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Yearbook on Procedural Law of the Court of Justice of the European Union
Third Edition – 2021

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Yearbook on Procedural Law of the Court of Justice of the European Union
Third Edition - 2021

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Foreword
The chapters contained in this yearbook have been composed by the participants of the third edition of the Forum on Procedural Law of the Court of Justice of the European Union held on Monday, 19 April 2021 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

Cite as

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Section I
General Topics
Chapter 1

New Strategies Concerning Actions for Damages against the Union

Kathleen Gutman

1. Introduction

Since the founding of the European Union, the Treaties have provided that a party may bring a claim directly before the Court of Justice of the European Union (the Union Courts) in order to establish the non-contractual liability of the Union and thus to obtain compensation for damage allegedly caused by the Union through its institutions and bodies. This type of claim is commonly referred to as the action for damages against the Union, and is governed by Article 268 TFEU and the second and third paragraphs of Article 340 TFEU.

The action for damages against the Union is indeed extraordinary because it has several important tasks in the Union legal order and intersects with so many areas of Union law. For example, this action is what distinguishes the European Union from international organisations whose rules traditionally

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* Référentaire, Court of Justice of the European Union. All opinions expressed herein are strictly personal. The author would like to thank the participants of the Third Edition of the Max Planck Institute Luxembourg Forum on Procedural Law of the Court of Justice of the European Union, held on 19 April 2021, for their valuable comments, and in particular the editors of this volume, Daniel Sarmiento, Hélène Ruiz Fabri and Burkhard Hess.

1 In this contribution, the term Union Courts denotes the institution of the Court of Justice of the European Union, which, in accordance with the first subparagraph of Article 19(1) TEU, currently includes the Court of Justice and the General Court.

2 For a general survey, see eg Dominik Hanf, 'EU Liability Actions' and Andrea Blondi and Martin Farley, ‘Damages in EU Law’ in Robert Schütze and Takis Tridimas (eds), Oxford Principles of European Union Law: The European Union Legal Order, vol I (OUP 2018) 910 and 1040; citations in nn 5, 6, 7 and 9. For older but still valuable works, see also Andrea Blondi and Martin Farley, The Right to Damages in European Law (Kluwer 2009); Ton Heukels and Alison McDonnell (eds), The Action for Damages in Community Law (Kluwer 1997); Jill Wakefield, Judicial Protection through the Use of Article 288(2) EC (Kluwer 2002).

3 Article 268 TFEU states: ‘The Court of Justice of the European Union shall have jurisdiction in disputes relating to compensation for damage provided for in the second and third paragraphs of Article 340 [TFEU].’

4 The second paragraph of Article 340 TFEU states: ‘In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties. The third paragraph of that provision continues: ‘Notwithstanding the second paragraph, the European Central Bank shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its servants in the performance of their duties.’
confer extensive immunity from suit. This action also crosses the divide between public and private law, as illustrated by its linkage to tort law and the liability of public authorities, and ventures into the realm of comparative law through the reference in the Treaties to the ‘general principles common to the laws of the Member States’ on the basis of which the Union Courts are to formulate rules concerning Union non-contractual liability. And with particular regard to EU procedural law, this action plays an essential role within the overarching EU system of judicial protection which comprises the various procedures before the Union Courts, along with the interaction between Union law and the Member State procedural and remedial frameworks more generally. In fact, the action for damages may even be considered something of a ‘crisis’ provision or procedure, since it has received increasing attention in the context of the Union Courts’ case-law relating to crises affecting the EU and its Member States, such as the global financial crisis, as shown by the recent judgment of 16 December 2020, Council v K. Chrysostomides & Co. and Others, among others. Consequently, taking account of recent jurisprudential developments, this is surely an opportune time for renewed reflection and engagement with this subject.

The aim of this contribution is therefore to examine, in the light of salient case-law of the Union Courts, some key points governing the action for damages against the Union, with a view to highlighting possible new strategies regarding this action going forward. To that end, it is structured in three main parts. The first part discusses the notion of Union non-contractual liability and its linkage...
to the jurisdiction of the Union Courts, related challenges in the field of the common foreign and security policy (CFSP) and the scope of the action (Section 2). The second part evaluates the attribution of non-contractual liability in terms of the parties involved and aspects relating to the interplay between Union and Member State liability and the scope of Union law (Section 3). The third part addresses the main conditions that must be satisfied for the action for damages to succeed, with an emphasis on the relationship between the Union and Member State non-contractual liability regimes and some salient applications of those conditions (Section 4).

Through this analysis, the main argument of this contribution is that, despite apparent challenges associated with the action for damages against the Union, recent developments in the case-law of the Union Courts indicate that the need to ensure effective judicial protection for parties in the Union legal order remains a driving force underlying this action.

2. Notion of Union Non-Contractual Liability

To begin with, although the term ‘non-contractual liability’ is mentioned (though not defined) in the text of Article 340 TFEU, there is a variety of terms to denote the action for damages against the Union, such as EU tort or public liability. Nonetheless, the notion of Union non-contractual liability is valuable for delineating the jurisdiction of the Union Courts (2.1), along with related aspects concerning jurisdictional challenges in the CFSP (2.2) and the scope of this action (2.3).

2.1. Jurisdiction of the Union Courts

As the Union Courts have long held, the action for damages against the Union is an autonomous form of action, with a particular purpose to fulfil within the system of legal remedies laid down in the Treaties and subject to conditions for its use dictated by its specific purpose. In fact, the General Court has taken to referring to the ‘principle’ of the autonomy of actions for damages in its case-law.

11 See citations in supra nn 6 and 7.

12 See eg C-134/19, Bank Refah Kargaran v Council, Judgment (6 October 2020) EU:C:2020:793, para 33. Thus, for example, unlike actions for annulment under Article 263 TFEU, the admissibility of actions for damages does not depend on whether the measure causing the alleged damage is binding; all conduct causing damage is capable of establishing the Union’s non-contractual liability. See T-107/17, Steinhoff and Others v ECB, Judgment (23 May 2019) EU:T:2019:353, para 55.

Importantly, there is a distinction drawn in the case-law with regard to the jurisdiction of the Union Courts to decide different kinds of damages claims involving the Union. Damages claims based on Union non-contractual liability are considered to fall within the exclusive jurisdiction of the Union Courts under Article 268 TFEU. In contrast, as regards damages claims based on Union contractual liability – which generally involve contracts concluded between a Union institution or body and a third party and are governed by Article 272 TFEU and the first paragraph of Article 340 TFEU – the Union Courts rule on such claims only to the extent that there is an arbitration clause within the meaning of Article 272 TFEU conferring such jurisdiction on them; otherwise, they fall within the jurisdiction of the national courts, as provided for in Article 274 TFEU. Moreover, the Union Courts have exclusive jurisdiction to rule on damages claims in the context of ‘staff disputes’ involving relations between the Union and its civil servants, on the basis of Article 270 TFEU in conjunction with Articles 90-91 of the Staff Regulations, in so far as such claims originate in the employment relationship and thereby fall outside Articles 268 and 340 TFEU.

Recent case-law highlights issues bearing on the Union Courts’ exclusive jurisdiction to rule on actions for damages against the Union based on Articles 268 and 340 TFEU vis-à-vis other procedural routes in the Treaties for ensuring effective judicial protection for parties in disputes with Union institutions and bodies, including the procedures involving Union contractual liability and staff disputes.

A salient example is the Court of Justice’s judgment of 25 June 2020, European Union Satellite Centre v KF. In this case, a contract staff member of a Union agency brought an action for annulment under Article 263 TFEU, along with an action for damages under Articles 268 and 340 TFEU, against that agency, which disputed the Union Courts’ jurisdiction on several grounds, relying on other procedures set out in the Treaties. In its judgment, the Court upheld its jurisdiction to decide the case, emphasising...
that in disputes seeking damages against the Union, the Union Courts must assess whether the action in question concerns the Union’s non-contractual or contractual liability. Therefore, according to the Court, the concept of non-contractual liability for the purposes of Articles 268 and 340 TFEU has an autonomous character and must, in principle, be interpreted in the light of its purpose, namely, that of allowing an allocation of jurisdiction between the Union Courts and the national courts. On that basis, the Court considered that the fact that the special staff regulations for that agency excluded any judicial review by the Union Courts or by the national courts, of its decisions was contrary to Union law, and that it fell to the Union Courts to exercise the jurisdiction conferred on them by Articles 263 and 268 TFEU to ensure effective judicial review.

Moreover, in the judgment of 15 July 2021, OH (Immunity from jurisdiction),18 the Court of Justice was confronted with a reference for a preliminary ruling submitted by a Greek court which raised questions concerning the division of jurisdiction between the Union Courts and the national courts. The case concerned an action brought before the referring court by a former temporary staff member of the European Commission, seeking compensation for damage arising from the termination of his employment contract with the Commission on account of wrongful conduct which the applicant attributed to the former Commission member for whom he worked. In its judgment, the Court held that the Union Courts have exclusive jurisdiction, to the exclusion of the national courts, to rule on such an action. In that regard, the Court found that the action for non-contractual liability brought by the applicant for alleged misconduct on the part of the former Commissioner stemmed from the employment relationship between the applicant and the Commission and thus fell within the scope of Article 270 TFEU. Such an action also fell, in the Court’s view, within the scope of Article 268 TFEU, read in conjunction with Article 340 TFEU, in so far as it sought compensation for allegedly wrongful acts committed by a member of the Commission in the performance of his duties.

2.2. Challenges in the CFSP

Although the ten-year anniversary of the Lisbon Treaty (on 1 December 2019) has long passed, the Union Courts are still in the process of working out some of the changes brought by that treaty which have an impact on the action for damages against the Union. In particular, this includes aspects relating to the CFSP. This is because the Union Courts’ jurisdiction continues to be restricted in this

18 See C-758/19, EU:C:2021:603, paras 20-35.
field, although there are certain exceptions laid down in the Treaties which provide for the Union Courts' jurisdiction as regards, first, monitoring compliance with Article 40 TEU and, second, reviewing the legality of decisions providing for restrictive measures against natural and legal persons adopted by the Council on the basis of Title V, Chapter 2 TEU (concerning specific provisions on the CFSP).¹⁹

The Court of Justice's case-law on actions for damages seems to have exploited the exception regarding restrictive measures 'to the max'.

A recent example is the judgment of 6 October 2020, *Bank Refah Kargaran v Council*.²⁰ In that judgment, the Court of Justice ruled that the principle of effective judicial protection of persons or entities subject to restrictive measures requires, in order for such protection to be complete, that the Union Courts be able to rule on an action for damages brought by such persons or entities seeking damages for the harm caused by the restrictive measures taken in the CFSP decisions. The Court reasoned that, since the Union Courts have jurisdiction to rule on an action for damages in so far as it concerns restrictive measures provided for by Union regulations based on Article 215 TFEU, they must also have jurisdiction to rule on actions for damages in respect of restrictive measures provided for in CFSP decisions in order to avoid a lacuna in the judicial protection of the natural and legal persons concerned. In that regard, the Court emphasised that the action for damages must be assessed having regard to the whole of the system established by the Treaties for the judicial protection of individuals, since that action contributes to the effectiveness of that protection, and the very existence of effective judicial review designed to ensure compliance with provisions of Union law is of the essence of the rule of law. The Court also rejected the Council's arguments that the Union Courts' jurisdiction in respect of regulations based on Article 215 TFEU ensures full judicial protection for individuals, given that those regulations may not be the same as CFSP decisions and the public designation of persons subject to restrictive measures is accompanied by opprobrium and suspicion in respect of which it cannot be ruled out that they cause harm and thus justify bringing an action for damages in compensation thereof.


²⁰ See C-134/19 P, EU:C:2020:793, paras 26-44. For a detailed discussion, see eg the contribution by Elisabet Ruiz Cairó in the present volume.
Furthermore, the Court of Justice’s case-law on actions for damages in the field of the CFSP has helped promote effective judicial protection for parties in other ways. For instance, in the judgment of 30 May 2017, *Safa Nicu Sepahan v Council*, the Court of Justice upheld the General Court’s finding that annulment of the provisions of the Union measure at issue is not always capable of constituting a form of reparation for the damage suffered and therefore financial compensation may be necessary to ensure full reparation of that damage depending on the particular case. Likewise, in the judgment of 10 September 2019, *HTTS v Council*, the Court of Justice ruled that the coherence underlying the system of remedies in the Treaties means that the methodology for examining the legality of measures or conduct of the Union institutions cannot differ according to the type of action. Thus, as with an action for annulment, in an action for damages, too, the illegality of an act or of conduct that may give rise to Union non-contractual liability must be assessed on the basis of the facts and law as they stood at the time when the act or conduct was adopted. As a result, the Court of Justice set aside the General Court’s finding in that case that the Council could rely on any relevant matter that was not taken into account when the party was included on the list of restrictive measures in order to show that it did not breach Union law.

Even so, gaps in the EU system of judicial protection seem to remain. This was recently spotlighted by the judgment of 13 February 2019, *Tomanović and Others v the European Union and Others*, in which a UK court dismissed several claims based on fundamental rights violations brought against Eulex Kosovo, an EU international mission in the CFSP. While the dismissal was based on grounds related to the UK’s incorporation of Treaty provisions on the CFSP into domestic law, the judgment nonetheless drew attention to the purported lack of the Union Courts’ jurisdiction over actions for damages in the field of the CFSP apart from the restrictive measures context.

Indeed, taken at face value, it would seem on the basis of the exceptions set out in the Treaties that the Union Courts have not explicitly been conferred jurisdiction to rule on actions for damages involving CFSP acts and conduct of the Union institutions and bodies taken on the basis of the Treaty provisions concerning the CFSP. That being said, recent case-law of the Court of Justice indicates that

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just because acts and conduct of the Union institutions and bodies in the CFSP are involved does not necessarily mean that the restrictions placed on the Union Courts’ jurisdiction in the CFSP apply, with the result that their jurisdiction in respect of actions for damages in this context may not be foreclosed depending on the circumstances of the case.  

2.3. Scope of Union Non-Contractual Liability

By and large, actions for damages against the Union are concerned with redress for allegedly unlawful acts and conduct of Union institutions and bodies. However, they are not strictly limited as such. Notwithstanding the refusal to recognise Union strict (or no-fault) liability in the judgment of 9 September 2008, *FIAMM and Others v Council and Commission*, the Court of Justice has nevertheless interpreted the scope of Union non-contractual liability broadly, so as to cover claims for damages in the absence of such unlawful acts or conduct.

