poland (para 39), Slovenia (para 40), Greece (para 43), Slovakia (para 48).

[89] ibid para 39.

[90] *Venezuela v Council*, Judgment (n 40) para 52.

While this part of the reasoning can either be applauded precisely for the axiological stance it takes[91], or criticised for the concrete consequences it might lead to[92], it cannot be ignored that in this ruling the Court rejected an argument it had admitted before in other fields. When asked to decide whether GATT provisions[93], and then WTO agreements[94] and rulings of the WTO Dispute Settlement Body[95] could be granted direct effect, the Court had held that direct effect before EU courts 'would deprive the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community's trading partners'[96] and excluded it as a matter of principle[97]. More recently, the Court implicitly agreed to grant direct effect of GATT provisions in the context of infringement proceedings brought by the Commission against Member States. The rationale appears to have been Advocate General Kokott's contention that direct effect in this case should be granted because, despite not being reciprocal, it would not weaken but on the contrary strengthen the position of the EU in the conduct of its international relations[98]. Similarly, in opinion 1/17 regarding CETA, the Court also referred to the 'the need to maintain the powers of the Union in international relations' and the 'reciprocal nature of international agreements' which justified the transfer of jurisdiction to an external international court or tribunal[99].

There is no doubt that distinguishing between this line of cases and the Venezuelan case is possible. All of them arguably related to treaty-based obligations in the economic sphere where

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[91] Van Elsuwege (n 72) 1751 (inserting the development in the 'gap-filling' role taken on by the Court of Justice).

[92] Poli (n 73) 1068-70, although in this case it ultimately leads to arguing that an illegal act is preferable as long as it serves the efficiency of the Union's action.

[93] C-21/72 through C-24/72, *International Fruit Company e.a.* v *Produktschap voor Groenten en Fruit*, Judgment (12 December 1972) ECLI:EU:C:1972:115, paras 24-27.

[94] C-149/96, *Portugal v Council*, Judgment (23 November 1999) ECLI:EU:C:1999:574.

[95] C-659/13, *C & J Clark International and Puma v The Commissioners for Her Majesty's Revenue & Customs and Puma SE v Hauptzollamt Nürnberg*, Judgment (4 February 2016) ECLI:EU:C:2016:74, paras 85, 86, and 94 to 96.

[96] C-149/96, *Portugal v Council*, Judgment (n 94) para 46.

[97] Exceptions concern cases where an EU act ensures implementation of a particular WTO obligation (C-70/87, *Fediol v Commission*, Judgment (22 June 1989), ECLI:EU:C:1989:254, paras 19-22) or where the act directly refers to precise WTO provisions (C-69/89, *Nakajima All Precision v Council*, Judgment (7 May 1991) ECLI:EU:C:1991:186, para 11), confirmed by *Portugal v Council* (n 94).

[98] C-66/18, *Commission v Hungary*, Opinion of Advocate General Kokott (5 March 2020) ECLI:EU:C:2020:172, para 63: 'However, infringement proceedings give it an instrument in relation to third countries which strengthens its negotiating position, as it thereby shows its negotiating partners that it can, if necessary, ensure internally that infringements of the WTO Agreement are effectively eliminated. Its credibility is therefore increased and account is taken of the need for prompt united external action'; see Emanuel Castellarin 'Retour sur l'utilisation du droit de l'OMC par la CJUE. À propos de l'arrêt Commission c/ Hongrie (Enseignement supérieur) du 6 octobre 2020' (2021) *Annuaire de droit de l'Union européenne 2020*, 17.

[99] C-1/17, *Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (CETA)*, Opinion (Full Court) (30 April 2019) para 117.

synallagmatism largely prevails, but this seems only partially convincing. The measures at hand in the Venezuelan case are also economic in nature, though allegedly pursuing a non-economic objective, and in any case the decision on the standing of third States exceeds the issue of (economic) sanctions. Third States now qualify as legal persons under Article 263(4) TFEU regardless of the object, content or context of the impugned act, and the clarification that international legal personality entails legal personality within the meaning of Article 263 TFEU was subsequently relied upon by the General Court to decide that an entity that is recognised some rights by international law, despite its uncertain nature, was also able to qualify as a 'legal person'[100].

The far-reaching aspect of the judgment cannot, however, be fully understood without the subsequent examination of other admissibility criteria, especially the requirement of direct concern, with which it combines to create a particularly large 'legal avenue'[101] for third States challenging EU sanctions.

2. Contribution to Economic Materialism in Sanction Analysis and Admissibility

In the particular context of CFSP, or in fact any other politically sensitive issues before courts, the equilibrium based on given conceptions of separation of powers does not have to be attained through the issue of standing. Many other elements, such as intensity of review, can contribute to its edification but this will only be examined by the General Court as the case was sent back to it. In the particular case of Article 263 TFUE, equilibrium also results from the interpretation and application of the rest of the admissibility criteria. It establishes three alternative hypotheses for 'natural' and 'legal' persons to lodge an admissible claim: either the act is 'directly addressed' to the applicant; or it is of 'direct and individual concern to them' despite them not being its formal addressee(s); or since the coming into force of the Treaty of Lisbon, it is a 'regulatory' act 'of direct concern to them and does not entail implementing measures'.

In the case of impugned measures, Venezuela was not the formal addressee, which is part of a general tendency to blur the distinction between the private and the public sphere in EU sanctions[102]. Regulation 2017/2063 imposed on Member States and legal and natural persons within

[100] T-279/19, *Front populaire pour la libération de la Saguia el-Hamra et du Rio de Oro (Front Polisario) v Council*, Judgment (29 Septembre 2021) ECLI:EU:T:2021:639, paras 133-40; this judgment is however under appeal before the Court of Justice and the Commission has expressly appealed the finding regarding legal standing.

[101] *Venezuela v Council*, Opinion of Advocate General Hogan (n 37) para 38; these are the Council's exact words.

[102] Eva Nanonpoulos, *The Juridification of Individual Sanctions and the Politics of EU Law* (Hart 2019) 144.

the jurisdiction of the Union the duty to refrain from engaging in relations with 'any natural or legal person, entity or body in, or for use in, Venezuela'. Further, since the act cannot be legislative as legislative acts are prohibited in the field of CFSP[103], the Court relied on the third limb: actions against a regulatory act of direct concern and not entailing implementing measures. The Court however adopted a material-oriented, less formalistic approach to the functioning and effects of sanctions the analysis of direct concern (1). These findings, and the nature of EU sanctions implemented at EU level then combined to ensure admissibility of the application with regard to the rest of criteria (2).

2.1. The Material Approach to Direct Concern

According to settled case law, the criterion of 'direct concern' entails two cumulative elements: the contested act 'should affect the legal situation' of the application and 'leave no discretion to the addressees who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from EU rules alone without the application of other intermediate rules'[104] .

The General Court had dismissed Venezuela's application on account of the first one. According to its judgment, Venezuela was not legally affected by the embargo because i) the regulation only applied to natural and legal persons within the jurisdiction of the European Union, ii) therefore the effect was 'indirect at best', in the sense that it only limited, *de facto* and not *de jure*, the capacity of Venezuela to obtain certain goods and services from operators subject to EU jurisdiction, iii) Venezuela retained its sovereign rights over 'areas and property under its jurisdiction' and elsewhere, iv) it was not referred to in the regulation, and v) it did not show that it was an active operator in the relevant markets, and in any case a State is not limited to such an activity contrary to economic operators.

The reasoning was qualified by General Advocate Hogan as 'highly artificial and unduly formalistic'[105]. According to him[106], and to the Grand Chamber[107], the General Court was right to hold that it is not the objective of the measure, but its 'subject matter, its content and substance, as well as to the factual and legal context of which it forms part'[108] but it had failed to draw the appropriate legal consequences

[103] Article 24(1) TEU.

[104] *Venezuela v Council*, Judgment (n 40) para 86.

[105] *Venezuela v Council*, Opinion of Advocate General Hogan (n 37) para 106.

[106] ibid.

[107] *Venezuela v Council*, Judgment (n 40) para 66.

[108] *Venezuela v Council*, Judgment (20 September 2019) (n 35) para 30.

from this statement. The General Court's line of reasoning relied on the distinction between legal and material effects. Originally and in principle, only legal effects on the situation of applicants could establish that the act is of direct concern[109]. However, the litigation against acts affecting the economic situation of third parties, in competition or antidumping law, had already shown that this distinction led to situations amounting to denial of justice[110]. In this case, the General Court's reasoning hardly reconciled with the intrinsic mechanism of sanctions. An *a contrario* analysis of its ruling underlines the discrepancy. Giving weight to the question of whether the State was formally designated in the impugned measures would have meant, as the Advocate General also underlined, that the Council, as author of the sanctions, could of its own accord ensure no judicial review is available by not designating the entities it is targeting[111]. Furthermore, a State is by nature more than a mere economic operator and could not have relied on the previous case law of the Court which had admitted actions by economic operators who only operate in the affected sector[112].

Unilateral sanctions against a third State leverage economic power in order to compel, materially, that State to change or alter policies deemed to be in breach of international law, at least most of the time. They do not only function as an instrumentalization of the economy to the service of 'political objectives'[113] but also substitute legal incapacity with economic strength. States or the EU rely on economic power because that State is by definition not legally subject to the jurisdiction of the author of sanctions. For the General Court, such effects on the applicant State are 'at best indirect' as the relevant State was not legally bound by the prohibition and could, in even event, always procure the designated goods and services elsewhere. Had the reasoning been upheld, the General Court would have created a situation where general sanctions against third States would never directly affect them. In order to do so, the prohibition would need to seek to legally order Venezuela, and/or other States, not to buy designated goods or weapons. Such a sanction would be blatantly illegal under international law, completely inefficient as a result and therefore defeat its very purpose. As the General Court itself had stated in another application by a private entity:

> self-evidently it is for the bodies established in the European Union to apply those measures, given that the acts adopted by the EU institutions are not, as a rule,

[109] *Salamander v Parliament and Council*, Judgment (27 June 2000) ECLI:EU:T:2000:168, para 62.

[110] At least 'problems'; see R. Barents, *Remedies and procedures before the EU courts* (2nd edn, Wolters Kluwer 2020) 292.

[111] *Venezuela v Council*, Opinion of Advocate General Hogan (n 37) para 109.

[112] T-515/15, *Almaz-Antey v Council*, Judgment (13 September 2018) ECLI:EU:T:2018:545, para 67.

[113] Nanonpoulos (n 102) 144.

> intended to apply outside the territory of the European Union', but 'prohibiting EU operators from carrying out certain types of transaction with entities established outside the European Union amounts to prohibiting those entities from carrying out the transactions in question with EU operators[114].

This would have led to a *de facto* judicial immunity, which the Court was apparently not prepared to grant.

The Grand Chamber of the Court of Justice therefore logically reversed the position. It underlined that 'any natural or legal person or entity' in the contested provisions included the Venezuelan State[115]. More significantly, however, it followed the Advocate General in holding that, because the prohibitions *materially* impede Venezuela from obtaining certain goods, they affect its legal position, aligning the solution with its case-law on private entities. It also rejected the idea that it is irrelevant that State are not limited to economic activities, and therefore 'transactions carried out *iure gestions* or *iure imperii*' are to be treated in the same way[116].

However logical, or legitimate, this material approach towards the effect of sanctions is, it seems that its combination with the nature of the applicant – a State – and the recognition of its standing combine to alter the previously established equilibrium in the field of litigating sanctions.

2.2. Capillarity with Other Admissibility Criteria: Modifying a Pre-Existing Equilibrium?

Though brief, the reasoning upholds a materialism which adheres more accurately to the mechanism of sanctions. The alignment with private entities is not, however, without consequences in the field of sanctions adopted within the CSFP framework. In previous decisions, the Court had denied that private entities could challenge sanctions that were of a 'general nature', such as those targeting Venezuela, for lack of jurisdiction[117] or interest in bringing the proceedings[118]. By adopting this analysis of the effect on sanctions on third States, the Court indeed created a venue where these two requirements would always be fulfilled. The risk which the Council pointed, that this solution would 'expand the

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[114] *Almaz-Antey v Council*, Judgment (n 112) para 66.

[115] *Venezuela v Council*, Judgment (n 40) para 69.

[116] ibid para 70.

[117] T-509/10, *Manufacturing Support & Procurement Kala Naft Co., Tehran v Council*, Judgment (25 April 2012), ECLI:EU:T:2012:201, para 37 (not overturned on appeal by the Court of justice).

[118] C-430/16 P, *Bank Mellat v Council*, Judgment (6 September 2018) ECLI:EU:C:2018:668, paras 56-62.

category of potential applicants to include any third State in respect of which the European Union decides as a matter of foreign policy to interrupt or reduce economic and financial relations', in part or completely, [119] appears founded, at least where authorities can be deemed to be affected. It remains unclear under what conditions a regulation targeting only certain private entities or bodies in a State could be challenged by the State itself[120].

Other admissibility criteria do not restore any balance because their analysis follows the legal consequences from the findings regarding direct concern. Since applicants relied on the fourth indent of Article 263 TFEU , they are 'ordinary applicants' and have first to establish, unlike Member States and EU Institutions, an interest in bringing the proceedings. In principle, this is the procedural translation of the remedy opened by Article 263 not being *actio popularis*. The requirement is satisfied if the annulment of the contested act must be capable, by itself, of procuring an advantage' for the applicant[121]. Given that sanctions here were deemed to directly affect the third State by virtue of their material economic effects, the annulment was, by nature, likely to restore the previous economic position of the State. The Court acknowledged the necessary consequence of its first analysis and directly referred to its previous findings under the first admissibility criterion examined[122]. The conflation also serves to justify seemingly contradictory solutions with previous cases. The Council had underlined that this solution would be at odds with the *Front Polisario* case. To contest the Front's argument that the contested agreement applied in practice to Western Sahara, the had formalistically held that the international agreement 'did', in the sense of 'could', not legally apply to Western Sahara despite some *de facto* applications, and that therefore the applicant had no interest in bringing the proceedings[123]. Here, the Court had held that the sanctions did materially produce effects on the applicant. It therefore stuck to this conflation of the economic material effects with the direct effect on Venezuela's legal position to reject the analogy[124].

The procedural equilibrium – some would argue disequilibrium – is further affected by the second criterion relating to 'direct concern', as well as the second textual requirement, namely that

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[119] *Venezuela v Council*, Judgment (n 40) para 56

[120] See for instance Council Regulation (EU) 2021/1030 amending Regulation (EC) No 765/2006 concerning restrictive measures in respect of Belarus (2021) OJ L 224I.

[121] C-88/61, *SES v Commission*, Judgment (31 March 1977) ECLI:EU:C:1977:61 para 19.

[122] *Venezuela v Council*, Judgment (n 40) para 83.

[123] C-104/16 P, *Council v Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario)*, Judgment (21 December 2016) ECLI:EU:C:2016:973, paras 83 to 125 and 132.

[124] *Venezuela v Council*, Judgment, (n 40) para 84.

the act 'does not entail implementing measures' because the precise object of an EU regulation on sanctions is actually to ensure implementation directly at EU level.