This issue is aptly illustrated by the recent judgment of 9 July 2020, *Czech Republic v Commission*. In this case, the Czech Republic contested the dismissal of its action for annulment by the General Court on the grounds that otherwise it had no legal remedy that would allow it to obtain judicial review of the position taken by the Commission in the dispute between them in the context of the system of the Union’s own resources. In its judgment, the Court of Justice upheld the dismissal of the action, making clear that it is open to that Member State to seek damages on account of the Union’s unjust enrichment and, if necessary, to bring an action before the General Court to that end. The Court underlined, in the light of previous case-law, that Union non-contractual liability may be based on a claim for unjust enrichment even though it does not require proof of unlawful conduct on the part of


the defendant Union institution, since excluding that possibility would be contrary to the principle of effective judicial protection. That judgment therefore highlighted, indeed invited, the Member States (!) to bring possible claims for unjust enrichment in the context of actions for damages based on Articles 268 and 340 TFEU. At the same time, that judgment begs questions whether the Court may recognise other types of claims in the absence of unlawful acts and conduct, such as those relating to the principle of *negotiorum gestio* (benevolent intervention in another's affairs), which awaits clarification in the case-law.

3. **Attribution of Non-Contractual Liability**

Traditionally, an action for damages against the Union has been brought by private parties (and not Member States, though the case-law mentioned in the previous section may give new impetus in that regard) against the relevant Union institution or body which allegedly caused the damage. Yet, as shown by recent case-law, matters relating to the attribution of non-contractual liability in terms of the parties involved (who to sue) (3.1) and related aspects bearing on Union and/or Member State liability (3.2) and the scope of Union law (3.3) may raise complications.

3.1. **The Parties (Who to Sue)**

Under the case-law, formally, the action for damages against the Union, as its name implies, concerns the non-contractual liability of the Union, yet it is directed at the particular Union institution or body to which the allegedly unlawful acts and conduct are attributed which represents the Union before the Union Courts and thus serves as the defendant in the action.

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29 See, in that regard, T-151/20, *Czech Republic v Commission* (pending); Dolores Utrilla, ‘Member States’ Actions for Damages Against the EU as a Means to Offset Shortcomings of Effective Judicial Protection? *Czech Republic v Commission*’ (*EU Law Live*, 26 May 2020). As indicated by that commentator, this would be the first case in which an action for damages against the Union is brought by a Member State.

30 See further, in that regard, Gutman (n 6) 740-747; Marloes van de Moosdijk, *Unjust Enrichment in European Union Law* (Kluwer 2018) 153-185, in particular 171-172.


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Such actions frequently concern the Union institutions listed in Article 13(1) TEU, which post-Lisbon include the European Council, as well as the European Parliament, the Council, the Commission, the Court of Justice of the European Union and the Court of Auditors. In view of the legal personality of the European Central Bank (ECB), there is a separate provision concerning its non-contractual liability set out in the third paragraph of Article 340 TFEU, which is modelled on the second paragraph of that provision and the main conditions governing Union non-contractual liability apply mutatis mutandis to it. Moreover, as regards the institution of the Court of Justice of the European Union, the Court of Justice has established that the sanction for a breach by a Union Court of its obligation to adjudicate within a reasonable time as guaranteed by the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union (the Charter) is an action for damages against the Union (see further section 4.2.2 below). The possibility of bringing an action for damages based on breaches of Union law committed by a Union Court on grounds other than those relating to excessively long proceedings was sidestepped in recent case-law and thus remains open.

As recognised in the case-law, actions for damages may also be brought against Union bodies, offices and agencies, despite the absence of explicit language to this effect in the Treaties. Yet, particular aspects and complexities may arise.

A salient example is the judgment of 16 December 2020, Council v K. Chrysostomides & Co. and Others, which was situated in the context of the restructuring of the Cypriot banking sector in the wake of the global financial crisis. In that judgment, the Court of Justice held that the Euro Group –

37 See, in that regard, Merijn Chamon, ‘Les agences décentralisées et le droit procédural de l’UE’ (2016) 52 Cahiers de droit européen 541; see also C-59/18 and C-182/18, Italy v Council (Seat of the European Medicines Agency), Opinion of Advocate General Bobek, EU:C:2021:812, points 99-100.
38 See C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P, Chrysostomides, Judgment, EU:C:2020:1028, in particular paras 78-98. For a detailed discussion, see eg the contribution by Menelaos Markakis in the present volume.

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composed of finance ministers of the Eurozone Member States who meet informally to discuss matters related to the euro, with the Commission and the ECB invited to attend – could not be regarded as a Union body established by the Treaties whose acts or conduct could form the subject matter of an action for damages. In that regard, the Court pointed out that the term ‘institution’ within the meaning of the second paragraph of Article 340 TFEU encompasses not only the Union institutions listed in Article 13(1) TEU, but also all the Union bodies, offices and agencies which, first, have been established by or under the Treaties and, second, are intended to contribute to the achievement of the EU’s objectives. However, according to the Court, the Euro Group did not satisfy the first of those criteria, since it was created as an intergovernmental body outside the Union institutional framework and which is characterised by its informality, without any competence of its own in the Union legal order. Nonetheless, the Court emphasised that parties may still bring actions for damages against the Council, the Commission and the ECB in respect of acts or conduct which those institutions adopt following the political agreements concluded within the Euro Group, and thus there was no clash with the principle of effective judicial protection.

For Union bodies with their own legal personality, provisions concerning their non-contractual liability are typically contained in the Union measures establishing them and which generally track the wording of the second paragraph of Article 340 TFEU.\(^\text{39}\) Or it may be the case that the disputed acts and conduct of the Union body are taken pursuant to delegated powers and thus are attributable to another Union institution which is the proper defendant. As a classic example, actions for damages concerning allegedly unlawful acts and conduct committed by the European Anti-Fraud Office (OLAF) are attributable to the Commission.\(^\text{40}\) Likewise, those of EU Delegations have been attributed to the Commission.\(^\text{41}\) As regards EU international missions in the CFSP, in the case-law decided at the time when those missions had not been given legal personality, their acts and conduct have been attributed to the Council or the Commission depending on the circumstances.\(^\text{42}\) However, this case-law may be


subject to refinement following the explicit grant of legal personality to such missions in the relevant Union measure.\footnote{See, in that regard, C-283/20, \textit{Eulex Kosovo}, Judgment (24 February 2022) EU:C:2022:126; see also Joni Helksoski, ‘Responsibility and Liability for CSDP Operations’ in Blockmans and Koutrakos (n 19) 132.}

\section*{3.2. Union and/or Member State Liability}

Another issue raised by recent case-law concerns the attribution of liability to Union and/or Member State authorities,\footnote{For a detailed discussion of Union and Member State concurrent liability, see eg Biondi and Farley (n 2) ch 4; M Fink, ‘EU Liability for Contributions to Member States’ Breaches of EU Law’ (2019) 56 Common Market Law Review 1227; Lenaerts, Gutman and Nowak (n 9).} which seems to have become an increasingly ‘hot’ topic especially in the context of actions for damages in view of the complex interactions between the Union and the Member States in a number of fields.

As the General Court has recognised, verification of the attribution of the act or conduct at issue to the Union may become relevant in an action for damages in two ways: first, in the context of the assessment of the admissibility of the action, given that the Union Courts have no jurisdiction to rule on actions attributable to Member State authorities as opposed to Union institutions and bodies; and, second, in the context of the assessment of the merits of the action, since it is one of the factors making it possible to determine whether the main conditions for bringing the action are met, namely, the existence of a causal link between the conduct of which the Union institution or body is accused and the damage alleged.\footnote{See T-531/14, \textit{Sotropoulou and Others v Council}, Judgment (3 May 2017) EU:T:2017:297, para 57. See also, in that regard, T-298/16, \textit{East West Consulting v Commission}, Judgment (14 December 2018) EU:T:2018:967, paras 83-91, and T-107/17, \textit{Steinhoff and Others v ECB}, Judgment (23 May 2019) EU:T:2019:353, paras 42-47; and T-158/18, \textit{Scaloni and Figini v Commission}, Order (9 July 2019) EU:T:2019:491, paras 19-24.}

For example, in the \textit{Chrysostomides} judgment,\footnote{See C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P, EU:C:2020:1028, in particular paras 106-117.} the Court of Justice found that the attribution of responsibility in respect of certain claims lay with the national authorities, and not those of the Union. The Court pointed out that, according to settled case-law, the Union Courts have jurisdiction only to award compensation for damage giving rise to non-contractual liability on the part of the Union through its institutions and bodies, while damage caused by national authorities can give rise to liability only on the part of those national authorities and the national courts retain sole jurisdiction to order compensation for such damage. Thus, in order to verify whether the Union Courts have jurisdiction, it

\footnote{\textit{Electronic copy available at:} https://ssrn.com/abstract=4212945}
must be established whether the unlawful acts or conduct are truly the responsibility of a Union institution or body and cannot be regarded as attributable to a national authority. On that basis, the Court found that the Union measure at issue had merely required in general terms that the Cypriot authorities maintain or continue to implement the conversion of certain deposits, but without defining in any way the specific rules for that operation, thereby leaving those authorities a margin of discretion. Consequently, the alleged harm on account of the conversion resulted from the implementing measures adopted by the national authorities.

Furthermore, in the judgment of 20 January 2021, *Folschette and Others v Commission,*47 the General Court underscored that, in line with previous case-law, where a party has brought two actions for compensation for one and the same loss, one directed against a national authority before a national court, and the other directed against a Union institution or body before the Union Courts and there is a risk that because of different assessments of that damage by the two courts seised, that party would be inadequately or wrongfully compensated, the Union Court must, before ruling on the damage, wait until the national court has ruled on the action brought before it by a decision bringing the proceedings to an end. However, the General Court continued, the bringing of such an action before a national court does not prevent the Union Court from assessing the lawfulness of the acts or conduct of the Union institution or body in question on the merits. The General Court therefore rejected the defendant institution's contention that the action was inadmissible.

3.3. **Scope of Union law**

As a related point, it is generally assumed that allegedly unlawful acts and conduct attributed to a particular Union institution or body fall within the scope of Union law. However, due to recent events arising from the global financial crisis, this has become a controversial subject in the case-law and raises questions in the context of actions for damages against the Union.

This was borne out by the judgment of 20 September 2016, *Ledra Advertising v Commission and ECB,*48 which was also situated in the context of the restructuring of the Cypriot banking sector and


involved actions for annulment and for damages brought by depositors of Cypriot banks against the Commission and the ECB in connection with the Memorandum of Understanding (MOU) concluded with Cyprus under the European Stability Mechanism (ESM) Treaty. The ESM Treaty is an intergovernmental treaty concluded by the Eurozone Member States outside the Union legal framework in order to establish an international financial institution with legal personality, with a view to providing financial assistance to Member States, subject to strict conditionality requirements, experiencing or threatened by severe financial problems. In its judgment, the Court of Justice considered, in the light of previous case-law, that the MOU does not constitute an act that can be imputed to the Commission and the ECB, and the fact that those institutions may play a certain role within the ESM framework does not alter the nature of the acts of the ESM, which fall outside the Union legal order. However, the Court reasoned, while such a finding is liable to have an effect in relation to the conditions governing the admissibility of an action for annulment, it cannot prevent unlawful conduct linked, as the case may be, to the adoption of a MOU on behalf of the ESM from being raised against the Commission and the ECB in an action for damages brought on the basis of Articles 268 and 340 TFEU. In that regard, the tasks conferred on the Commission and the ECB within the ESM Treaty do not alter the essential character of the powers conferred of those institutions by the TEU and the TFEU. Moreover, the tasks allocated to the Commission under the ESM Treaty oblige it to ensure that a MOU concluded by the ESM is consistent with Union law and hence the Commission retains its role as ‘guardian of the Treaties’ under Article 17(1) TEU and should refrain from signing a MOU whose consistency with Union law it doubts. Ultimately, the Court concluded that the conditions to engage the Union’s non-contractual liability were not satisfied and dismissed the case. Nevertheless, the judgment makes clear that, even where a Union institution or body is acting outside the Union legal framework, an action for damages may be possible depending on the circumstances.49


49 With regard to the ECB, see further eg T-107/17, Steinhoff and Others v ECB, Judgment (23 May 2019) EU:T:2019:353, in particular para 98 (appeal dismissed in C-571/19 P); and Diane Fromage, ‘The ECB and Its Expanded Duty to Respect and Promote the EU Charter of Fundamental Rights after the Steinhoff Case’ (EU Law Analysis, 9 June 2020).
4. The Main Conditions to Engage Union Non-Contractual Liability

Overall, there are various requirements featuring in the proceedings of an action for damages against the Union, which can be broadly classified as ‘procedural type’ and ‘substantive type’ requirements.\(^{50}\) On the one hand, the ‘procedural type’ requirements generally bear on the admissibility of the action. While they are not the focus of this contribution, it may be useful to note that such requirements include, in particular, compliance with the rules on the specificity and content of the application,\(^{51}\) the requisite showing of interest as far as actions brought by natural and legal persons are concerned\(^ {52}\) and the five-year limitation period.\(^ {53}\) On the other hand, there are the ‘substantive type’ requirements or three main conditions which the Court of Justice identified early on in the case-law, relating to unlawfulness, causation and damage.\(^ {54}\) This invites discussion of the relationship between the Union and Member State non-contractual liability regimes (4.1), before delving into some salient applications of those conditions in the case-law (4.2).

4.1. Relationship between the Union and Member State Non-Contractual Liability Regimes

While the action for damages against the Union is set down in the Treaties, the action for damages against a Member State for breach of Union law – commonly referred to as the principle of State liability – was established by the Court of Justice starting in the landmark trio of judgments,\(^ {55}\) known

\(^{50}\) See Gutman (n 6) 710-712.  
\(^{51}\) See Article 21 of the Statute of the Court of Justice of the European Union (the Statute); Article 76(d) of the General Court Rules of Procedure. For a recent application in which those requirements were found to be satisfied, see T-565/18, P. Krücken Organic v Commission, Judgment (9 September 2020) EU:T:2020:395, paras 15-19.  
\(^{53}\) See Article 46 of the Statute. As underlined in the case-law, this limitation period is not the same thing as a procedural time-limit. See eg C-469/11 P, Evropáiki Dynamiki v Commission, Judgment (8 November 2012) EU:C:2012:705, paras 49-59.  
\(^{55}\) For a detailed discussion, see eg Aalto (n 7); Biondi and Farley (n 2) chs 1-2; Sieburgh (n 6).
simply as Francovich, 56 Brasserie du Pêcheur 57 and Köbler. 58 As is well-known, the Court of Justice drew from the Union non-contractual liability regime in its formulation of the main conditions governing State liability in Brasserie du Pêcheur, 59 and then came full circle in Bergaderm, 60 declaring that those same conditions also governed Union non-contractual liability, the rationale being that parties should be afforded equivalent protection no matter whether a Union or a Member State authority is responsible for the damage caused. Thus, in a nutshell, the main conditions which must be fulfilled to engage Union and Member State non-contractual liability for breach of Union law in principle govern both regimes. 61

Consequently, there is considerable cross-fertilisation and infusion between these two regimes in the case-law of the Union Courts, whereby the case-law on State liability is taken into account in the case-law on Union non-contractual liability, and vice-versa. By way of recent example, in the judgment of 5 September 2019, European Union v Guardian Europe, 62 the Court of Justice held that the regime governing State liability of national last instance courts established in the Köbler judgment was transferable to the Union non-contractual liability regime, with the result that breach of Union law arising from a decision of the General Court cannot give rise to Union non-contractual liability.