Probably deliberately, Venezuela had only challenged the prohibitions in the regulation. The Court was therefore able to ignore the different mechanisms which provided for the framework under which authorisation of the export of goods and services could be authorised by Member States[125]. The very functioning of the adoption of sanctions within the broad CSFP framework paved for the way for the admissibility. The contested decision is a regulation aimed at implementing at EU level the decision adopted within the CFSP *stricto sensu*. The prohibition, by definition, becomes valid with the very adoption of the regulation under Article 215 TFEU[126]. Furthermore, since legislative acts are defined by the procedure of their adoption, and not their inherent characteristics, the Court easily concluded that the procedure laid down in Article 215 TFUE is not legislative[127]. The specificity of the CFSP, and of the measures aimed at its implementation, which sets aside Parliament, renders challenges easier. Implementation regulations such as the one at hand qualify as 'regulatory acts' under the third limb of Article 263(4) TFEU, which only requires that the contested act does not entail implementing measures. There again, if the prohibitions 'are directly applicable without requiring the adoption of implementing measures' when assessing whether they leave any discretion to its addressees, they cannot entail implementing measure. The application was therefore admissible.

3. Aftermath of the Ruling: An International Dispute Settlement Mechanism?

The consequences of the ruling are threefold: consequences in the case at hand, for litigation of restrictive measures in general, and for annulment proceedings in general.

In the case at hand, the Court of Justice sent back the application to the General Court on the merits. This will trigger interesting issues, in light of the pleas made by the applicant State. Venezuela, which, for instance, alleged 'that the restrictive measures constitute unlawful countermeasures under customary international law'. This is a typical claim of States targeted by sanctions, but it often lacks a judicial venue for challenge. In this sense, the EU system of remedy will indeed operate as a 'quasi-international' dispute settlement function in the sense of settling a dispute under international law between the EU and another subject of international law. This was, unsuccessfully, raised by the

[125] ibid para 90.

[126] ibid.

[127] ibid para 92.

Commission in its observations in the *Polisario* case[128].The expression is not new when it comes to domestic courts being asked to adjudicate disputes between States substantially pertaining to the realm of international law[129]. Its utilisation by the Commission seems to imply that the CJEU is, in its reasoning not an international court, but it more accurately refers to the CJEU adjudicating and external dispute – EU *versus* a third party. If the CJEU is the internal court of the EU, and is therefore similar to a domestic court, the argument cannot stand on the sole basis of international law. Admitting it would force the Court, as we have seen, to find other reasons to grant judicial immunity to this type of dispute. It might also lead the EU to turn towards a different legal basis for sanctions so as to avoid litigation[130].

Venezuela also invoked a breach of a fundamental right, 'the right to be heard' by the Council. The debate about whether States can be the bearers of fundamental rights is gaining attention. The CJEU has traditionally upheld a welcoming approach towards the existence of the human rights of public bodies. Contrary to the ECtHR, which conflated the procedural restrictions to its jurisdiction with the material scope of human rights[131], the CJEU has repeatedly held that 'it must be held that European Union law contains no rule preventing legal persons which are emanations of non-Member States from taking advantage of fundamental rights protection and guarantees. Those rights may therefore be relied on by those persons before the General Court and the Court of Justice in so far as those rights are compatible with their status as legal persons'[132]. Beyond this issue of principled recognition, the violation of the right of defence in this case would mean that the Council is entitled to communicate with a third State before adopting sanctions, which would have an important impact on

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[128] T-344/19 and T-356/19, *Popular Front for the Liberation of Saguia el-Hamra and Rio de Oro (Front Polisario) v Council*, Judgment (29 September 2021) ECLI:EU:T:2021:640 para 158.

[129] In fact it seems to have been coined by Justice Holmes as he delivered the opinion of the Supreme Court of the United States in the *Virginia v West Virginia* case, stating that 'A suit between states to apportion debt is a quasi-international controversy (*Virginia v West Virginia*, 220 US 1 (1911) 220 US 2). Although this dispute opposed two federated states about the consequences of separation between the two, and was decided on the basis of constitutional law, Thomas Lee pointed out that the Supreme Court and its handling of state to state disputes on the basis of federal and international law was thought by some judges or scholars as a model for international courts; Thomas H Lee, 'Supreme Court of the United States as Quasi-International Tribunal: Reclaiming the Court's Original and Exclusive Jurisdiction over Treaty-Based Suits by Foreign States against States' (2004) (104) Columbia Law Review 1765, 1769, fn 11.

[130] Beatriz Vázquez Rodríguez, 'El Locus Standi De Terceros Estados para Interponer Recurso de Anulación Contra Medidas Restrictivas de la UE: El Asunto C-872/19 P, Venezuela/Consejo' (2021) (70) Revista de Derecho Comunitario Europeo 1037, 1059.

[131] *Slovenia v Croatia*, Decision (ECtHR, 18 November 2020) ECLI:CE:ECHR:2020:1118DEC005415516.

[132] T-35/10 and T-7/11, *Bank Melli v Iran*, Judgment (6 September 2013) ECLI:EU:T:2013:397, para 70; the idea was confirmed by the Court at least with regard to right of the defence and effective judicial protection; *Bank Mellat v Council*, Judgment (6 September 2018) (n 118) para 49 : 'Bank Mellah puts forward pleas alleging an infringement of its rights of defence and its right to effective judicial protection. Such rights may be invoked by any natural person or any entity bringing an action before the Courts of the European Union'.

the efficiency of sanctions in the field of international relations. Furthermore, as actions for damages are available whenever 'a sufficiently serious breach, not merely any breach, of a rule of EU law protecting individuals'[133] is identified, it remains to be seen whether third-States, or emanations, could in this regard seek reparation.

Beyond the application at hand, because of the combination of standing to third States and the analysis made of other criteria, all embargos against third States can now be directly challenged by them. This does not mean that the previous case-law of the Court which barred private individuals from challenging restrictive measures of a general character was overturned, but third States can now challenge them of their own accord and acting as proxy. It is hard to predict to what extent such future litigation is likely. The EU for instance maintains 20 other embargos on arms with similar provisions[134], but litigation by States is always affected by strategic decisions. The reason Venezuela appealed the sanctions itself is not clear, at least not publicly, but it can be assumed that one of the incentives is the narrative it can help build. If the decision is annulled, the third State can claim the EU breached international law and its own rules. If the application is rejected, the third State will remain free to denounce the absence of the effective rule of law and disregard for the international legal order which the EU claims to be upholding through the challenged sanctions.

Naturally, more generally, the decision does not just apply to the particular field of EU restrictive measures. As the case initiated by Cambodia shows[135], third States can see an interest in challenging several types of EU measures. Admissibility will not be automatic, and, outside the field of sanctions, the general strict interpretation of admissibility criteria might shield EU action from judicial scrutiny like it has more generally. In this regard again, it remains to be seen whether third States will regularly make use of this newly found venue and, as the evolution of domestic systems proves, it cannot be excluded that a case-law restricting review on the basis of the nature of the act someday arises out of concern for separation of power or, indeed, reciprocity. Absent this, it is undeniable that the Court will be called to settle international disputes, despite having avoided the issue as a matter of applicability of international law in the first place.

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[133] C-355/15 P, *European Ombudsman v Claire Staelen*, Judgment (14 April 2017) ECLI:EU:C:2017:256, paras 31-32.

[134] Source 'EU Sanctions Map' https://www.sanctionsmap.eu/#/main (last accessed on 8 February 2023)

[135] T-246/19, *Cambodia and CRF v Commission*, Judgment (9 November 2022) ECLI:EU:T:2022:694.

Chapter 8

Arrêt *Commission/Landesbank Baden-Württemberg et CRU* (C-584/20 P et C-621/20 P) : La Cour encadre le contrôle de légalité des décisions du Conseil de résolution unique

*Silvère Lefèvre**

Réponse à la crise bancaire qui a ébranlé l'économie de l'Union européenne, l'Union bancaire[1] incluant les seuls États membres y participant – ceux ayant l'Euro comme monnaie ou qui souhaiteraient un telle participation[2] – a abouti à la reconnaissance de nouvelles prérogatives à des institutions et organes de l'Union dans des domaines relevant antérieurement soit de la compétence des États membres, soit de la mise en œuvre du droit de l'Union par les autorités nationales. Les décisions adoptées par ces institutions et organes de l'Union ont généré un contentieux important devant le Tribunal de l'Union européenne.[3]

L'Union bancaire dispose, en premier lieu, d'un volet préventif constitué par le Mécanisme de Surveillance Unique (MSU), dans le cadre duquel des missions spécifiques ayant trait aux politiques en matière de surveillance prudentielle des établissements de crédit ont été confiées à la BCE.[4] Des

* Référendaire du Tribunal de l'Union européenne. Les opinions exprimées le sont à titre personnel et n'engage pas le Tribunal.

[1] Sur l'Union bancaire en general V. G. Boccuzi, *The European Banking Union : Supervision and Resolution* (Palgrave Macmillan 2016), Zilioli & K-P Wojcik, *Judicial Review in the European Banking Union* (Edgar Financial Law and Practice 2021) et pour une position plus critique S Grundmann and H-W Micklitz, The *European Banking Union and Constitution – Beacon for Advanced Integration or Death-Knell for Democracy?* (Hart 2019).

[2] À l'heure actuelle seuls les États membres de la zone euro sont concernés par l'Union bancaire. Néanmoins la Bulgarie et la Croatie ont établi une coopération étroite avec l'Union bancaire et la Suède a conduit une enquête sur la perspective d'une participation à l'Union bancaire. Sur la question de la participation d'États non membres de la zone euro V D Singh, 'Should Non-participating Member States Join the Banking Union? A Legal Perspective' in Grundmann and Micklitz (n 1) 293–308.

[3] V. à cet égard, les données figurant sur le internet du *European Banking institute* (EBI): https://ebi-europa.eu/publications/eu-cases-or-jurisprudence consulté le 2 février 2023.

[4] Règlement (UE) n° 1024/2013 du Conseil du 15 octobre 2013 confiant à la Banque centrale européenne des missions spécifiques ayant trait aux politiques en matière de surveillance prudentielle des établissements de credit, JO L 287, 63, complété par le règlement (UE) n° 468/2014 de la BCE du 16 avril 2014 établissant le cadre de la coopération au sein du mécanisme de surveillance unique entre la Banque centrale européenne, les autorités compétentes nationales et les autorités désignées nationales (le 'règlement-cadre MSU') JO L 141, 1.

décisions portant, par exemple, sur l'agrément des établissements de crédit,[5] le respect des règles de gouvernance,[6] l'évaluation des notifications d'acquisitions et de cessions de participations qualifiées dans les établissements de crédit,[7] les exigences en matière de fonds propres,[8] l'application de dérogations envisagée dans la règlementation pertinente,[9] qui dépendaient antérieurement de la responsabilité des autorités de surveillance prudentielles nationales, sont désormais adoptées par cette institution et relèvent du contrôle juridictionnel du Tribunal.[10]

En second lieu, le MSU a été complété par la création du « mécanisme de résolution unique » (MRU), qui vise à constituer un « cadre pour le redressement et la résolution des défaillances » des établissements de crédit de la zone euro et des États membres participants. [11] L'objectif est d'éviter la réitération d'intervention financières des États aux fins de renflouer des établissements de crédit considérés « *too big to fail* ». Il repose sur la reconnaissance aux autorités nationales ainsi qu'à une entité nouvellement crée – le Conseil de Résolution Unique (CRU) – de prérogatives concernant la « résolution » des établissements de crédit[12] et sur la constitution d'un fonds de résolution unique (FRU), abondé par les établissements de crédit eux-mêmes et destiné à financer lesdites résolutions.

Les décisions du CRU fixant les contributions au FRU ont également fait l'objet de nombreux recours devant le Tribunal.[13]

La Cour avait déjà eu la possibilité de préciser certains aspects du traitement contentieux de ces décisions en « démêlant » l'enchevêtrement des interventions des autorités nationales de

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[5] V. par ex. TUE, T-351/18 et T-584/18, Ukrselhosprom *PCF et Versobank/BCE,* (octobre 2021) EU:T:2021:669

[6] V. par ex. TUE, T-133/16 à T-136/16, *Caisse régionale de crédit agricole mutuel Alpes Provence e.a./BCE* (24 avril 2018) EU:T:2018:219.

[7] V. par ex. TUE, T-913/16, *Fininvest et Berlusconi/BCE* (11 mai 2022) EU:T:2022:279

[8] V. par ex. TUE, T-712/15, *Crédit Mutuel Arkéa/BCE* (13 décembre 2017) EU:T:2017:900

[9] V. par ex. TUE, T-733/16, *Banque postale/BCE* (13 juillet 2018) EU:T:2018:477.

[10] Sur cette question, outre les arrêts cités ci-dessus, v. les contributions figurant dans les chapitres 29 à 34 de Zilioli and Wojcik (n 1) 494-550. V. également M Prek et S Lefèvre, 'Le contentieux de la surveillance prudentielle des établissements de crédit devant le Tribunal de l'Union européenne' (2019) (3) Journal de droit européen 99–106.

[11] Règlement (UE) n° 806/2014 du Parlement européen et du Conseil du 15 juillet 2014 établissant des règles et une procédure uniformes pour la résolution des établissements de crédit et de certaines entreprises d'investissement dans le cadre d'un mécanisme de résolution unique et d'un Fonds de résolution bancaire unique, et modifiant le règlement (UE) n° 1093/2010, JO L 225, 1. À ce sujet voy. Kl-P Wojcik, 'Bail-in in the Banking Union' (2016) 53 CML Rev 91–138, spécialement 91.

[12] V. à cet égard, le contentieux généré par la décision du CRU du 7 juin 2017 d'adopter un dispositif de résolution en ce qui concerne Banco Popular Espanõl, SA, laquelle a généré, selon les statistiques de l'EBI, près d'une centaine de recours devant le Tribunal.

[13] Selon les données de l'EBI au 8 août 2022, environ 80 de recours ont été introduits contre des décisions du CRU fixant les contributions d'établissements de crédit.

résolution et du CRU lié au caractère « composite » des procédures appliquées par le CRU. Dans son arrêt *Iccrea Banca*[14] elle avait souligné que la décision fixant les contributions était imputable au CRU et relevait donc du seul contrôle de légalité du juge de l'Union, les circonstances que les autorités nationales puissent intervenir dans sa préparation et soient en charge de sa notification et de sa mise en œuvre étant sans incidence. Partant, même si les établissements ne sont pas les destinataires de cette décision – celle-ci n'est adressée qu'aux autorités nationales – ils sont directement et individuellement contestés et donc recevables à introduire un recours en annulation à son encontre.[15]

Plusieurs recours portant sur la décision fixant les contributions au FRU pour l'année 2016 avaient été accueillis par le Tribunal[16] sans que la Cour ait encore eu l'occasion de se prononcer sur la légalité de ces arrêts. Cette possibilité s'est d'abord manifestée à l'égard de l'arrêt du Tribunal annulant la décision du CRU fixant pour les contributions pour l'année 2017 à l'égard de *Landesbank Baden-Württemberg* (ci-après « LB »).[17] Par son arrêt *Commission/Landesbank Baden-Württemberg et CRU,* la Cour a fait droit au pourvoi, puis, statuant en premier ressort, a elle-même annulé la décision du CRU. [18] Cet arrêt, rendu en grande en chambre, constitue ainsi la première véritable prise de position de la Cour sur la manière par laquelle le Tribunal doit procéder au contrôle de légalité de ces décisions.[19]

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[14] C-414/18, *Iccrea Banca*, (3 décembre 2019) EU:C:2019:1036, appliquant par analogie la solution retenue à l'égard des décisions de la BCE adoptées au titre du MSU dans CJUE C-219/17, *Berlusconi et Fininvest* (19 décembre 2018) EU:C:2018:1023. Sur ce jugement v. M Cossa and E Mancini, 'EU and Italian case Law on the Ex-ante Contribution to the Resolution Funds' in R D'ambrosio (ed), *Law and Practice of the Banking Union and its Governing Institutions* (avril 2020) 88 Quaderni di Ricerca Giuridica della Consultenza Legale 417, disponible à l'adresse https://www.bancaditalia.it/pubblicazioni/quaderni-giuridici/2020-0088/qrg-88.pdf?language_id=1 consulté le 2 février 2023.