At the same time, important aspects flow from the fact that these two regimes are situated and play out in different procedural settings. The action for damages against the Union involves assessment undertaken by the Union Courts pursuant to EU procedural and substantive rules, while the principle of State liability involves assessment undertaken by the national courts pursuant to the domestic procedural and remedial rules. Nonetheless, there is a role for the Court of Justice to play in providing guidance to the national courts through the preliminary ruling procedure under Article 267 TFEU. This often arises in the context of tackling procedural obstacles at the national level through the prism of the Court of Justice's case-law relating to national procedural autonomy, in terms of ensuring that the relevant national rules are not less favourable than those applicable to similar claims based

59 See Brasserie du Pécheur and Factortame (n 57) paras 48-53.
61 As the Court of Justice has consistently held, nothing precludes State liability being incurred under less restrictive conditions. See eg C-501/18, Bałgarska Narodna Banka, Judgment (25 March 2021) EU:C:2021:249, para 114.
on a breach of national law (principle of equivalence) and do not make it impossible or excessively difficult in practice to obtain compensation (principle of effectiveness).63

This is illustrated by the 'companion' judgments of 4 October 2018, Kantarev64 and of 25 March 2021, Balgarska Narodna Banka,65 involving references for a preliminary ruling submitted by Bulgarian courts in the context of the application of Union rules on deposit guarantee schemes. In particular, they raised detailed questions relating to the compliance of several national rules, such as those requiring proof of fault, payment of fees and prior annulment of the administrative measure which caused the harm, with the principles of equivalence and effectiveness for the purposes of an action brought on the basis of State liability. In this way, it should not be underestimated that, while the main conditions governing Union and Member State non-contractual liability may in principle be the same, in practice strategies for damages actions must take account of the specific procedural environment.

4.2. Salient Applications

Under the case-law, and following the alignment of Union and State liability in Bergaderm, there are three main conditions which must be met in order for an action for damages against the Union to succeed: first, there must be a sufficiently serious breach of a rule of Union law intended to confer rights on individuals; second, the occurrence of damage; and third, the existence of a causal link between the breach of Union law attributable to the Union institution or body concerned and the damage sustained.66 In other words, unlawfulness encompasses the elements relating to the sufficiently serious breach and the rule of Union law intended to confer rights on individuals.67 These three conditions are cumulative, meaning that the burden rests on the applicant to prove that all are satisfied, or the action fails.68 While these conditions have given rise to an extensive body of case-law of the Court of Justice and the General Court,69 certain key issues associated with each stand out.

64 See C-571/16, EU:C:2018:807, in particular paras 118-147.
69 As discussed in the literature, the Court of Justice and the General Court do not always see eye to eye in this context. See further, in that regard, Giulia Gentile, 'The ECJ as the EU Court of Appeal: Some Evidence from the Appeal Case-law on the Non-contractual Liability of the EU' (2020) 13 Review of European Administrative Law 73.
4.2.1. The Sufficiently Serious Breach and the Rule of Union Law Conferring Rights

Recent case-law demonstrates that both elements of unlawfulness are significant, such that the rule of Union law breached must be intended to confer rights on individuals has started to garner more attention in the case-law, and thus it is no longer just the sufficiently serious breach claiming the spotlight.

According to the case-law, a rule of Union law is intended to confer rights on individuals where that rule gives rise to rights for individuals which the national courts must protect so that it has direct effect, but direct effect need not be shown; this requirement is also met in situations where, inter alia, the rule is intended to protect the interests of individuals or is deemed to protect both general and individual interests.\(^{70}\) For instance, in the judgment of 14 December 2018, *East West Consulting v Commission*,\(^{71}\) the General Court underlined that while the principle of institutional balance pertaining to the horizontal division of powers between the Union institutions is not intended to protect individuals, the position is different where the rule is accompanied by a breach of a substantive provision of Union law that is intended to confer rights. This was the case in the present proceedings where there was a breach of a rule on legal basis accompanied by a breach of the principles of the rights of the defence and the presumption of innocence which were deemed to confer rights on the applicant, so the requirement was fulfilled.

The case-law has also made it clear that it is necessary that the protection afforded by the rule relied on is effective as regards the person who relies on it and therefore that person is among those on whom the rule in question confers rights; conversely, a rule that does not protect the person concerned against the illegality which he or she pleads, but another person, does not suffice.\(^{72}\) This was recently highlighted by the judgment of 25 February 2021, *Dalli v Commission*,\(^{73}\) in which the Court of Justice held that the Union was not liable for possible breach of the right to privacy and confidentiality of the communications of third parties whose conversations had been listened to and recorded, but not involving the applicant.


\(^{71}\) See T-298/16, EU:T:2018:967, paras 142-144.


\(^{73}\) See C-615/19 P, EU:C:2021:133, in particular paras 128 to 130.
Of note, recent General Court case-law has suggested a possible extension of this requirement. In a series of judgments delivered on 16 December 2020, the General Court considered that the case-law does not necessarily exclude the possibility that the Union may incur non-contractual liability as a result of the breach of a rule of law which is not intended *stricto sensu* to confer rights on individuals, but rather is likely to lead to the imposition or strengthening of obligations on individuals pursuant to other rules of Union law. Ultimately, however, the General Court did not address this issue in detail in those judgments because the other requisite conditions were not shown. As several of these judgments are currently on appeal before the Court of Justice, it remains to be seen whether this issue may be clarified.

Proceeding to the requirement that there be a sufficiently serious breach of a rule of Union law, as the Court of Justice has recognised, it *stems from the need to strike a balance between, on the one hand, the protection of individuals against unlawful conduct of the institutions and, on the other, the leeway that must be accorded to the institutions in order not to paralyse action by them.*

This requirement was squarely at issue in the judgment of 4 April 2017, *European Ombudsman v Staelen.* In that judgment, the Court of Justice pointed out that, following from established case-law, where a Union institution or body has little or no discretion, the mere infringement of Union law may suffice, whereas in the case where the Union institution or body has been given a discretion, only that particular institution's or body's manifest and grave disregard of the limits on that discretion is capable of constituting a sufficiently serious breach of Union law. Accordingly, the Court held that, since the European Ombudsman enjoys wide discretion, manifest and grave disregard of that discretion must be shown, taking account of various factors elaborated in the case-law, and thus the General Court had erred by ruling in general terms that a mere breach by the Ombudsman of the duty to act diligently amounted to a sufficiently serious breach.

More generally, that judgment cast light on the relationship between Article 41 of the Charter concerning the right to good administration, to which the duty of care is attached, and the action for

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76 See C-337/15 P, *European Ombudsman v Staelen,* Opinion of Advocate General Wahl, EU:C:2016:823, points 1, 24-33, and as regards the conferral of rights, points 44-47. See further Nikos Vogiatzis, ‘The EU’s Liability Owing to the Conduct
damages against the Union, which is referred to in the third paragraph of that provision. According to the Explanations relating to the Charter of Fundamental Rights, Article 41(3) of the Charter reproduces the right guaranteed by Article 340 TFEU. Therefore, it does not as such modify or supplant the main conditions that must be satisfied under the case-law. In other words, Article 41(3) of the Charter is not the legal basis for this action, which remains grounded in Article 268 TFEU and the second and third paragraphs of Article 340 TFEU. Nonetheless, the reference to the action for damages in Article 41 of the Charter gives formal recognition to the role of that action in the context of guaranteeing the right to good administration and which is linked, according to those explanations, to the existence of the Union as subject to the rule of law. It might also provide interpretative support in the context of the Union Courts' formulation of rules concerning Union non-contractual liability in circumstances involving administrative activities of Union institutions and bodies, as witnessed by the growing number of actions for damages in this context.

This is already apparent to some extent in respect of the emphasis placed in certain cases on the ‘ordinary care and diligence’ which must be demonstrated by a Union administrative authority in connection with the sufficiently serious breach requirement. As the Court of Justice recently held: ‘non-contractual liability of the European Union can arise only if an irregularity is found that would not have been committed in similar circumstances by an administrative authority exercising ordinary care and diligence’. As noted by Advocate General Wahl in his Opinion in European Ombudsman v Staelen, this language does not seem to replace the traditional criteria for establishing Union non-contractual liability. Thus, while further clarification by the Union Courts would be welcome, this language may be considered to flesh out or amplify the assessment of the sufficient serious breach requirement in the light of the relevant circumstances.


4.2.2. The Causal Link and the Occurrence of Damage

Lastly, the other two main conditions to engage Union non-contractual liability concern the causal link and the occurrence of damage. Under the case-law, there must be a direct causal link between the act or conduct of the Union institution or body and the damage alleged, which necessitates a showing by the applicant of a sufficiently direct causal nexus between the act or conduct and the damage, so that such act or conduct complained of must be found to be the determining cause of the damage. In addition, the damage alleged must be actual and certain, so that it must be shown that damage occurred and its extent. As with the other requirements to engage Union non-contractual liability, the inquiry largely depends on the circumstances of the case.

In particular, recent case-law in respect of actions for damages based on the General Court’s breach of the requirement to adjudicate a case within a reasonable time under the second paragraph of Article 47 of the Charter in the context of the EU competition rules demonstrates that the Union Courts take seriously the directness of the causal link and that the damage must be directly attributable to the unlawful act or conduct of the Union institution or body concerned, and not to the applicant’s own decision.

For example, in the judgment of 5 September 2019, European Union v Guardian Europe, the Court of Justice held that the General Court’s breach of its obligation to adjudicate within a reasonable time was not the determining cause of the damage sustained by the applicant as a result of paying bank guarantee costs during the time in which the reasonable time was exceeded, as opposed to paying the fine imposed on it under the EU competition rules. According to the Court, such damage was the result of the applicant’s own decision.


84 For a detailed discussion, see eg Katri Havu and Suvi Kurki-Suonio, ‘Damages Liability of the EU for Harm Caused by Excessive Duration of Court Proceedings’ (2021) 27 European Public Law 1; Paul Verbruggen and Katarzyna Kryla-Cudna, ‘The Union’s Liability for Failure to Adjudicate within a Reasonable Time: EU Tort Law after Gascogne, Kendrion and ASPLA’ (2020) 57 Common Market Law Review 191.

despite the financial consequences which that entailed. The Court therefore ruled that the General Court had erred in finding a sufficiently direct causal link had been shown, and dismissed the case.

Likewise, in the judgments of 13 December 2018, *European Union v ASPLA and Armando Álvarez* and *European Union v Kendrion*, the Court of Justice upheld the General Court’s ruling rejecting alleged damage arising from the payment of default interest on the amount of the fine during the period by which the reasonable time was exceeded. According to the Court, since an act or omission of a Union institution may give rise to certain costs for an undertaking but, at the same time, it may result in certain gains for that undertaking, it can be considered that there is damage, within the meaning of Article 340 TFEU, only where the net difference between costs and gains stemming from the conduct alleged against that institution is negative. Thus, it is only if the interest which accrued during that period is greater than the advantage conferred on the claimant by possession, during that period, of the sum equal to the amount of the fine plus default interest that it may be considered that there is actual and certain damage, which was not the case in the proceedings.

Even so, this line of case-law has also underlined the possibility for compensation for non-material damage which may be claimed by legal as well as natural persons. In the judgments of 13 December 2018, *European Union v Gascogne Sack Deuschland and Gascogne* and *European Union v Kendrion*, the Court of Justice upheld the General Court’s findings regarding the award of non-material damages to the applicant undertakings regarding the prolonged state of uncertainty in which they were placed because of the excessive duration of the judicial proceedings.

5. Conclusion

In the light of the foregoing discussion, one may detect a certain tension in the functioning of the action for damages against the Union. In principle, this action plays an essential role in the EU system of judicial protection to help protect parties against unlawful acts and conduct committed by Union institutions and bodies which cause them damage, while in practice there are significant challenges

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associated with its use. For instance, as touched on above, there are apparent gaps in respect of the Union Courts’ jurisdiction in the CFSP, and the action for damages entails the fulfilment of various requirements which make it difficult for such an action to succeed.

Nevertheless, recent developments in the case-law of the Union Courts indicate that the need to ensure effective judicial protection for parties is, and remains, a driving force underlying the evolution of the action for damages against the Union in the EU system of judicial protection, whether in terms of elucidating the jurisdiction of the Union Courts, the scope of the action, the parties involved or the conditions to be satisfied. In this way, as crises affecting the EU and its Member States continue, the action for damages against the Union may be considered to provide a crucial safety net or failsafe for parties seeking judicial protection before the Union Courts which should not be underrated.
Chapter 2

Digital Justice at the European Court of Justice after Covid-19: Solving the ‘Smaller Questions’ to Tackle the ‘Big Questions’

Luigi Malferrari*

Introduction

The Covid-19 crisis required the abrupt and partly improvised finding of pragmatic solutions for the functioning of the EU justice to avert significant delays in the administration of justice. After the emergency must come proper policy. Digitalisation of justice is a major technological, regulatory and constitutional challenge that the EU must face with poise, competence and strategy. Indeed, digital technologies must be used in a manner that enables the Union’s values to be preserved and pursued.\(^1\) But can the value-oriented moulding of digital technologies always be accomplished in practice? If and to the extent that technologies cannot be moulded to that effect, shouldn't regulatory limits be placed on their use? More fundamentally, isn't the content of the EU values being – explicitly or surreptitiously – in part changed on the spur of the digitalisation of society? If that were the case, should those changes to the Union's values be countered or rather accepted?

These are some of the ‘big questions’ raised in many countries in several and multidisciplinary debates regarding the digitalization of justice, which the Covid-19 crisis has accelerated and accentuated. But there are also several ‘smaller questions’ that practitioners of the law (lawyers, administration officials, public prosecutors and judges) need to face and solve; those smaller questions are often important if one wants to tackle the big questions in a constructive way and fill the

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topos of effective judicial protection with life, which is enshrined in the EU Charter of fundamental rights and is a general principle of EU law.\(^2\)

1. Legal Research

Despite its relatively technical and seemingly value-free nature, legal research deserves to be mentioned first. Indeed, it is one of the initial steps in the daily activity for both legal practitioners and academics. Furthermore, efficient and effective legal research is instrumental to the correct and widespread application of the law, especially in a legal system such as the EU’s in which the judicial precedence carries substantial weight (almost comparable to a common law system). Therefore, high performing and sophisticated but still user-friendly tools for legal research are important not only for the practical ease but also for upholding the rule of law, which is one of the values of the Union pursuant to Art. 2 TEU and constitutes the backbone of the process of European integration.\(^3\)

Access to information about EU legal acts and case law is already provided for free by the EU. In particular, the InfoCuria database is run by the Court of justice of the EU (“CJEU”)\(^4\) and its use is for free. The related Curia search engine available on the Internet is probably a familiar tool to virtually all EU lawyers. However, that does no exhaust the debate. In fact, the most relevant issue is how that information is indexed, systematized and retrievable in a searchable database. Three main points can be made on that issue.