[15] C-414/18, *Iccrea Banca* (3 décembre 2019) EU:C:2019:1036, points 64–66.

[16] TUE, T-323/16, *Banco Cooperativo Español/CRU*, (28 novembre 2019) EU:T:2019:822, T-365/16, *Portigon/CRU*, EU:T:2019:824, T-377/16, T-645/16 et T-809/16, *Hypo Vorarlberg Bank/CRU*, EU:T:2019:823. Sur ces arrêts V C Brescia Morra and F Della Negra, 'Overview on the litigation on the "ex ante contributions" to the SRF: the strict standard of review adopted by the Court to ensure effective Legal protection" in Zilioli and Wojcik (n 1) 551–63.

[17] TUE, T-411/17, *Landesbank Baden-Württemberg/CRU* (23 septembre 2020) EU:T:2020:435. Sur cet arrêt V. sabel Lightbody, Michael Huertas 'Too little, too late? The European Court of Justice's annulment of the Single Resolution Board's 2017 decisions on resolution fund contributions and the latter's recent decision to appeal' (2021) 36(4) JIBLR 141–45.

[18] C-584/20 P et C-621/20 P, *Commission/Landesbank Baden-Württemberg et CRU* (15 juillet 2021) EU:C:2021:601.

[19] Il a, depuis, été suivi de deux ordonnances annulant, pour des motifs équivalents, des arrêts du Tribunal ayant suivi un raisonnement analogue à celui de l'arrêt *Landesbank Baden-Württemberg/CRU*. V. CJUE, C-663/20 P, *CRU / Hypo Vorarlberg Bank*, (ordonnaces) (non publiée, 3 mars 2022) EU:C:2022:162 et C-664/20 P, *CRU/Portigon et Commission* (non publiée, 2022) EU:C:2022:161.

1. La décision du CRU

Les règles gouvernant les contributions des établissements de crédit au FRU sont complexes[20] et trouvent leur origine dans une diversité d'instruments juridiques : certains concernant l'ensemble de l'Union européenne,[21] d'autres sont propres aux seuls États participants à l'Union bancaire.[22]

Un élément essentiel ressort : l'objectif assigné aux décisions du CRU est d'obtenir un financement du FRU au niveau d'1% du montant des dépôts couverts de l'ensemble des établissements de crédit agréés dans l'Union bancaire d'ici 2023 sur la base de contributions revêtant un caractère proportionnel, notamment, à l'étendue de leur passif (hors fonds propres et dépôts couverts) et leur profil de risque.

Il en découle – et c'est là un point qui sera au cœur de l'examen de l'étendue de l'obligation de motivation du CRU s'agissant du calcul des contributions tant par le Tribunal que par la Cour[23] – que le calcul de la contribution ne se fait pas en fonction d'élément exclusivement propres à l'établissement de crédit concerné. Au contraire, il implique la prise en compte des données de l'ensemble des établissements de crédit, dès lors qu'il s'agit de répartir une somme déterminée par avance entre ceux-ci. Le montant de la contribution de LB impliquait donc la prise en compte par le CRU de données d'autres établissements de crédit, lesquelles revêtent un caractère confidentiel par nature.

S'agissant plus particulièrement de la décision du CRU en cause, celle-ci est commune à l'ensemble des établissements de crédit et explicite la méthodologie qu'il a suivi.[24] Lui est associée une annexe fixant le montant des contributions par établissement de crédit. Enfin, un document qui ne fait pas partie de la décision et intitulé « Détails du calcul (ajusté au risque) : Contributions ex ante au [FRU] pour 2017 », semble fournir des informations additionnelles sur la méthode de calcul suivie

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[20] Sur la détermination par le CRU des contributions des établissements de crédit et leur contentieux, V M Meijer Timmerman Thijssen, 'Judicial review of the SRB's Contributions and Fees Decisions' in Zilioli and Wojcik (n 1) 443–60.

[21] Directive 2014/59/UE du Parlement européen et du Conseil, du 15 mai 2014, établissant un cadre pour le redressement et la résolution des établissements de crédit et des entreprises d'investissement, JO 2014, L 173, 190 et règlement délégué (UE) 2015/63 de la Commission, du 21 octobre 2014, complétant la directive 2014/59/UE du Parlement européen et du Conseil en ce qui concerne les contributions ex ante aux dispositifs de financement pour la resolution, JO 2015, L 11, 44.

[22] Règlement (UE) n° 806/2014 et règlement d'exécution (UE) 2015/81 du Conseil, du 19 décembre 2014, définissant des conditions uniformes d'application du règlement n° 806/2014, JO 2015, L 15, 1). accord intergouvernemental concernant le transfert et la mutualisation des contributions au FRU, du 21 mai 2014.

[23] Voir les points 98 à 102 de l'arrêt *Landesbank Baden-Württemberg/CRU* (TUE) et 113 et 114 de l'arrêt *Commission/Landesbank Baden-Württemberg et CRU* (CJUE).

[24] Accessible sur le site internet du CRU : https://www.srb.europa.eu/en/content/ex-ante-contributions-0 consulté le 2 février 2023.

par le CRU. Les destinataires de sa décision sont les autorités nationales de résolution, lesquelles sont en charge de la perception des contributions.

2. L'arrêt du Tribunal

Le Tribunal a annulé la décision du CRU en ce qui concerne LB en se fondant sur deux moyens.

Premièrement, il a relevé d'office une violation des formes substantielles consistant dans l'absence d'authentification de l'annexe à la décision du CRU établissant le montant de chacune des contributions. Le Tribunal s'est fondée sur la circonstance que l'annexe n'était pas liée de manière indissociable au texte de la décision du CRU et que n'y figurait ni signature manuscrite ni électronique.[25]

Deuxièmement, le Tribunal a retenu que le CRU avait manqué à son obligation de motivation dès lors qu'aucune information n'avait été fournie à LB sur les données des autres établissements de crédit alors même que « le calcul de [sa] contribution de [...] implique, d'une part, une mise en proportion du montant de son passif (hors fonds propres et dépôts couverts) avec le total du passif (hors fonds propres et dépôts couverts) de l'ensemble des autres établissements et, d'autre part, une évaluation de son profil de risque en rapport avec les profils de risque de ces autres établissements selon les indicateurs prévus ».[26] Le Tribunal a estimé que cette absence d'information aboutissait à rendre le calcul de la contribution de LB intrinsèquement opaque, ce qui portait atteinte à sa possibilité de contester utilement la décision du CRU.

Le Tribunal a ajouté deux considérations supplémentaires aux fins justifier cette conclusion d'une insuffisance de motivation.