First, there are a number of private legal research tools, which are very powerful and refined, but they are also expensive. In order to facilitate and spread the use of EU law, it is essential that the databases provided by the EU for free are sophisticated and powerful. As much as we may be emotionally attached to the InfoCuria database and its website, that database may be updated and upgraded, so that it can continue to perform that public function in an even better way. To that end,


\(^4\) ‘CJEU’ is used in the present article to refer to the Court as an institution, whereas ‘ECJ’ is used to refer to the Court of justice of the EU as the highest judicial instance within the EU.
the search function needs to be made more effective both in retrieval and extraction, as modern
technology allows, *inter alia* by:

a) making the research 'elastic': providing also results that are based on natural
language processing (in particular on the basis of synonyms, stemming\(^5\) and
lemmatisation\(^6\)),

b) adding a function whereby cases are divided according to the relevance (for ex. lead
cases and other cases)

c) making use of Artificial Intelligence ('AI') tools that take into account the context and
thus also propose documents that are similar or related;

d) displaying the result in a more user-friendly and easy-to-use way, also by presenting
them in a table with selected relevant parts only;

e) developing linguistic tools enabling the searches to be executed in several languages
at the same time and also providing the EU lawyers with guidance on how recurrent
terms and phrases are best translated into the different EU official languages;

f) allowing the research to be performed not only in writing but also phonetically, to the
benefit both of the effectiveness of the research\(^7\) and the fundamental rights of
visually impaired individuals.

Second, the searchable database should be enlarged, by encompassing the ECHR Court's case
law\(^8\), the EFTA Court's case law, further relevant international case law, national case law pertaining to
EU law (on the basis of ECLI), national legislation (on the basis of ELI) and EU or national administrative
decisions applying EU law. In particular, the inclusion of the ECtHR's case law would allow EU lawyers
to more easily take into account the Strasbourg case law which, pursuant to Art. 52(3) of the Charter
of fundamental rights of the EU, is indirectly incorporated into EU law and indeed may play a decisive
role in EU adjudication regarding fundamental rights;\(^9\) the inclusion of national case law regarding EU
law would *inter alia* facilitate national courts of last instance in complying with their duty to refer

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\(^5\) According to Wikipedia, stemming is the process of reducing inflected (or sometimes derived) words to their word stem, base
or root form. The term in French ('racinisation') may be more telling.

\(^6\) According to Wikipedia, in computational linguistics lemmatisation is the algorithmic process of determining the lemma of a
word based on its intended meaning; unlike stemming, lemmatisation depends on correctly identifying the intended part of
speech and meaning of a word in a sentence, as well as within the larger context surrounding that sentence, such as
neighbouring sentences or even an entire document.

\(^7\) So, for example, the phonetic use of the word ‘photo’ would allow to retrieve documents using not only ‘photo’, but also ‘fot’.

\(^8\) For example the free app Accuricy.com combines the EU and ECH case law and allows searches in an elastic format.


Electronic copy available at: https://ssrn.com/abstract=4212945
preliminary questions pursuant to Art. 267(3) TFEU, which the ECJ has recently confirmed (including the limited exceptions under the CILFIT case law). Furthermore, all relevant public documents (including pre-legislative or legislative ones as well as administrative acts at national, EU and international level) related to a judicial case should be stored in a single place, thus allowing access to them in an easy and comprehensive way. Thereby the issue of different language versions would become relevant because some documents would be available only in one or some languages.

Third, the available databases provided by the EU institutions and bodies (be they internal or external) should be integrated with each other, so that their resources are pulled together, to the advantage of effectiveness and completeness of the database.

2. Written Procedure before the EU Courts

As is well known, the written procedure is particularly important in the judicial procedure before the ECJ and the General Court. That importance has probably been reinforced by the Covid crisis. That in turn should provide further stimulus to invest administrative and financial resources in the improvement of the digitalization of the written procedure before the EU courts. Indeed, the progress of digitization offers opportunities but also raises new challenges, which are especially related to the multi-linguistic and multi-cultural nature of the EU legal order.

2.1. e-Curia

e-Curia constitutes the ‘digital infrastructure’ used for the electronic notification of judicial documents in the process before the ECJ and the General Court. The security of the electronic signature is of central importance to keep e-Curia a fully reliable tool. In that context it is worthy to mention the eIDAS

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10 C-561/19, Consorzio Italian Management, Judgment (6 October 2021) para 40 (‘Before concluding that such is the case, the national court or tribunal of last instance must be convinced that the matter would be equally obvious to the other courts or tribunals of last instance of the Member States and to the Court of Justice’) and ibid para 49 (‘Nonetheless, 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.’).

11 Eur-Lex already partly provides that, however only as regards legislation.
Regulation (electronic IDentification, Authentication and trust Services),\textsuperscript{12} which the European Commission plans to revise.\textsuperscript{13} Whereas e-Curia has proved to be a very valuable and successful tool in the process of digitalization of the EU justice administration, its uptake is not so widespread as it could be. In fact, a number of national judges and lawyers still prefer to use the paper format for the purposes of document transmission. The justice reforms in the Member States, which will be part of the implementation of Next Generation EU, could be an opportunity for fostering the use of e-Curia too. Adequate infrastructure refinement (increasing the ease of use) and training are likely to be crucial in that regard.

A procedural point should be recalled here which is of significance for practitioners. The e-Curia users are supposed to regularly consult their account. Furthermore, the procedural documents are notified to them through e-Curia and an email is sent to each user's registered email account to that effect. The date of the notification is the date when the user accesses that document on e-Curia or, if he/she omits such access, at the expiry of the seventh day therefrom.\textsuperscript{14} As a result, once that deadline has expired, it is irrelevant whether the party has actually had knowledge of the document or not.\textsuperscript{15}

That presumption of successful notification must be read together with the general exceptions regarding unforeseeable circumstances or force majeure that the person concerned may be able to prove pursuant to Article 45 of the Statute of the Court. Under the case law, unforeseeable circumstances and force majeure contain i) an objective element relating to abnormal circumstances unconnected with the appellant and ii) a subjective element involving the obligation, on its part, to guard against the consequences of the abnormal event by taking appropriate steps without making unreasonable sacrifices.\textsuperscript{16} Whereas those concepts have constantly been construed in a narrow manner (for good reasons), it cannot be excluded that in some exceptional cases they can be successfully invoked for example in case of a serious illness or because of a lockdown due to pandemic.


\textsuperscript{14} See Article 7 of the Decision of the ECJ of 16 October 2018 on the lodging and service of procedural documents by means of e-Curia and the analogue article 6 of the General Court’s decision of 11 July 2018 on the lodging and service of procedural documents by means of e-Curia, read together with points 21 to 25 of the conditions of use of e-Curia.

\textsuperscript{15} C-539/20, Hochmann Marketing, Order (6 May 2021) EU:C:2021:361, para 22.

where no one else has access to the e-Curia notifications. At the same time, parties are under a duty of diligence, which include the need to take adequate preparatory measures.

By way of exception to the notification through e-Curia, procedural documents may also be served in accordance with the other methods of transmission provided for by the Rules of Procedure, if required because of the size or nature of the item or where the use of e-Curia is not possible for technical reasons.17

2.2. Machine-Generated Templates of Judicial Documents

The ECJ and the General Court provide guidance on how preliminary references submitted by national judges and judicial documents submitted by the parties must be structured and drafted.18 The fact that practitioners follow the indicated structure and formalities is beneficial because it contributes to easing and speeding up the work of the CJEU personnel (not only Judges, Advocates-General and their référendaires, but also the registry and the Research and Documentation Directorate). Indeed, ECJ judgments and orders have a very specific structure and content.

Whereas some national judges and lawyers from Member States are well-versed with and used to that structure and style, others are not. Therefore, a computer-generated template could be devised by the CJEU and be made available to the parties in such a way that some sections of at least some documents are already automatically filled in (for example, intervention in direct actions, confidentiality request, etc.). There would be of course no obligation to follow the model. It would yet be attractive to some parties because it would spare them time. Ideally, such templates should be based on the LegalDocML/LegalDocumentML (AkomaNtoso) standard, which provides, inter alia, standardized tags for identifying sections, constituent elements, and metadata of a legal document. Obviously, it would be for the CJEU to make sure that the information provided reflects accurately and completely the information available to the CJEU; at the same time, the parties would still have a duty of care, so that they would have to check that information too because the document will be sent to the CJEU under

17 See Article 6 of the above-mentioned ECJ decision and Article 7 of the above-mentioned General Court decision.
18 See the Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2019/C 380/01); ECJ’s Practice Directions to Parties concerning Cases brought before the Court (14 February 2020) OJ L 42/1; Practice Rules for the Implementation of the Rules of Procedure of the General Court and the General Court’s document titled ‘Aide-Mémoire – Application’.
their responsibility. The future CJEU tool “Système intégré de gestion des affaires” will probably propose certain parts, which will have to be filled in by the parties.

2.3. Time-Stamping and Encryption of Online Evidence

Given that many aspects of life nowadays take place online, there is also the need to take evidence of online information or events such as webpages posted or videos/audios broadcasted on the Internet. That seems to be important in particular in cases regarding IP rights, competition law, rules implementing the e-commerce directive and the audio-visual media services Directive (just to name a few). How can the CJEU and the parties be sure that a document, screenshot or a photo produced constitute faithful and complete evidence of a particular digital event or piece of information? It cannot be excluded that in particular the content, the format and the date could be partly hidden or manipulated.\(^{19}\) As a result, the used technology needs to be suitable to reduce that risk. Whereas there is some guidance on the minimal requirements that online information should fulfil in order to be accepted as valid proof by the EU courts, further clarifications may be furnished.

On the market several types of software are available that are likely to offer viable and reliable solutions to make a permanent copy of the webpage in at least three formats: HTML (webpage), pdf (document) and .png (image).\(^{20}\) That allows the documents in particular to be time-stamped and encrypted. There are also new services which, by using the block-chain technology, make the content permanent. Those new services are particularly interesting for the purposes of the correct administration of justice.\(^{21}\) At the same time, even if their use is limited to judicial proceedings, they raise issues of data protection because the permanence of the document is potentially in conflict with the ‘right to be forgotten’ as recognized (under certain circumstances) in the ECJ judgment in Google Spain.\(^{22}\)

\(^{19}\) Cf T-166/15, Grambert/EUIPO - Mahdavi Sabet (Protective case for a mobile telephone), Judgment (General Court) (27 February 2018) paras 38 ss; and T-373/20, Framery/EUIPO - Smartlock (Transportable Building), Judgment (30 June 2021) paras 24 and 25.

\(^{20}\) See for example a software called Cappture.

\(^{21}\) See for example [arweave.org].

\(^{22}\) C-131/12, Google Spain, Judgment (13 May 2014) EU:C:2014:317, para 99.
2.4. Use of AI in Translation of Judicial Documents

The type of AI that is relevant here is the latest generation of machines that use sophisticated and powerful algorithms and can learn on the basis of massive sets of data. Digital tools for speeding-up, easing and improving the translation of judicial documents at the CJEU have made enormous progress in the last 10 years; that is essential because it is a very important and also time-consuming step in the procedure before the CJEU. The development of even more powerful, refined and dedicated software is key to that end and seems to have made an enormous qualitative leap forward in the last decade. At the same time, the limits thereof and the added-value of highly specialized and experienced lawyer-linguists from all Member States should be acknowledged, preserved and enhanced. That can be illustrated by way of two examples. First, the term ‘prescrizione’ in Italian can have at least two very different meanings: on the one hand, ‘statute of limitation’ and, on the other hand, ‘obligation’. Which of the two is the correct translation depends on the context. It cannot be excluded that one day software will be so developed that it can infer from the context which of the two meanings is the correct one. However, given the stakes (the correct administration of justice), the need for human control is paramount. Second, legal concepts are often specific to a given national legal order: for example, ‘concordato preventivo’ has very specific features in Italian insolvency law and it may be difficult to find a correspondence in the legal orders of other Member States, so that the choice of the closest term (for translation purposes) depends heavily on the context; furthermore, the concept in another Member State may not be the identical twin (in other words: there may be partial overlap between the original concept and its translation), so that additional explanation may be needed, which must in turn take into account the legal and factual context of the case.

In light of the foregoing it is clear that legal translation at the CJEU requires both the understanding of the factual and legal context of the case and a very refined knowledge of several legal systems, which can be expected from highly skilled humans but not necessarily (at least at the time of writing) from machines. Moreover, software has a terrific potential but its over-reliance carries some legal risks. Therefore, the design of the algorithms should be done with extreme care because risks such as

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24 It is a special procedure regulated by the insolvency law in Italian and aimed at allowing the undertaking to continue its activities and possibly its sale to a third party with a view to ensuring its viability.
unwanted biases need to be minimized. The compliance with the Union’s values should be ‘designed into the technology’.

3. Streamlining Case Management Thanks to Digitalization

The process of digitalization can directly and indirectly foster the streamlining and improvement of case management at the CJEU.

First, there is a small but useful change that can be easily implemented and have immediate beneficial effects: in some cases, procedural issues can be solved effectively and efficiently through a direct contact with the parties. That can be done by email, on the phone or by video-conference by the registry. But, for certain more difficult questions, the General Court which deals in particular with detailed administrative litigation could do so through videoconferences with the parties. A suitable procedural framework would be important because it would give both the CJEU and the parties the necessary legal certainty.

Second, procedural steps at the ECJ’s registry and General Court’s registry are already in part automatized. Whereas some steps always require human intervention (for example, the decision on the notification of a procedural act), others do not necessarily do so (for example, a decision on the request for extension of time-limits). Needless to say, further automation should be introduced gradually and according to a method of trial and error. Moreover, even where it reaches a sufficiently tested and reliable level, automation should entail the supervision by registry personnel, who should under certain circumstances be alerted and always have the possibility to modify and correct the steps taken by the machine.

Third, the CJEU should revisit how they assess the need for an oral hearing. By way of context, during the months of lockdown due to the Covid-19 crisis, the CJEU made extensive use of written questions to the parties in lieu of an oral hearing.

25 Cf European Commission’s Proposal for a Regulation laying down harmonised rules on artificial intelligence, COM/2021/206 final’ See also Susskind (n 23) page 289.
4. Oral Procedure

4.1. Oral Hearings from Remote?

One of the major issues that are usually discussed with regard to digitalization of justice concerns oral hearings by remote, which is different from the issue of making available to the public of oral hearing videos (see below). Confronted with the Covid-19 crisis, the CJEU (after having first suspended oral hearings in presence from 16 March 2020 and then reintroduced them from 25 May 2020) decided in that context to hold hybrid oral hearings: whereas the parties who were able to come to Luxembourg and the bench participate physically in the oral hearing, the parties who are unable to come to Luxembourg have the possibility to participate remotely.28. The EFTA Court has held hearings exclusively from remote. Oral hearings from remote has entailed restrictions as regards the use of languages.