D'une part, il a retenu que le caractère confidentiel des informations relatives aux autres établissements de crédit n'avait pas d'incidence sur l'étendue de l'obligation de motivation du CRU, aux motifs « qu'un défaut de motivation ne saurait être justifié par l'obligation de respecter le secret professionnel » et que l'obligation « de respecter les secrets d'affaires ne saurait être interprétée à ce point extensivement qu'elle vide l'exigence de motivation de son contenu essentiel ».[27]

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[25] Arrêt *Landesbank Baden-Württemberg/CRU*, points 38 à 55. Un vice similaire avait été relevé dans les arrêts *Banco Cooperativo Español/CRU* et *Hypo Vorarlberg Bank/CRU* précités.

[26] Arrêt *Landesbank Baden-Württemberg/CRU*, point 98.

[27] ibid point 108.

D'autre part, il a fait droit à une exception d'illégalité soulevée à l'encontre du règlement délégué 2015/63, considérant qu'il était à l'origine d'une méthode de calcul opaque impliquant la prise en compte de données confidentielles d'autres établissement de crédit, ce qui avait contribué à l'insuffisance de motivation de la décision du CRU. À cet égard, il a relevé que la directive 2014/59 et le règlement n° 806/2014 n'imposaient pas à la Commission d'adopter, par le règlement délégué 2015/63, la méthode en cause et que la Commission avait elle-même admise que, d'un point de vue économique, il était possible d'évaluer le profil de risque d'un établissement uniquement sur la base de données qui lui étaient propres.[28]

3. L'arrêt de la Cour

La Cour a retenu deux motifs d'annulation à l'encontre de l'arrêt du Tribunal tiré, d'une part, d'une violation du principe du contradictoire et, d'autre part, d'erreurs de droit dans l'appréciation du caractère insuffisamment motivé de la décision du CRU et dans la constatation de l'illégalité du règlement délégué 2015/63. Statuant en premier ressort, elle a écarté tout vice entachant l'authentification de la décision du CRU mais l'a annulée pour insuffisance de motivation.

Les enseignements de cet arrêt peuvent être résumés en trois points portant, respectivement, sur, premièrement, les modalités du contrôle du respect du contradictoire au cours de la procédure devant le Tribunal, deuxièmement, l'authentification des décisions des institutions et organes de l'Union et, troisièmement, la conciliation des obligations de motivation et de confidentialité.

3.1. Les modalités de contrôle du respect du contradictoire au cours de la procédure devant le Tribunal

Le premier moyen d'annulation retenu par la Cour tient dans la violation du principe du contradictoire au cours de la procédure devant le Tribunal, lorsque celui-ci a relevé d'office un défaut d'authentification de l'annexe de la décision du CRU fixant la contribution de LB. Essentiellement, la Cour a reproché au Tribunal de ne pas avoir indiqué avec suffisamment de clarté qu'il entendait soulever d'office un tel moyen dans les questions adressées aux parties au titre des mesures d'organisation de la procédure puis lors de l'audience.[29]

[28] ibid points 129–41.

[29] Points 56–78 de l'arrêt *Commission/Landesbank Baden-Württemberg et CRU*.

Cette censure n'est pas nécessairement surprenante. Non seulement il est, depuis 2009, bien admis que le relevé d'office des moyens doit se faire en respectant le principe du contradictoire,[30] mais il découle de la jurisprudence de la Cour une interprétation particulièrement stricte des exigences du contradictoire appliquées au Tribunal. Par un arrêt de 2014, *OHMI/National Lottery* Commission, le Tribunal avait été censuré au motif que s'il avait invité les parties à faire valoir leur point de vue sur une disposition du code civil italien, celles-ci n'avaient pas été mises en mesure de présenter leurs observations sur un arrêt de la Cour de cassation italienne en faisant application, et sur lequel il s'appuyait.[31] Il est, partant, assez logique qu'une imprécision portant sur l'existence même d'un moyen soulevé d'office ait conduit à la constatation d'une violation du principe du contradictoire.

Plus innovante est la référence – qui semble largement inédite – par la Cour à l'enregistrement de l'audience devant le Tribunal aux fins d'examiner si le principe du contradictoire avait été respecté.[32] En effet, classiquement, dans la mesure où l'enregistrement de l'audience, ou sa retranscription, ne font pas partie du dossier transmis à la Cour, ils ne sont pas pris en compte lors de l'examen des pourvois. C'était, d'ailleurs, la position suivie par l'avocat général Richard de la Tour dans ses conclusions.[33] Cette approche, dans l'éventualité où elle serait maintenue à l'avenir, devrait être saluée. Elle permet, en effet, une bien meilleure compréhension de la conduite des débats devant le Tribunal que la seule prise en compte du procès-verbal de l'audience, pas nature beaucoup plus lacunaire.

3.2. Vers un interprétation plus souple des exigences en matière d'authentification des actes ?

La formulation classique de la jurisprudence met en exergue l'importance du respect des règles relatives à l'authentification des actes, en soulignant qu'elles ont pour but d'assurer la sécurité juridique en figeant le texte adopté, permettant ainsi de vérifier, en cas de contestation, la correspondance parfaite avec ce dernier des textes publiés ou notifiés.[34] Dès lors que, selon la Cour,

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[30] C-89/08 P, *Commission/Irlande e.a* (2 décembre 2009) EU:C:2009:742, point 50–55, sur arrêt v. V Michel, « droits de la défense et moyens d'ordre public » (2010) 2 Europe, commentaire n° 59.

[31] C-530/12 P, *OHMI/National Lottery Commission* (27 mars 2014) EU:C:2014:186, points 57–59, cité aux points 57, 59 et 60 de l'arrêt *Commission/Landesbank Baden-Württemberg et CRU*.

[32] Point 68 de l'arrêt Commission/Landesbank Baden-Württemberg et CRU.

[33] Point 64 des conclusions de l'avocat général Richard de la Tour dans les affaires jointes *Commission/Landesbank Baden-Württemberg et CRU*, C-584/20 P et C-621/20 P, EU:C:2021:330.

[34] C-137/92 P, *Commission/BASF e.a*. (15 juin 1994) EU:C:1994:247, points 75 et 76, et C-286/95 P, *Commission/ICI* (6 avril 2000) EU:C:2000:188, points 40, 41 et 51.

« le contrôle du respect de la formalité de l'authentification et, ainsi, du caractère certain de l'acte est un préalable à tout autre contrôle tel que celui de la compétence de l'auteur de l'acte, du respect du principe de la collégialité ou encore celui du respect de l'obligation de motiver les actes »,[35] l'authentification s'apparente à la « *mère de toutes les autres formalités substantielles* ».[36] Au regard de cette importance, un vice l'entachant peut être relevé d'office et son respect appelle – ou appelait – un contrôle strict : l'exigence d'une correspondance parfaite semblant empêcher l'existence du moindre doute à cet égard. La gravité d'un tel manquement avait même poussé le Tribunal a en faire une cause d'inexistence de l'acte,[37] sans être suivi sur ce point par la Cour.[38]

Si la prémisse majeur du raisonnement de la Cour rappelle la rigueur de la formulation classique de sa jurisprudence,[39] son application aux circonstances de l'espèce est nettement plus souple.[40] Alors que l'avocat général Richard de la Tour avait, tout comme le Tribunal, retenu un défaut d'authentification de l'annexe précisant le montant de la contribution de LB en relevant que le seul élément de preuve de nature à démontrer l'existence d'un lien indissociable avec la version signée de la décision du CRU était postérieur de plus de deux mois à celle-ci,[41] la lecture de l'arrêt de la Cour donne plutôt l'impression qu'elle s'est, en réalité, fondée sur un faisceau d'indices pour considérer qu'existait un tel lien indissociable.