There are a number of legal and policy questions that are raised by the question of hybrid oral hearings. To begin with, the CJEU developed its own digital tool and avoided using a commercial platform for the oral hearings. Whereas other courts may have had reasons for using a commercial platform for holding digital oral hearings,29 there are differences between the two solutions. The CJEU solution is preferable. First, the technical features of commercial platforms are aimed at maximizing traffic data (and the relative commercial value) of the private companies owning and running them. Second, it may be problematic that the use of an essential public service enabling access to justice is based on the terms and conditions of use (including the data collection practices) imposed by private companies.30 Third, private platforms may be less secure (for example with regard to the risk of so-called zoom-bombing i.e. the intrusion of unauthorized third parties disturbing an online event). These three shortcomings do not evaporate simply in light of the consideration that where a court uses one of the commercial platforms, the corresponding app runs on that court’s server. In fact, that consideration describes how any app functions and does not entail that the court has full control over the technical functioning and commercial conditions related to the platform in question. The full public control of the functioning is not simply a technical issue: the technicalities are essential to make sure

28 Cf ECJ letter 11 November 2020 in reply to a letter by the German government of 9 November 2020
29 M J Clifton and C Şchiopu, ‘Justice Must also Be Seen to Be Done: Digitalisation at the EFTA Court’ (2021) 63 EU Law Live 2.
that the digitalization of justice increases the quality of the administration of justice in compliance with the Union's values.\textsuperscript{31} The control over technology in the EU has been advocated as one aspect of the digital sovereignty which the EU should pursue in order to protect its values.\textsuperscript{32}

Further, the rules of procedure of the ECJ and the General Court lack a specific legal basis for oral hearings from remote. It has been put forward that there seem to be no legal obstacles against oral hearings from remote.\textsuperscript{33} However, it may be appropriate to regulate at least some aspects in the Rules of procedure and others in the ECJ's Practice Directions to Parties concerning Cases brought before the Court as well as in the Practice rules for the implementation of the Rules of Procedure of the General Court. In fact, several issues are specifically raised for example from the perspective of data protection; furthermore, several important details need to be set out: for example, the boundaries of 'impossibility to participate' are not clearly defined (\textit{de facto} the parties have had an extremely wide margin of discretion in that regard).

Then, there is an important policy choice to be made as to whether hybrid oral hearings before the EU courts should continue or even be generalized. At least three perspectives need to be taken into account: the public in general, the parties to the procedure (including the judges as individuals) and the administration of justice. There are some advantages ensuing from the remote oral hearings: the costs and time related to travelling can be non-negligible for parties, especially for those travelling from geographically remote regions; the potential reduction of CO\textsubscript{2} emissions of means of transportation could also be mentioned. On the other hand, the added value of oral hearings in presence is clear: the debate is more direct, richer, more effective and more efficient.\textsuperscript{34} Furthermore, rituals and symbolism are part of the judicial process:\textsuperscript{35} inter alia through that process and thanks to that process the CJEU is the public authority that interprets the law in an authoritative and binding way and ensures that in the interpretation and application of the Treaties the law is observed pursuant to Art. 19 TEU.\textsuperscript{36} Just as language possesses a performative function, also symbols and rituals have a

\footnotesize{\textsuperscript{31} See to this effect Pasquale (n 26) page 171.  \\
\textsuperscript{32} H Roberts and others, 'Safeguarding European Values with Digital Sovereignty: An Analysis of Statements and Policies' (2021) 3 Internet Policy Review 1, 18.  \\
\textsuperscript{33} See also M Kianička, 'Streaming of Hearings: A Tough Call for the Court of Justice' (2020) 20 EU Law Live 5.  \\
\textsuperscript{34} See also Gaudissart (n 27) 105-106.  \\
\textsuperscript{35} See also R Herz, 'The Dilemma of Open Justice in the Present Political, Social and Cultural Climate' in B Hess and A Koprivica Harvey (eds), \textit{Open Justice} (1st edn, Nomos 2019) 117.  \\
\textsuperscript{36} See also K Becker, ‘Zoom in den Gerichtssaal? Über das Für und Wider digitaler Gerichtsprozesse’ (\textit{Verfassungsblog}, 8 January 2021).}
performative function.37 Of course, symbols and rituals can be modified over the centuries, also because of practical, cultural or technological changes. It is however important to think about the impact of technologies over those symbols and rituals and the ensuing implications for the administration of justice. Indeed, the modification of judicial symbols and rituals entailed by technological innovation is not without danger.38 In addition, the possibility of having one’s day in court and the ‘Kirchberg experience’ are additional benefits for individuals, in particular given the importance of informal casual chats for human society and culture.39 From that perspective, the physical oral hearing indirectly contributes to the absorption of European legal integration in the making.

It is thus an open question whether in any single case the benefits outweigh the costs. Should it be possible to depart from the rule of oral hearings in presence also in cases where the oral hearing is not impossible but disproportionate (for example in terms of health risks)? If that path were followed, there would be a number of issues to be tackled. In particular: a) do criteria need to be laid down for guiding the bench’s decision in that regard? And b): is the consent by all parties necessary to depart from the ‘presence rule’? As regards the former issue, the need for predictability of decisions would plead for laying down at least general criteria. On the other hand, the setting-out of very precise criteria may be overly prescriptive. As regards the latter issue, parties do have a right to an oral hearing before the General Court: under Article 106 Rules of procedure of the General Court, the General Court must hold an oral hearing if one of the parties makes a reasoned request to that effect. The wording of that Article does not expressly cater for the event that the oral hearing is in practice impossible because of, for example, a pandemic. By contrast, the ECJ can adjudicate cases without an oral hearing pursuant to Article 76 of the Rule of procedures, save where a request for a hearing, stating reasons, has been submitted by an interested person referred to in Article 23 of the Statute who did not participate in the written part of the procedure. The obligation to hold a public hearing under Art. 6(1) ECHR is not an absolute one; thus, a hearing may be dispensed with inter alia where it raises no questions of fact or law which cannot be adequately resolved on the basis of the case-file and the parties’ written observations.40 It should be noted that, whereas before the Covid crisis an oral hearing before the ECJ

37See to that effect also ibid; A Garapon and J Lassègue, Justice digitale (1st edn, Puf 2018) 52, 54.
38 See also C Chainais, ‘Open Justice and the Principle of Public Access to Hearings in the Age of Information Technology: Theoretical Perspectives and Comparative Law’ in Hess and Koprivica Harvey (n 35) 68.
39See to this effect R Magnus, ‘New Media in the Courtroom: Benefits and Challenges’ in Hess and Koprivica Harvey (n 35) 96.
would usually be held if a party submitted a reasoned request for a hearing,\textsuperscript{41} at least during 2020 and 2021 that has no longer been the case: in a number of cases the ECJ has considered that an oral hearing was not necessary. That being said, if an oral hearing is decided, the question is whether the parties have the right that it takes place physically.

No matter whether the oral hearings remain in a hybrid format or whether in the future a remote-only format were introduced, a number of technical/regulatory questions are raised. First, an apparently banal but practically relevant question: which devices can be used for the remote connection to the oral hearing? At the moment the CJEU requires from the parties a relatively expensive infrastructure. That is justified on the ground of the safety and stability of the connection, which represent of course an added value: sophisticated telepresence devices and software offer a much better experience to the participants.\textsuperscript{42} At the same time, less affluent lawyers do not necessarily have that infrastructure available and the sum of several thousand euros may constitute a substantial additional expense to them.\textsuperscript{43} Therefore, unless that financial burden is at least partly open to public funding, the poor-rich divide in the administration of justice may risk becoming more palpable if the digital oral hearing were generalized.\textsuperscript{44}

In that regard, it is noteworthy that in its Guidelines issued in November 2020 titled Videoconferencing, Courts and COVID-19: Recommendations Based on International Standards, the International Court of Justice indicates the following: ‘Any time videoconferencing or similar technologies are used as a substitute for physical presence, authorities must also ensure that individual parties/accused are able to effectively participate in the proceedings ..., including by ensuring: ... (iii) proceedings are suspended when interruptions in video-communications occur and until they are resolved.’\textsuperscript{45}

It is unclear whether this part of the Recommendations applies only to criminal proceedings: the use of ‘individual parties/accused’ would plead for a broader, horizontal ambit of application. In any event, several cases before the CJEU have quasi-criminal law character: either because the preliminary reference is about a criminal case or because the case is about EU sanctions that are in substance criminal or quasi-criminal.

\begin{footnotesize}
\textsuperscript{41} See, to this effect, also ibid 55-56.
\textsuperscript{42} Susskind (n 23) page 256, reporting about his experience with Cisco’s telepresence.
\textsuperscript{43} See also, to this effect, Kianička (n 33) 8.
\textsuperscript{44} See also A Salyzyn, “Trial by Zoom”: What Virtual Hearings Might Mean for Open Courts, Participant Privacy and the Internet of Court Proceedings” (SLAW, 17 April 2020).
\textsuperscript{45} 6th point of the Recommendations. See also Resolution of 16 July 2020 by the UN Human Rights Council (44/9) regarding fair trial and the need for a procedural framework and technical solutions.
\end{footnotesize}
Second, the idea that the digital hearing should be a prolongation of the physical hearing appears *prima facie* intuitive, but is not so straightforward in all regards. It could be argued that the virtual hearing should not reproduce but rather minimize the shortcomings of the physical hearing. So, for example, it has been put forward that in virtual reality (i.e. a computer-generated world) parties and the bench should be avatars on the screen. The idea makes sense from a certain perspective, because lawyers represent the clients and the bench embodies the judicial institution. The gowns are indeed a mechanism to conceal the differences between the parties for the judges' eye and render the parties equivalent in the judges' perception. On the other hand, the fact that there is a human body wearing the gown has positive aspects: it is liable to entail a higher sense of acceptance of justice by society; moreover, all individuals involved in the administration of justice must take responsibility for what they do: for example, if a lawyer submits misleading, incomplete or inaccurate information to the court, his/her reputation as a professional and as a person will suffer; thus, from that perspective, it is important that he/she appears to the bench also as a human being. The de-personification might lead to higher level of de-responsabilization also because the author does not have any immediate personal reaction by the other individuals involved and has a feeling of detachment from reality and of lack of social responsibility for his/her actions. In this context, it is to be asked whether parties intervening from remote should be allowed to forfeit their digital appearance by delegating the reading of their pleadings to one of the interpreters, as the ECJ has accepted to date in some cases (not only in the scenario of technical failure).

Third, it needs to be explored how to ensure the public nature of oral hearings by remote. The requirement of publicity of CJEU oral hearings means to date the possibility for the public to access the courtroom. That entails *inter alia* that journalists too can access the courtroom and can write reports about the oral hearings. It is undisputed that the public (including journalists) is not allowed to take films or audio-recording of the oral hearings; it is a fortiori not allowed to publish them. That is expressly set out in an CJEU document titled 'Guide aux journalistes' whereby '[les prises de son et de vues sont uniquement admises dans les salles d'audience à l'occasion du prononcé d'un arrêt, de la lecture des conclusions ou de l'appel de l'affaire.]' Journalists seem to be allowed to write reports live during the oral hearing and publish them on the Internet (including social media), at least that is the current practice.

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46 Susskind (n 23) page 260.
47 Malferrari and Spina (n 1) page 8.
Indeed, the journalistic reporting is covered by the journalists’ fundamental right to freedom of speech and also serves an important information function.48

Fourth, there are a number of practical questions which are however not deprived of practical importance. I will mention a few:

- Is there any limitation to the software that parties may use during the oral hearing? Think of software that improves the tone of the voice to make it more suave. The tone of the voice could be used according to the bench’s preferences, which could be established more easily thanks to data collected on the Internet if the CJEU oral hearings were made available on the Internet to the public at large (see also below).
- How to verify the identity of the lawyer/agent who represents the parties? And how to make sure that it is that individual that is actually pronouncing the words that are heard?
- How should images be taken? Should the framing be frontal and full-length? Should the focal length be fixed? Should the use of multiple cameras, zooms and camera movements allowed? Should the use of filters be allowed? How should the lights be arranged?49 Are there standards and limits as regards the background and the setting for the parties connecting from remote? Is there an etiquette as regards their behaviour during the oral hearing?50 These are not futile questions; in fact, they may have an impact on the perception by the judges, who moreover may not be aware of these differences (which would make them more insidious). Parties may be tempted to hide certain conduct or modify certain parameters, which cannot be done in a physical courtroom.51
- Can the number of channels available for interpretation during a hybrid oral hearing be increased? At the moment, the number of channels available for parties intervening from remote is limited to twelve and the number of languages is limited

48 A K Bernzen, Gerichtssaalberichterstattung (1st edn, Mohr Siebeck 2020) 11 et seq and 97 et seq.
49 See, in this regard, the research carried out by the Laboratoire de Cyberjustice de l’Université de Montréal [https://droit.umontreal.ca/aide-financiere-bourses-ressources-et-services/laboratoire-de-cyberjustice/] accessed 28 February 2022.
50 See also Becker (n 36).
51 See also Garapon and Lassègue (n 37) page 116.
to three.\textsuperscript{52} That also has an impact on the language combinations because some of the languages play the role of \textit{langue pivot} for other (less widespread) languages in combination with each other. That is not just a detail because interpretation plays an important role in CJEU oral hearings.

– Should software that transforms speech to text be employed by the CJEU? If so, should its results be made available to the judges and other CJEU staff or also to the parties? Such software exists on the market and is being used by other courts. It could be employed to enhance the parties’ right of defence because the parties could easily and almost immediately check the accuracy of the reproduction of their statements; it could also constitute an additional tool for the bench, which could thus quickly and more precisely go back to one party’s statement when asking questions. Furthermore, speech-to-text software does not eliminate the challenge for the interpreters but may facilitate their task in some regards: whereas the CJEU strives for top-notch professionals, it is inevitable that the quality varies from one individual interpreter to another; if the difference were tangible, there would be a question regarding the parity of arms. At the same time, it should be emphasized that the use of software would not take away the need for human intervention and expertise: as litigators appearing before the CJEU know, a very good and experienced interpreter is able to put into another language not only the words but also the message that the pleader wants to convey. To date, a software cannot do that at the same level as a skilled interpreter in blood and flesh. In fact, one risk is that legal terms may be translated by the software out of context, so that the use of interpreters combined with software would be necessary. Moreover, whereas it is challenging to ensure top quality interpretation from/into less widespread languages, reliable software from/into those languages is not even available for the time being and the costs for developing it in-house would be substantial. That being said, increasing the quality of justice is worthwhile an investment; the need to have technology that is moulded in a way that pursues the Union’s values entails investment to develop that technology rather than leaving it only to the market.

\textsuperscript{52}See ECJ letter 11 November 2020 in reply to a letter by the German government of 9 November 2020. See also Kianička (n 33) page 7.
In light of the foregoing, the question cannot be put simply in terms of ‘should hybrid oral hearings be continued before the CJEU’ or ‘should remote-only oral hearings be introduced’. There are so many variables playing an important role both for the parties and for the CJEU that a global and holistic approach should be taken, with a view to reforming the EU judicial system and reaping the benefits of digitalization in compliance with the Union’s values. Moreover, there may be a few questions that perhaps are best addressed by the legislator in the context of possible modifications of the the Rules of Procedure.

4.2. Availability of Oral Hearing Videos to the Public (Including Streaming)?

The Zeitgeist seems to be that videos of the oral hearings of the ECJ (not yet of the General Court) will be made available to the public (either through live-streaming or after the oral hearing). During the FIDE Congress held in The Hague in November 2021 it was hinted to the fact that the ECJ would in 2022 start a pilot project making available to the public oral hearings in selected cases. It seems that a decision in that direction within the ECJ has been taken. What is still open is the question of how that decision will be framed legally and how it will be put into practice in detail. That bears not only procedural but also constitutional significance.

From a general policy perspective, it is incontestable that the principle of transparency is an important feature of the fairness of the trial, allowing the scrutiny of the judiciary by the public. It is equally incontestable that that principle is not absolute but needs to be reconciled with many different principles and provisions (for example, the serenity of the procedure and the impartiality of the bench; the right to privacy). Therefore, primary EU law does not oblige the ECJ to make oral hearing videos available to the public. It is a question of opportunity whether to do so. That is confirmed by the fact that the issue is solved differently in different European countries and organisations. For example, the German constitutional court and its Austrian counterpart do not make their oral hearings available.

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54 Pretto and Others v Italy, App no 7984/77 (CCHR, 8 December 1983) para 27. See Szpunar (n 40) 50.

55 For example, the secrecy of deliberations, the serenity of the process and the right of defence of the parties. See, to that effect, ibid., 51

56 Chainais (n 38) 77 et seq.
in video format;\textsuperscript{57} by contrast, the ECtHR, the Italian Constitutional Court, the French Conseil constitutionnel and the UK Supreme Court do so.

When determining the legal and operational framework for the making available of oral hearings to the public, advantages as well as risks should be taken into account. Public scrutiny is likely to increase. Furthermore, in particular professors, students, researchers and legal practitioners will benefit from the availability of ECJ oral hearing videos. That would militate in favour of the broadest possible access. On the other hand, the possible social and personal sanctions through the increased mediatization might contribute to an additional pressure on lawyers and agents, whose independence is guaranteed under the Statute and Rules of procedure.\textsuperscript{58} It remains to be seen whether that fear is only theoretical. In addition, there is the risk that a party starts turning the platform of court proceedings into an advertising board for its commercial or private activities or favours smart-sounding soundbites rather than objective and reasoned arguments.\textsuperscript{59} Indeed, on the Internet platforms the public enjoys entertainment, which in turn is maximized if positions are polarized and content is trivialized.\textsuperscript{60} There is then a linguistic challenge: oral hearings at the CJEU are multi-linguistic and hallmarked by cultural diversity, so that it is unclear whether the public at large, if accessing the oral hearing video \textit{tel quel}, would have the legal, cultural and linguistic instruments to put it into its procedural and substantive context.\textsuperscript{61} That is particularly relevant for the preliminary reference procedure, which is a procedure before the ECJ and at the same time constitutes a procedural incident within national proceedings. Last but not least, it cannot be excluded that the ECJ members will be massively the object of social media and thus also exposed to enhanced political scrutiny, with the risk of a chilling effect being increased: in particular, they could be tempted to give up asking certain questions which are based on the law but underlie politically controversial propositions.\textsuperscript{62}

\textsuperscript{57} See on that issue Bernzen (n 48) pages 390 et seq.

\textsuperscript{58} Art 19 ECJ Statute; Art 43(1) ECJ Rules of Procedure. See C-515/17 P, \textit{University of Wroclaw}, Judgment, paras 61-62 (see below the contribution by Dirk Arts).

\textsuperscript{59} Luigi Malferri, ‘Corona-Krise und EuGH: mündliche Verhandlungen aus der Ferne und in Streaming?’ (2020) EuZW 393; Chainais (n 38) 64 and 72.

\textsuperscript{60} See, to this effect, Chainais (n 38) 64.

\textsuperscript{61} See, to that effect, Szpunar (n 39) 57.

In my opinion, in light of the foregoing the oral hearing videos should not be made available before the ECJ has handed down its decision, in order to minimize the risks – real or perceived – of undue influence on the adjudication process, which is a very sensitive and important aspect of the rule of law. That temporal limitation of the making available to the public would find an indirect support in the ECJ’s case law whereby judicial documents lodged by an institution are presumed to be covered by the exception of the protection of court proceedings as long as the judicial procedure is not finished.63 Judges’ independence is one of the elements that breathe life into the principle of the rule of law.64 Judicial independence should also be safeguarded against indirect hints, pressures and influences.65 Indeed, it is the indirect threats to judicial independence that occur in practice more frequently.66

It would in this context still need to be analysed which legal form the change at issue should take. It is true that EU provisions do not explicitly say anything on the availability of videos of ECJ oral hearings. But that consideration does not exhaust the discussion. Article 31 Statute provides that the oral hearing shall be public, without defining what ‘public’ means. In order to understand what has so far been the legislator’s understanding of “public”, it is useful to take into account Article 85 of the Rules of Procedure (titled ‘Recording of the hearing’), which provides that ‘[t]he President may, on a duly substantiated request, authorise a party or an interested person referred to in Article 23 of the Statute who has participated in the written or oral part of the proceedings to listen, on the Court’s premises, to the soundtrack of the hearing in the language used by the speaker during that hearing.’ Article 85 of the Rules of Procedure has a normative meaning only under the condition that the video of the ECJ oral hearing would not be made available to the public. Whereas the Statute enjoys primacy over the Rules of procedure, it is appropriate to read the two documents together. Indeed, under Article 63 of the Statute ‘The Rules of Procedure of the Court of Justice and of the General Court shall contain any provisions necessary for applying and, where required, supplementing this Statute.’ Under Article 2 of the Rules of Procedure (titled ‘Purport of these Rules’), ‘[t]hese Rules implement and supplement, so far as necessary, the relevant provisions of the EU, FEU and EAEC Treaties, and the Statute.’ The way in which the oral hearing video is made available to the public can vary substantially

63 See for example judgment of 18 July 2017, Case C-213/15 P, Breyer, EU:C:2017:563, paras. 40-43,
64 See in that regard judgment of 6 October 2021, Case C‑487/19, W.Z, EU:C:2021:798, para 108: ‘[the] requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded.’
65 ibid para 110.
in many regards: for example, it can be streamed or be made available one day after the oral hearing or on the day of the judgment; each option is not only of a technical nature but also has repercussions of a constitutional nature. Since the Rules of Procedure already contain very detailed rules, it would seem logical in view of Article 63 Statute that an important matter such as the making available to the public of oral hearing videos would be (at least regarding the crucial elements) regulated in the Rules of Procedure. Furthermore, given that the right to privacy is a fundamental right, any limit to the exercise thereof must be provided for by law. It could be objected that Article 23 of the Statute would constitute a legal provision. However, that article does not say anything about the way in which a reconciliation is made between, on the one hand, the availability to the public of ECJ oral hearing videos and, on the other hand, the fundamental right to privacy.

Going beyond the issue of the most appropriate legal basis, the making available to the public of ECJ oral hearing videos raises two further questions from the viewpoint of data protection. First, it is to be asked how the balancing of the different interests at issue should be done. Whereas personal data are affected in a courtroom oral hearing in a very limited manner, they are very largely and substantially affected where the video is made available to the public, inter alia because of the enormously increased possibility of automated treatment of personal data. Not only consent given by the data subject but also legitimate public interests can be the basis for allowing data processing: for example, where processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. However, even if there is a legal basis for processing of personal data, shouldn't some limits be laid down? There may in fact be some overriding reasons of public interest (for example, the protection of lawyers and agents against possible attacks in relation to the position they defend before court) which require, as the case may be, special protection, regardless of the data subject's consent or the presence of another legal basis for data processing.

Second, there is an institutional and more general question that is raised in this context: as Professor Chanais emphasized, ‘pursuant to Article 57(1)(a) of the EU Reg. on the processing of personal data by the Union institutions [footnote], the supervisory tasks of the European Data Protection Supervisor are not to include the processing of personal data by the ECJ when acting in its judicial capacity; for those activities the ECJ (meaning either the ECJ or the General Court) decides by

67 Art. 5(1)(a) of the EU Data Protection Regulation (Regulation (EU) 1725/2018) which mirrors Art. 6(1)(e) GDPR.
It is thus an open question how to interpret the expression ‘in its judicial capacity’. In substance the same question is raised in the case C-245/20, X, Z v. Autoriteit Persoonsgegevens with regard to the analogue expression laid down in Art. 55(3) GDPR. In that case one of the parties challenged a decision taken by a national judge on the disclosure to a journalist of one of the parties’ personal data. In his Opinion of 6 October 2021, Advocate General Bobek proposed to the ECJ to construe the expression ‘acting in their judicial capacity’ on the basis of both the institutional role of the deciding body (‘is it a court?’) and the type of activity that it exercises. Whereas the case X, Z v. Autoriteit Persoonsgegevens concerns the disclosure of documents, Advocate General Bobek sets out general considerations, which lead him to the above-mentioned construction of the expression ‘in their judicial capacity’. He points out that there are a number of borderline activities (straddling between judicial and administrative) such as video recording or potentially even the video streaming of court hearings. What would be the institutional and regulatory framework for cases in which an individual disagrees with the ECJ’s decision to make available to the public the oral hearing in which he/she participates?

In addition, the need to protect commercial confidentiality and trade secrets may also raise difficult questions if ECJ oral hearings were made publicly available. It is true that a (seemingly) similar issue is raised where the oral hearing is limited to the courtroom, which is accessible by the public. However, the breadth of the diffusion to an unlimited audience and the possibility de facto to scrutinize the hearings through means of AI make the threat to commercial confidentiality qualitatively different. Technologies and a proper regulation of the Internet could offer some relief to some of those risks. Both the technology and the EU regulation of the Internet are rapidly evolving. For example, techniques for blurring faces and beeping out parts of the sound could be taken into account in this context.

In sum, a host of difficult and delicate legal and policy questions need to be tackled as regards the details of the availability to the public of oral hearings before the ECJ. Before the CJEU and the EU legislator take concrete and detailed action, it may be useful to reflect exactly on their short-term and long-term implications, which are important both for the institutions and for individuals.

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68 Decision of the Court of Justice of 1 October 2019 establishing an internal supervision mechanism regarding the processing of personal data by the Court of Justice when acting in its judicial capacity (11 November 2019) OJ C 383, 2.

69 Opinion, para 100.

70 Opinion, para 90.

71 See, to this effect, Chainais (n 38) 62-63.

72 Ibid 84-85.
5. AI-Determined Judicial Decision-Making?

One of the objectives for the future seems to be the development of digital tools that help human judges’ work become more effective and more efficient (what Frank Pasquale calls ‘Intelligence augmentation’). That objective seems to be shared by at least the majority of institutions, practitioners and scholars in the EU, although opinions are divided on the how to achieve it exactly.

By contrast, one of the polarising issues concerns the use of AI in doing entirely the work of legal analysis and judicial decision-making. The matter has been the object of several academic contributions. It is complex both technically and policy-wise, so that a more in-depth debate would be necessary and goes beyond the present contribution. I will thus make here only a few limited considerations.

At this stage it seems very difficult to go from the algorithm to law. At the moment, most AI machines are unable to explain or justify satisfactorily their decisions in a reasoned manner. Thus, it is an open question whether at some point a machine may be able to do the logical subsumption done in law equally well or even better than a human being. But even if it were technologically possible, would that be advisable? Views seem to be polarized. Some are unrestrained in their faith in machines as being efficient and good decision-makers, even in lieu of human beings. By contrast, other – not necessarily traditional – lawyers are rather sceptical, in particular on the ground that judicial decision-making depends inter alia on policy-orientations and moral values or even empathy and mercy.

The biases of machines are not necessarily less substantial than those present in the judges’ mind. Moreover, the EU is at the same time a union of States and citizens. EU law is a multicultural and multilingual creature that develops according to the stage of European Integration, but also influences it. From that perspective, it would seem reasonable that the hope that AI will continue to develop needs to be accompanied by a reflection by the ECJ and further practitioners on what is needed exactly and how best achieve it, in conformity with the EU’s values (including the equality of citizens and their languages). As Lord Sales eloquently put it, ‘[L]aw is a vehicle to safeguard human values. The law has

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73 See Pasquale (n 26) 16.
74 See also Garapon and Lassègue (n 37) 123.
75 Susskind (n 23) 288.
77 See to this effect Pasquale (n 26) 171.
to provide structures so that algorithms and AI are used to enhance human capacities, agency and dignity, not to remove them. It has to impose its order on the digital world and must resist being reduced to an irrelevance. In the EU administration of justice, we may thus want to keep a justice system in which policy-orientations and moral values or even empathy and mercy play a role: especially in borderline cases (which are often the most significant ones) adjudication cannot be confined to a merely mechanical exercise.

6. Conclusion

One of the strengths of European Integration is the development of adequate and proportionate technical and regulatory solutions which contribute concretely petit à petit to the well-being of the Union’s citizens in pursuit of the Union’s values. The best way to protect and pursue the Union’s values consists of embedding those values in detailed regulatory and technological solutions. In other words, it is the proper solution to the ‘small questions’ that allows ‘the big questions’ to be tackled in pursuit of the Union’s values. To that end, effectiveness and efficiency are important but they must be reconciled with the pursuit of the Union’s values: that is essential for tackling long-term the current challenges that the EU judicial system faces.

The technical and regulatory issues that need to be solved include the improvement of the InfoCuria database, the fostering of the use of e-curia, the introduction by the ECJ of machine-generated templates of judicial documents, the regulation of time-stamping and encryption of online evidence, the automation of procedural steps by the registry, the use of video-conferencing to solve technical/detailed procedural issues, the further refinement of translation software for the use by lawyer-linguists; the regulation of several general and technical aspects of oral hearings from remote. An additional issue that is difficult pertains to the question of how ECJ oral hearing videos should be made available to the general public.

The digitalization of justice gives us cause to revisit the concepts through which we understand public powers, including justice; at the same time, traditional models may prove important in understanding wrong turns in digitalization. As Joe Tomlinson eloquently put it, “accounts of whether

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79 See also Garapon and Lassègue (n 37) 115 et seq.
80 Ibid 13-14.
changes linked to digitalisation are a success or not will ultimately be framed by political judgments of various kinds.” Whereas the values enshrined in Article 2 TUE are formulated in broad terms, they have a legal significance that must be preserved. That should be kept in mind when devising technical and regulatory solutions for the digitalisation of the EU justice administration.
Section II
National Remedies / National Litigation
Chapter 3

Judgment of the Court of Justice of the European Union (Grand Chamber) of 19 December 2019, Deutsche UmWelthilfe eV v Freistaat Bayern, C-752/18

Burkhard Hess and Walter Bruno*

Introduction

On 19 December 2019, the Court of Justice of the European Union delivered a judgment82 in a much-debated case originating from a preliminary reference request solicited by the Bayerischer Verwaltungsgerichtshof (Higher Administrative Court of Bavaria, Germany). It was about the enforcement of the Clean Air Directive,83 particularly the establishment of an air quality action plan for Munich. In this case, the responsible Bavarian authorities (the government of the Freistaat of Bavaria) publicly refused to comply with the EU Directive and the judgment of the Administrative Court of Munich. The ultimate question submitted to the CJEU asked whether EU law requires the coercive detention of government officials when other enforcement mechanisms provided for under national procedural law were not effective.