Appréciation liée aux circonstances de l'espèce ou inflexion de la jurisprudence ? L'arrêt *Conseil/Hamas*, également rendu en grande chambre milite plutôt en faveur de la seconde option. La Cour y a suivi un raisonnement analogue aux fins de censurer l'analyse du Tribunal ayant retenu un défaut d'authentification de l'exposé des motifs individuels justifiant l'inscription sur les listes de personnes, groupes et entités visés par un acte instaurant des mesures restrictives.[42]

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[35] C-287/95 P et C-288/95 P, *Commission/Solvay* (6 avril 2000) EU:C:2000:189, point 50.

[36] Selon la formule de L Bernardeau et J-P Christienne, *Les amendes en droit de la concurrence* (Larcier 2013), 519–20.

[37] TUE, T-79/89, T-84/89 à T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 et T-104/89, *BASF e.a./Commission* (27 février 1992) EU:T:1992:26.

[38] C-137/92 P, *Commission/BASF e.a.* (15 juin 1994) EU:C:1994:247, points 66–102.

[39] Point 152 de l'arrêt *Commission/Landesbank Baden-Württemberg et CRU*.

[40] ibid points 153–163.

[41] Voir les points 172 et 173 des conclusions de l'avocat général Richard de la Tour précitées.

[42] C-833/19 P, *Conseil/Hamas* (23 novembre 2021) EU:C:2021:950, points 55–76.

3.3. Conciliation des obligation de motivation et de confidentialité

Mais l'aspect le plus marquant de l'arrêt de la Cour concerne l'examen des interactions entre les obligations de motivation et de confidentialité du CRU lors de l'explicitation du calcul de la contribution de LB.

Cette question n'était pas évidente dès lors que la logique de deux dispositions du traité FUE s'opposaient.

D'un côté, en application de l'article 296 TFUE, le CRU est soumis à l'obligation de motiver ses actes juridiques et, à ce titre, selon la formulation classique, de « faire apparaître de façon claire et non équivoque le raisonnement de l'institution, auteure de l'acte de manière à permettre aux intéressés de connaître les justifications de la mesure prise et au juge de l'Union européenne d'exercer son contrôle ».[43] Sous cet angle, l'ensemble des informations nécessaires à la bonne compréhension et au contrôle de la légalité du calcul de la contribution de LB devraient lui être accessibles. D'un autre côté, le CRU a l'obligation de protéger les données confidentielles de toutes les entités, y compris les secrets d'affaires, en vertu de l'article 339 TFUE, de l'article 41, paragraphe 2, sous b), de la Charte et de l'article 88, paragraphe 5, du règlement n° 806/2014,[44] la méconnaissance de cette obligation est susceptible d'engager sa responsabilité extracontractuelle.[45] Il lui était, sous cet angle, difficile de dévoiler à LB, à l'occasion de l'explicitation du calcul de sa contribution, des informations s'apparentant à des secrets d'affaires d'autres établissements de crédit.

La Cour, en faisant droit au pourvoi tout en constatant, à l'instar du Tribunal, une insuffisance de motivation de la décision du CRU, a retenu une interprétation différente de la conciliation de ces deux impératifs que celle privilégiée par le Tribunal. Essentiellement, la Cour s'est appuyée sur un raisonnement en six temps.

Premièrement, la circonstance que la décision du CRU aboutisse au paiement d'une somme d'argent n'implique pas nécessairement que sa motivation comprenne l'intégralité des éléments permettant à son destinataire de vérifier l'exactitude du calcul de son montant. Même dans une telle

[43] V. par ex. C-413/06 P, *Bertelsmann et Sony Corporation of America/Impala* (10 juillet 2008) EU:C:2008:392, point 166 ; TUE, T-691/18, *KPN/Commission* (non publié, 27 janvier 2021) EU:T:2021:43, point 161.

[44] Voir dans un autre contexte CJUE, T-628/17, *Aeris Invest/Commission et CRU* (1er juin 2022) EU:T:2022:315, point 366.

[45] Voir CJUE, T-88/09, *Idromacchine e.a./Commission* (8 novembre 2011) EU:T:2011:641T-88/09 et CJUE, T-838/16, *BP/FRA* (non publié, 11 juillet 2019) EU:T:2019:494.

configuration, il appartient aux institutions et organismes de l'Union de concilier leurs obligations au titre des article 296 et 339 TFUE.[46]

Deuxièmement, la jurisprudence admet déjà dans plusieurs domaines des limites à l'obligation de motivation justifiées par la préservation de la confidentialité de certaines informations.[47]

Troisièmement, le calcul des contributions sur la base de de données couvertes par le secret des affaires ne pouvant pas être reprises dans la motivation de la décision du CRU est inhérent à la nature de ces contributions tel qu'elles sont envisagées par le législateur à l'occasion de l'adoption du règlement n° 806/2014 et de la directive 2014/59.

Quatrièmement, le Tribunal en retenant que la motivation de la décision du CRU doit nécessairement permettre à LB de vérifier l'exactitude du calcul de sa contribution a remis en cause le choix du législateur d'instituer un mode de calcul de cette contribution intégrant des données dont le caractère confidentiel est protégé par le droit de l'Union et, ainsi, a « réduit de manière excessive le large pouvoir d'appréciation dont doit disposer, à cette fin, ce législateur, en l'empêchant notamment d'opter pour une méthode susceptible d'assurer une adaptation dynamique du financement du FRU aux évolutions du secteur financier, par la prise en compte comparative, en particulier, de la situation financière de chaque établissement agréé sur le territoire d'un État membre participant au FRU ».[48]

Cinquièmement, il était loisible au CRU de concilier préservation de la confidentialité des données et respect de l'obligation de motivation par la divulgation de la méthode de calcul utilisée, associée à des informations suffisantes pour comprendre, en substance, de quelle façon la situation individuelle des établissements de crédit a été prise en compte lors du calcul de leur contribution, au regard de la situation de l'ensemble desdits établissements. Pour la Cour, l'établissements de crédit serait alors en mesure – même sans avoir eu accès aux données confidentielles des autres établissements – de vérifier si sa contribution a été fixée de manière arbitraire, en méconnaissant la réalité de leur situation économique ou en utilisant des données relatives au reste du secteur financier dépourvues de plausibilité.[49]

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[46] Voir les points 104–109 de l'arrêt *Commission/Landesbank Baden-Württemberg/CRU*.

[47] ibid points 110–112.

[48] ibid points 113–116.

[49] ibid points 121–123.

Sixièmement, le règlement délégué 2015/63 ne fait aucunement obstacle à la possibilité, pour le CRU, de divulguer, sous une forme agrégée et anonymisée, des informations suffisantes pour permettre à un établissement de comprendre de quelle façon sa situation individuelle a été prise en compte dans le calcul de sa contribution au regard de la situation de l'ensemble des autres établissements concernés.[50]

La Cour a déduit, d'une part, que le Tribunal avait commis une erreur de droit en considérant, que « le CRU était tenu, en vertu de l'article 296 TFUE, de faire figurer dans la motivation de la décision [du CRU] les éléments permettant à [LB] de vérifier l'exactitude du calcul de sa contribution au FRU, sans que puisse faire obstacle à cette obligation le caractère confidentiel de certains de ces éléments »[51] et, d'autre part, que la décision du CRU était entachée d'une insuffisance de motivation dans la mesure où les éléments fournis ou auxquels LB pouvait avoir accès ne couvraient qu'une partie des informations pertinentes qu'il aurait pu communiquer sans porter atteinte au secret des affaires.[52] Dans la mesure où l'annulation découle d'une violation des formes substantielles et aux fins de ne pas porter atteinte à la mise en œuvre de la directive 2014/59, du règlement n° 806/2014 et du règlement délégué 2015/63 « qui constituent une partie essentielle de l'union bancaire, laquelle contribue à la stabilité de la zone euro », la Cour a maintenu les effets de la décision du CRU en ce qui concerne LB jusqu'à l'entrée en vigueur, dans un délai raisonnable qui ne saurait dépasser six mois à compter de la date du prononcé de son arrêt.[53]

À première vue, il serait tentant de considérer que, tant le CRU que le Tribunal, ont chacun succombé à un tropisme opposé : le CRU, en ne fournissant aucune information sur les données des autres établissements de crédit aurait attribué une priorité absolue au respect de son obligation au titre de l'article 339 TFUE, alors que le Tribunal aurait accordé une importance exclusive au respect de l'obligation de motivation. L'arrêt de Cour aurait permis une conciliation de ces deux impératifs.