The issues touched upon by this judgment of the Court of Justice involved several open questions of EU law: its relationship with national (constitutional) law and the implementation by the domestic judges, acting as both national and EU law judicature. This case puts at the core of the debate the enforcement of EU law before national courts. Therefore, several questions about the principle of procedural autonomy vis-à-vis Member States obligation under EU law arise, along with the constitutional-ranked principle of effectiveness of Union law.

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82 C-752/18, Deutsche Umwelthilfe eV v Freistaat Bayern, Judgment (19 December 2019).

The following paper presents the case at hand and analyses the judgment under both the lenses of EU law and German procedural law in order to open a broader understanding of the legal background and the consequences of the implementation of this judgment in the German legal order.

1. Legal and Factual Background

1.1 Legislative Framework: The Clean Air Directive (2008/05/EC)

Merging pre-existent legislative instruments\(^{84}\), the ‘Clean Air’ or ‘Ambient Air Quality’ Directive is a central instrument of the EU policy against air pollution. It establishes air quality assessments to monitor the concentration of certain pollutants locally (e.g. criteria for measurement stations) and information duties towards the public. It poses objectives and deadlines to be achieved with a few allowed postponements in the concentration of a list of pollutants in the air.

Most importantly for the case at hand, it imposes the establishment of air quality plans for the whole EU territories of EU Member States.

Article 4 of the Directive obliges the Member States to divide their countries into zones and agglomerations. Article 13 of the Directive affirms that ‘Member States shall ensure that, throughout their zones and agglomerations’, levels of a series of pollutant agents\(^{85}\) ‘do not exceed the limit values laid down’ in Annexes XI and XII of the Directive. Tolerance margins are listed in Annex IX. The Directive uses a diversified glossary to classify different levels of concerns and imposes resulting obligations on the Member States. The Directive sets ‘limit values’ representing concentration thresholds that should not be exceeded, fixed on the basis of scientific knowledge. The ‘target values’ are more flexible parameters ‘to be attained where possible over a given period’\(^{86}\). Article 13, para 2, also sets ‘alert thresholds’ specifically for sulphur dioxide and nitrogen dioxide, ‘a level beyond which there is a risk to human health ... and at which immediate steps are to be taken’\(^{87}\).


\(^{85}\) Sulphur dioxide SO\(_2\), nitrogen dioxide NO\(_2\), benzene, carbon monoxide, lead, PM\(_{10}\) (and PM\(_{2.5}\) as of 1 January 2015).

\(^{86}\) Article 2 Directive 2008/05/EC.

\(^{87}\) Ibid.
Articles 23 and 24 of the Directive model the actions to take when the concentrations exceed the values set and the margins allowed. Under these two norms, Member States must establish air quality plans and short-term action plans providing appropriate measures to bring the concentration back within the established thresholds ‘so that the exceedance period can be kept as short as possible’ (Article 23 para 1). The Directive only suggests examples of measures, and it is up to the Member States to implement the air quality requirements effectively and appropriately. The plans mentioned above may also include traffic bans, as well as more severe limitations.

1.2. The Implementation of the Directive in Munich

In Munich, the capital city of Bavaria, the first air quality plan was established on 28 December 2004, with regular updates in October 2007, August 2008 and September 2010. In 2011 the agglomeration of Munich over the calendar year recorded more than 200 roads with several kilometres having an average concentration of nitrogen dioxide (NO₂) that was considerably in excess of the limit value imposed in Annex XI, Section B of the Clean Air Directive, under its Article 13.

For these reasons, in 2012, Deutsche Umwelthilfe, a German non-governmental organisation focusing on environmental protection, sued the Bavarian government before the Verwaltungsgericht München (Administrative Court of Munich). The plaintiff aimed to force the Freistaat to improve the air quality plan of Munich. In the plaintiff’s view, the lack of measures available to deal with atmospheric nitrogen dioxide and particulate matter (the well-known PM₁₀) entailed the continuous violation of the limit values (and therefore, infringed EU law). Indeed, in October 2012, the Administrative Court enjoined the Freistaat to modify the air quality plan to include appropriate measures capable of reducing the nitrogen dioxide levels under the limits imposed by the Directive.

However, the defendant Freistaat did not comply with the judgment and in 2016 the Umwelthilfe eventually sought a coercive measure to have the previous decision implemented. The Administrative

88 Emphasis added.
89 See Article 24 para 2 Directive 2008/05/EC.
91 Namely, the limit value imposed by the Directive for the concentration of nitrogen dioxide was equal to a yearly average of 40 μg/m³.
92 Klinger (n 9).
Court of Munich granted the order, but also granted the Bavarian government a timeframe of one year starting from 27 February 2017 to adopt the requested amendments. The Order also indicated measures to be taken, including traffic bans on vehicles with diesel engines in some zones of the agglomeration of Munich. If the defendant failed to fulfil its obligation, then an injunction with financial penalties totalling EUR 10,000 could be imposed. The Freistaat appealed the decision, but the Bayerischer Verwaltungsgerichtshof (Higher Administrative Court of Bavaria), in October 2017, rejected the appeal and ordered the payment of one of the penalties amounting to EUR 4,000.

However, despite the mentioned rulings, the Freistaat of Bavaria persisted in its resistance to properly amend the air quality plan. Consequently, Deutsche Umwelthilfe made a further application seeking to effect the financial penalty of EUR 4,000 previously imposed. The Bavarian government did not object and paid the fine. However, the payment in practice simply consisted of a transfer from the Ministry for Justice to the Ministry for Internal Affairs.

Notwithstanding, Bavaria still did not implement the original judgment imposing the modification of the air quality plan. Moreover, the government, including the Prime Minister of Bavaria, Markus Söder, publicly refused to comply with either the obligations or the orders pronounced, considering them inappropriate and disproportionate. He later declared officially: ‘Bavaria is the home of cars. I own myself two cars, not only as an economic advantage but also as an expression of personal liberty. We do not want any traffic ban.’

As a result of this and similar statements, Deutsche Umwelthilfe filed a further application to the Administrative Court, seeking the imposition of a new financial penalty for non-compliance with the Order of 27 February 2017 and an order of coercive detention against the Minister for the Environment and Consumer Protection of Bavaria and, eventually, against the Prime Minister personally. On 28 January 2018, the Administrative Court imposed a new fine of EUR 4,000 and envisaged the imposition of an additional financial penalty. However, the Court rejected the application seeking coercive measures against the members of the government.

Both parties appealed the decision. The Higher Administrative Court of Bavaria rejected the appeal of the Bavarian government against the financial penalties. Meanwhile, the Freistaat government

93 The date of the Order.
94 C-752/18, Deutsche Umwelthilfe eV v Freistaat Bayern, Judgment (19 December 2019) para 17.
continued to refuse to implement the Order: it declared that it ‘believe[d] that the inclusion of vehicle bans in air quality plans [was] politically undesirable and disproportionate. It [was] convinced that (even the less restrictive) road-specific traffic bans [were] disproportionate and therefore not required by law, as they [were] unsuitable in view of the burdens caused by diverted traffic and [were] also unnecessary given that there are equally effective alternative measures.’ In light of this position, the appeal proceeding regarding the coercive measures generated the preliminary reference analysed in this paper.

2. The Preliminary Reference to the CJEU

The referring Court highlighted the practical difficulty in enforcing an Order vis-à-vis two particular issues. The first was the open refusal by the Bavarian government to comply with the series of Orders pronounced. The second one was the ineffectiveness of financial enforcement of the rulings considering: (a) the amount of the sum and (b) the ‘neutralisation’ of the penalty due to the fine imposed being a transfer from one Ministry to another within the same government. Therefore, based on relevant Articles in the Code of Administrative Procedure and Civil Procedure, the domestic judges asked the Court of Justice to evaluate the possibility of coercive detention as an enforcement measure under EU law. Specifically, the question referred was whether Article 4 (3) TEU, Article 197 TFEU, Article 47 of the EU Charter, Article 9 of the Aarhus Convention and Article 19 (1) TEU are to be interpreted as meaning that in order to implement Directive 2008/50 effectively, a national court may or shall adopt coercive measures to deprive public officials of their liberty to comply with a final judgment.

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96 Summary of the request for a preliminary ruling of 3 December 2018 starting the case before the CJEU.

97 Cf Case C-752/18, Deutsche Umwelthilfe eV v Freistaat Bayern, Judgment (19 December 2019) ECLI:EU:C:2019:1114, paras 14 to 20 (henceforth ‘the Judgment’), and C-752/18, Deutsche Umwelthilfe eV v Freistaat Bayern, Opinion of A.G. Saugmandsgaard Øe (14 November 2019) ECLI:EU:C:2019:972, paras 14 to 21 (henceforth ‘the Opinion’).

98 The ‘ridiculously low financial penalties’, as described by Delphine Misonne, and as explained in the AG Opinion, paras 37 to 39, have a specific genesis in the German enforcement procedural law, see infra Section 5. Delphine Misonne, ‘Arm Wrestling around Air Quality and Effective Judicial Protection: Can Arrogant Resistance to EU Law-Related Orders Put You in Jail?’ (2020) Journal for European Environmental & Planning Law 409.

99 C-752/18, Judgment, para 28.
3. Enforcement of Court Orders in German Law

From a procedural point of view, the starting point is Section 167 (1) of the Verwaltungsgerichtsordnung (VwGO, the German Code of Administrative Court Procedure), which reads as follow:

(1) Unless the present Act provides otherwise, Book Eight of the Code of Civil Procedure shall apply mutatis mutandis to execution. The execution court shall be the court of first instance.

Obviously, the Code of Administrative Court Procedure does not provide an independent self-standing enforcement regime. Indeed, at the time this Code entered into force\(^{100}\), the legislator did not consider it necessary to enact a specific enforcement regime against public authorities and public officials. They assumed that public authorities would always comply with judgments rendered by the administrative courts.

As is evident from the judicial background, no one could consider the lawmakers in 1960 to be naive vis-à-vis the behaviour of future German governments. The binding force of court judgments represents a well-established principle under German constitutional law.\(^{101}\) Nonetheless, the case at hand is not the only example of this kind of conflict between executive and judicature.\(^{102}\)

In this case, the most crucial issue was not about the traffic bans, which were not really contested, regardless of the declarations of the Prime Minister of Bavaria.\(^{103}\) The ‘actual scandal’\(^{104}\) was about a ‘constitutionally highly disconcerting situation’\(^{105}\), which reflects a conflict in the internal rule of law system.

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\(^{100}\) The current text of the Code of Administrative Court Procedure was promulgated on 19 March 1991 (Federal Law Gazette, p. 686), but this article already pre-existed in the text published on 21 January 1960 (Federal Law Gazette I, 17).

\(^{101}\) According to the so-called principle of the legality of administration (Gesetzmäßigkeit der Verwaltung), Matthias Ruffert, ‘Europarecht: Zwangshaft für Politiker?’ (2020) Juristische Schulung 700.

\(^{102}\) Ruffert (n 21) refers to two additional cases: the administration of the city of Wetzlar regarding the assignment of a municipality to a right wing party and to a case of an asylum seeker who was expelled to Tunisia despite a successful order for interim relief.

\(^{103}\) The proportionality of the diesel bans was already affirmed under certain conditions by the Federal Administrative Court in Liepzig, upon solicitation by several Land courts. Misonne (n 18). This same direction was later followed by other judges in German cities such as Hamburg, Aachen, Cologne. Michael Bothe, ‘Dieselgate as an Issue of Urban Planning – German Approaches’ (2020) Journal of Comparative Urban Law and Policy 285.

\(^{104}\) As described by Remo Klinger, representing the plaintiff before the CJEU, in Remo Klinger, Zwangshaft zur Durchsetzung rechtskräftiger Urteile? (2020) Zeitschrift für Umweltrecht 363.

Nevertheless, the enforcement of the administrative rulings is not entirely unregulated. The first sentence of Section 167 (1) of the VwGO refers to Book Eight of the Zivilprozessordnung (ZPO, the Code of Civil Procedure). The relevant norm is Section 888 (1) ZPO:

(1) Where an action that depends exclusively on the will of the debtor cannot be taken by a third party, and where a corresponding petition has been filed, the court of first instance hearing the case is to urge the debtor to take the action in its ruling by levying a coercive penalty payment and, for the case that such payment cannot be obtained, by coercive punitive detention, or by directly sentencing him to coercive punitive detention. The individual coercive penalty payment may not be levied in an amount in excess of 25,000 Euros. The stipulations of Chapter 2 regarding detention shall apply mutatis mutandis to coercive punitive detention.

The procedure imposed under Section 888(1) consists of two stages: first, the imposition of financial penalties and second, measures of coercive detention only if the financial penalties are ineffective.

Section 172 of the VwGO further complicates matters given that the relation between Section 167 and Section 172 is not self-evident. The first sentence of Section 167 refers to eventual further provisions of the same Code that prevail as lex specialis. It is, in this case, Section 172:

If in cases covered by Section 113, subsection 1, second sentence, and subsection 5 and by Section 123 the authority fails to comply with the obligation imposed on it in the judgment or in the injunction, the court of first instance may, in response to a motion, by order including the setting of a deadline, threaten, determine after unsuccessful expiry of the deadline, and execute ex officio, a coercive fine of up to 10,000 Euros against it. The coercive fine may be repeatedly threatened, determined and executed.

This provision may in principle prevent the indirect application of Section 888 ZPO, with two consequences: the maximum amount for financial penalties provided for in Section 888 ZPO (EUR 25,000) is here reduced to EUR 10,000 and the coercive detention is not able to be applied.

Therefore, as mentioned by Advocate General Saugmandsgaard Øe, it is helpful to recall what the Bundesverfassungsgericht (Federal Constitutional Court of Germany), had previously affirmed: ‘administrative courts must treat themselves as free from the restriction arising from paragraph 172 of the VwGO whenever appropriate’. In particular, the Court considered the use of Section 167 with the ZPO ‘necessary, having regard to the requirement for effective judicial protection, at least where a suspended financial penalty limited to [the amount foreseen at those times] is not apt to protect the
rights ... concerned’. This is the case for financial penalties that turn out to be ineffective in compelling public authorities. Then, it is up to the administrative judges to apply the civil procedure norms to each situation mutatis mutandis.\(^{106}\) In this mutanda stands most of the question at stake in this case.