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[50] ibid point 139.

[51] ibid point 124.

[52] ibid points 164–168.

[53] ibid points 173–178. Le Tribunal dans l'arrêt sous pourvoi avait suivi une approche analogue : V. arrêt *Landesbank Baden-Württemberg/CRU* points 144–47. Au contraire dans l'arrêt *Hypo Vorarlberg Bank/CRU* une demande en ce sens avait été rejetée au motif que le CRU n'avait pas « démontré en quoi, à la suite du présent arrêt, le remboursement des sommes perçues de la requérante au titre de contribution ex ante pour 2016 mettrait en péril des considérations impérieuses de sécurité juridique tenant à l'ensemble des intérêts, tant publics que privés, en jeu dans la présente affaire. En effet, le simple fait qu'un remboursement dans l'attente de l'adoption d'une nouvelle décision soit inapproprié ne constitue pas un motif s'apparentant à des considérations impérieuses de sécurité juridique » (point 222).

Si un tel résumé est assez conforme à la réalité, il convient de garder à l'esprit une considération qui semble avoir été sous-jacente au raisonnement du Tribunal. Se dégage, en effet, de son arrêt l'impression qu'il n'y avait pas lieu d'avaliser une limitation à l'obligation de motivation, laquelle constitue l'une des conditions de l'effectivité du contrôle juridictionnel garanti par l'article 47 de la Charte,[54] pour des motifs de confidentialité dans une situation caractérisée par la possibilité pour la Commission d'élaborer un mode alternatif de calcul n'impliquant pas la prise en compte de données confidentielles. Ce raisonnement se rapproche de la logique du contrôle de proportionnalité d'une dérogation à un droit lequel, au titre de l'exigence de nécessité, exclut l'existence de toute autre mesure qui serait aussi appropriée tout en étant moins contraignante.[55]

Certes, le postulat sur lequel repose de raisonnement est en lui-même discutable, dès lors qu'il ressort de l'arrêt de la Cour que le choix de cette méthode ne découlait pas tant du règlement d'exécution de la Commission que du législateur lui-même, lors de l'adoption règlement n° 806/2014 et de la directive 2014/59. Elle procède néanmoins d'un souci assez légitime d'éviter la création d'une nouvelle hypothèse de dérogation ou de limite à l'obligation de motivation.

Sans aller jusqu'à soutenir, en paraphrasant Shakespeare dans *Hamlet*, que la motivation des actes juridiques est « *more honoured in the breach than in the observance* », il peut quand même être relevé qu'il existe déjà plusieurs domaines dans lesquels l'auteur d'un acte est dispensé de faire figurer dans sa motivation certaines informations pourtant pertinentes pour le contrôle de sa légalité. Ainsi que le rappelle l'avocat Général Richard de la Tour dans ses conclusions, « les juridictions de l'Union ont admis des limitations à l'obligation de motivation fondées sur le secret des affaires (droit de la concurrence, aides d'État et marchés publics), sur la complexité de la matière (mesures antidumping), sur la charge pesant sur l'autorité décisionnaire (concours de la fonction publique), sur la nécessité d'avoir un impact sur le comportement des entreprises par un effet dissuasif des amendes en matière de concurrence ainsi que sur des considérations impérieuses touchant à la sûreté de l'Union ou de ses États membres (lutte contre le terrorisme) ».[56]

Il ne saurait, en effet, être nié que de telles limitations sont problématiques sous l'angle du droit à protection effective des parties concernées, au regard des deux objectifs clés joués par l'obligation de motivation des actes juridiques rappelés plus haut : permettre, d'une part, aux

[54] Point 103 de l'arrêt *Commission/Landesbank Baden-Württemberg/CRU*.

[55] Voir, par ex. C-283/11, *Sky Österreich* (22 janvier 2013) EU:C:2013:28, points 54–57. Sur cette question v. B Pirker, *Proportionality Analysis and Models of Judicial Review* (Europa Law Publishing 2013) 29.

[56] Point 144 des conclusions Richard de la Tour précitées.

intéressés de connaître les justifications de la mesure prise afin de défendre leurs droits et, d'autre part, au juge de l'Union d'exercer son contrôle.

Si la limitation de l'obligation de motivation n'empêche pas la réalisation du second objectif – le Tribunal peut ordonner la communication des informations confidentielles nécessaire à son contrôle par le biais d'une mesure d'instruction – leur prise en compte se fera, néanmoins, dans un cadre moins favorable au requérant dès lors que c'est un principe du contradictoire « allégé » qui aura vocation à s'appliquer. L'article 103 du règlement de procédure portant sur le « Traitement des renseignements et des pièces confidentiels » permet de porter à la connaissance d'une autre partie principale des renseignements ou pièces confidentiels « en subordonnant leur divulgation à la souscription d'engagements spécifiques, ou de ne pas les communiquer en précisant, par voie d'ordonnance motivée, les modalités permettant à cette autre partie principale dans la plus large mesure possible, de faire valoir ses observations, notamment en ordonnant la production d'une version non confidentielle ou d'un résumé non confidentiel des renseignements ou pièces, comportant leur contenu essentiel ».

La limitation de l'obligation de motivation d'un acte est plus problématique encore sous l'angle de son premier objectif. En effet, en l'absence de certains motifs essentiels, la partie intéressée peut ne pas être en mesure d'apprécier si un acte est entaché de vices justifiant qu'elle introduise un recours en annulation ainsi que de déterminer les moyens qu'il pourrait invoquer à son soutien. Il est donc nécessaire que les établissements de crédit disposent d'un degré minimal d'informations sur le calcul de leur propre contribution, dépassant la simple explicitation de la méthode suivie. Le Tribunal pouvait donc légitimement avoir quelques difficultés à avaliser l'approche du CRU.

Sous cet angle, la solution à laquelle la Cour est arrivée est plutôt satisfaisante : consciente de la nécessité d'assurer une compréhension minimale de la décision du CRU aux fins de ne pas entraver l'exercice de son droit à un recours juridictionnel – ainsi qu'en atteste la formulation de cet objectif dans l'arrêt, plus précise que celle classiquement utilisée par la jurisprudence, en ce qu'elle souligne que la motivation doit permettre « à l'intéressé de décider *en pleine connaissance de cause s'il entend introduire un recours contre cette décisio*n » – [57] elle ne dispense pas le CRU de communiquer les données nécessaires à la bonne compréhension du calcul des contributions mais prévoit plutôt une obligation de traitement de ces données afin de les fournir sous une forme préservant la

[57] Point 108 de l'arrêt *Commission/Landesbank Baden-Württemberg/CRU*.

confidentialité des établissements de crédit, tout en permettant un minimum de compréhension de la détermination desdites contributions.[58]

[58] Voir la cinquième étape du raisonnement de la Cour retranscrit ci-dessus (point 140 de l'arrêt *Commission/Landesbank Baden-Württemberg/CRU*).

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