Section 888 of the ZPO suffers from its adaptation to a different context. The *Deutsche Umwelthilfe* case demonstrated the difficulties of adapting the enforcement procedure of the Code of Civil Procedure to administrative court judgments. The financial penalty imposed on the Bavarian government that was finally paid according to the Order of 27 February 2017, consisted of the mere transfer of a paltry sum from one Ministry to another, id est from one voice of the Freistaat budget to another. Therefore, the enforcement, although successful, was ineffective and without any coercive effect. Secondly, as highlighted by the referring judge, Section 888 ZPO, as far as the measure of coercive detention goes, does not apply to the members of the Bavarian government. On the one hand, the Ministers involved in the case were also members of the Bavarian parliament, and they enjoyed immunity from these kinds of acts. On the other hand, the Federal Constitutional Court had already stated in 1970 that the legislator should have envisaged the objective pursued in this form by Section 888 ZPO at its entry into force. The genesis of the Section cannot assure any form of ‘foreseeability’ in this case. Therefore, Section 888 ZPO cannot be enforced against public officials in the form of coercive detention.\(^{107}\) Moreover, the Federal Constitutional Court reiterated the same principle in the more recent ruling mentioned, also reported by the Advocate General, impeding the deprivation of liberty against public officials.\(^{108}\) Also, in a public article in the *Frankfurter Allgemeine Zeitung* in July 2019, the President of the Federal Administrative Court considered this measure as ‘not appropriate’, adding that ‘the public would expect state and regional organs and senior officials to continue to perform all their functions’.\(^{109}\)

The ruling here reported is, as it stands, the pre-existent answer of the German Federal Constitutional Court to the same (indirect) question asked of the Court of Justice of the European Union in *Deutsche Umwelthilfe eV v Freistaat Bayern*. In other words, the referring judge is asking whether Union law requires a different assessment of the norm at stake, especially according to the constitutional guarantee of effective judicial protection.

\(^{106}\) C-752/18, AG Opinion, para 25; BvG 1 BvR 2245/98.

\(^{107}\) As pointed out by the referring judge and highlighted by the Advocate General in his Opinion, para 27; BvG 1 BvR 226/70.

\(^{108}\) C-752/18, AG Opinion, para 28; BvG 1 BvR 2245/98.

\(^{109}\) As reported in the Opinion, para 88, note 44 and in Missonne (n 18) 423.
4. The Perspective of EU Law

With this preliminary reference, a German domestic constitutional conflict became a potential, additional conflict between the *Bundesverfassungsgericht* and the CJEU. The referring judge asked the Court of Justice to review the established constitutional case law for the sake of an effective implementation of the judgments pronounced under EU law. The domestic judges acknowledged that the several financial penalties imposed on the *Freistaat* did not deliver a ‘significant persuasive effect’, either on the budget or on the Ministers’ intentions. They also acknowledged that national constitutional case law prevented them from applying the detention measure provided in the ZPO to the judgment at hand. From their point of view, this was the only effective enforcement.\(^{110}\) In other words, the referring court asked whether, under EU law, the assessment offered by the *Bundesverfassungsgericht* might or shall be reviewed by the CJEU.\(^{111}\) Or in other words whether the national judge must disregard constitutional case law to safeguard the principle of effectiveness.\(^{112}\)

The Grande Chambre, well instructed by Advocate General Saugmandsgaard Øe, reacted wisely to this solicitation. The key of the AG’s analysis was the effectiveness of EU law. The legal solution to the case required a balance between two established principles of EU law: primacy and procedural autonomy.

The Court of Justices had already affirmed the direct effect of the Clean Air Directive in its previous case law. In *Janecek*, where the protagonist was again *Freistaat Bayern*, the EU judges recognised the legitimate interest in a healthy environment for individuals, entitled to expect the establishment of the air quality plan by competent authorities.\(^{113}\) In *Client Earth*, the direct ‘ancestor’ of *Deutsche Umwelthilfe*, the CJEU legitimised the domestic courts to take any necessary measure to enforce the obligation to establish an air quality plan.\(^{114}\) In *Cranyest and Others*, it reaffirmed, even more strongly, that national judges must take ‘all necessary measures ... provided for by national law.’\(^{115}\)

\(^{110}\) C-752/18, AG Opinion, para 31.

\(^{111}\) C-752/18, Judgment, para 29.

\(^{112}\) C-752/18, Judgment, para 41.


In fact, the effectiveness of rulings and their enforcement is a matter of the procedural autonomy of the Member States. But what happens when the national procedural law turns into ‘a barrier’? Procedural autonomy is not absolute. It must be balanced with the principle of equivalence, and above all, the principle of effectiveness. In the context of the Clean Air Directive, the latter is an essential part of safeguarding human health and the rule of law, in the framework of Article 47 of the Charter of the EU and the Aarhus Convention, as invoked by the referring judge.

However, the rationale in this judgment goes beyond this. The principle of effectiveness must be balanced not only with the norms offered by the procedural law of the Member States. It shall also take into account the individual rights enshrined in the primary law of the EU. The relevant norm in the case at hand is Article 6 of the Charter of Fundamental Rights: the right to liberty. The answer given by the CJEU was not an answer about the prevailing assessment between two highest courts but an evaluation of two fundamental rights in the EU Charter. The argumentation delivered is not far from what is required under German constitutional law by the Grundgesetz, para 104, and by the case law of the Bundesverfassungsgericht. EU law stands for the existence of a legal basis to decide about the deprivation of liberty for individuals, especially when imposed against public officials. The Opinion and the Judgment invoke the case Del Rio Prada v. Spain of the European Court of Human Rights (ECtHR), already quoted in Al Chodor: ‘A law empowering a court to deprive a person of his or her liberty

\[\text{C-723/17, Cranyest and Others (n 34); C-348/16, Moussa Sacko, Judgment (26 July 2017) ECLI:EU:C:2017:591; C-73/16, Puškár, Judgment (27 September 2017) ECLI:EU:C:2017:725. A general obligation to provide procedures is established in Article 30 of the Directive 2008/05/EC.}\]

\[\text{Matthias Keller, ‘Case Study on Air Quality Legislation’ (Webinar EU Environmental Law, EJTN, AEAJ, Trier, 25 May 2020).}\]

\[\text{Case 33/76, Rewe, Judgment (16 December 1976) ECLI:EU:C:1976:188; C-723/17, Cranyest and Others (n 34); C-407/18, Kuhar, Judgment (26 June 2019) ECLI:EU:C:2019:537, para 33; C-752/18, AG Opinion, para 53.}\]

\[\text{As extensively recalled by the AG and the Court in Deutsche Umwelthilfe, the lack of effectiveness of the judgments delivered under EU law constitutes a violation of the Article at hand, since the effective remedy guaranteed in this norm would result in an illusory safeguard. C-752/18, AG Opinion, para 48; C-752/18, Judgment, para 35; C-556/17, Torubarov, Judgment (29 July 2019) ECLI:EU:C:2019:626; C-205/15, Toma and Biroul Executorului Judecătoroiu Horățiu-Vasile Cruduleci, Judgment (30 June 2016) ECLI:EU:C:2016:499. Reference is also made to the case law of the European Court of Human Rights (ECtHR) about Article 6(1), relevant for the interpretation of the Article 47 of the EU Charter: Hornsby v Greece (ECtHR, 19 March 1997) case 18357/91.}\]

\[\text{For example, C-240/09 Lesochranárské zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky (Slovak Bear case), Judgment (8 March 2011). The Member States are therefore obliged to interpret access to justice in their respective legal systems consistently with the Aarhus Convention, in a way to guarantee the effectiveness of access to a legal remedy, including effectiveness of the judgments.}\]

\[\text{C-752/18, AG Opinion, para 83.}\]

\[\text{Del Rio Prada v Spain, Judgment (ECtHR, 21 October 2013) case 42750/09.}\]
must, so as to meet the requirements of Article 52 (1) of the Charter, be sufficiently accessible, precise and foreseeable in its application in order to avoid all risk of arbitrariness.\textsuperscript{123}

The same requirement of foreseeability and non-arbitrariness, harmonious in the German and EU legal system, finally impeded the extensive interpretation of Section 888 ZPO for the public officials in the case at hand.

Was the conflict ultimately avoided? The answer must be ‘not completely’. The stratagem used by the AG and followed by the Court did not recognise a free leeway to the constitutional case law of the German Constitutional Court as a matter of subsidiarity. It found the solution to the question within the borders of EU law, balancing two conflicting principles of the EU Charter. Therefore, the principle of primacy is implicitly reaffirmed, insofar as the constitutional case law has not been the direct term of reference for the assessment.\textsuperscript{124} On the contrary, the Court expressly affirmed that if the national judge considers the limitation to liberty consistent with the condition laid down in that regard in Article 52 (1) of the Charter, ‘EU law would not only authorise but require, recourse to such a measure.’\textsuperscript{125}

The Advocate General highlighted the doubts that emerged in the acts transmitted by the referring court, leaving the door open to multiple scenarios.\textsuperscript{126} The first is a new intervention by the Bundesverfassungsgericht on the matter, in light of the doubts and conflicting interpretations emerging in many directions in the proceeding. The second possibility is a national legislative intervention to set up an effective enforcement mechanism.\textsuperscript{127}

This idea is even more evident in light of paragraphs 53 and 54 of the Judgment, where the Court indirectly invoked the ‘complete system of legal remedies’ established by the Treaties.\textsuperscript{128} Here, the Court referred to other remedies offered by EU law: the infringement procedure and State liability for violation of EU law. The jurisprudence of the Court provides many cases where infringement proceedings have been launched to enforce the obligation of establishing air quality plans under the

\textsuperscript{123} C-518/15, \textit{Al Chodor}, Judgment (15 March 2017) ECLI:EU:C:2017:213, para 38 and 40, reported in Judgment, para 46 and Opinion 72 (emphasis added).

\textsuperscript{124} Misonne (n 18) 420.

\textsuperscript{125} C-752/18, Judgment, para 52.

\textsuperscript{126} C-752/18, AG Opinion, para 59.

\textsuperscript{127} Misonne (n 18) 422-424.

Clean Air Directive. When it comes to State liability, of course, its potential is reduced in urgently tackling lack of action threatening human health, like it is in the case at hand. But with several cases following this approach, it is not something to ignore. It is feasible that such a successful claim could expressly compel the German legislator or judiciary to adopt large-scale solutions.

5. A Hidden Message in the Judgment of the Grand Chamber?

In the explanations for the five preliminary questions addressed to the Court of Justice, the referring judge stated: ‘national law does not provide for coercive instruments that are more expedient than threats and imposition of financial penalties but are less invasive than detention’. If it is undeniably true that alternative avenues are not available in the relevant national law mentioned. However, further declinations of those measures could be possible. In other words, it is doubtful whether coercive detention is the only solution, as the referring court thought.

It cannot secure compliance with the principle of effectiveness of EU law and the right to an effective remedy unless EU law empowers or even obliges it to disregard the reasons ... which ... prevent the application of coercive detention to office holders involved in the exercise of official authority.

Remo Klinger, the plaintiff’s lawyer before the CJEU, presented a further argument during that case hearing, but inapplicable in the case at hand. He referred to Section 890 ZPO, which regulates indirect enforcement of orders to desist from an action. This provision reads as follows:

(1) Should the debtor violate his obligation to cease and desist from actions, or to tolerate actions to be taken, the court of first instance hearing the case is to sentence him for

129 Some examples: C-488/15, Comm. v Bulgaria, Judgment (5 April 2017) ECLI:EU:C:2017:267; C-336/15, Comm. v Poland, Judgment (6 April 2017) ECLI:EU:C:2017:276; and more recently C-730/19, Comm. v Bulgaria II (pending); C-125/20, Comm v Spain (pending).


131 Misonne (n 17) 422 and 424. Mirjana Orenovak-Ivanovic, ‘Rights of Individuals and Obligations of the State in Protectiong Air Quality (2020) Collection Papers, Faculty of Law, University of Nis 35. Christoph Sobotta, ‘Relevant Case Law of the CJEU’ (2020 EURJE Annual online Conference, Air Pollution Law, 9-10 October 2020).

132 C-752/18, Judgment, para 30, last point.

133 C-752/18, Judgment, para 41.
each count of the violation, upon the creditor filing a corresponding petition, to a coercive fine and, for the case that such payment cannot be obtained, to coercive detention or coercive detention of up to six (6) months. The individual coercive fine may not be levied in an amount in excess of 250,000 euros, and the coercive detention may not be longer than a total of two (2) years.

(2) The sentence must be preceded by a corresponding warning that is to be issued by the court of first instance hearing the case, upon corresponding application being made, unless it is set out in the judgment providing for the obligation.

(3) Moreover, upon the creditor having filed a corresponding petition, the debtor may be sentenced to creating a security for any damages that may arise as a result of future violations, such security being created for a specific period of time.

Klinger proposed to apply Section 890 as an alternative to Section 888 ZPO based on the deferral included in Section 167 VwGO already commented on. What is peculiar is that the case law and the literature in Germany unanimously agree in refusing this interpretation and application of Section 890 ZPO. The only publication supporting this theory is an article authored by Klinger himself. However, this was not included in the file submitted to the Court of Justice in the references to legal literature. At least it was not included in the form translated and published.

Under this provision, a court may impose penalties on the debtor. Fines issued under this Section are to be considered as criminal sanctions. According to Section 153 (2) n 2 of the Strafprozeßordnung (StPO, Code of Criminal Proceedings) the court may order that those penalties are to be paid to a third party. As such, penalties under Section 890 ZPO require fault.

The answer of the EU judicature is noteworthy. Advocate General Saugmandsgaard Øe in his Opinion, introduced the question of proportionality in assessing the most appropriate (and necessary) measure to adopt. In paragraph 86 of the conclusions, by way of a reference to his Opinion in Al Chodor, he re-stated that ‘deprivation of liberty must be a measure of last resort’. In the following paragraph, he added that it was unclear whether the referring court ‘has used all the means available


135 Generally, the internal translations of documents (to be submitted to the Court) do not refer to legal literature quoted by the referring court, the litigants or other parties. They are kept out and are indicated as: ‘omini’, Burkhard Hess, Europäisches Zivilprozessrecht (2nd edn, De Gruyter 2021) no 13.51, fn 217.

136 Case C-518/15, Al Chodor (n 43).
Indeed, already in paragraphs 56 and 57, and all through the Opinion, the Advocate General made references to the *Popławski* case when he affirmed that ‘national courts are, therefore, required to interpret their national law, to the greatest extent possible, in conformity with the requirement of EU law.’ EU law requires ‘that the whole body of domestic law is taken into consideration.’ As a result, the A.G. echoed what had already been suggested during the hearing: to consider the viability of several financial penalties within the limit of EUR 25,000 (Section 888 ZPO) recurring at a short interval. Another possibility would be to impose these penalties as payable not to the *Land*, which deprives the measure of any sanctioning effect, but to a third party. But it is for the referring court to evaluate all these possibilities under the principle of procedural autonomy.

The Court of Justice took a similar position regarding this possibility in an even more explicit manner. Firstly, Section 890 ZPO was already mentioned at the beginning part of the judgment (para 13) among the applicable provisions. Secondly, in paragraph 40 the Court also recalled the obligation of the national court to take into account ‘the whole body of domestic law’, and to ‘disapply any provision of national law which is contrary to a provision of EU law with direct effect’, citing the seminal judgment *Simmenthal* explicitly. The Grand Chamber also stressed the importance of the proportionality test in choosing the correct measure within the framework of procedural autonomy to reconcile different rights (para 50). Thereby, it immediately referred to paragraph 86 of the Opinion of A.G., mentioned above, inviting the referring court to evaluate every possible alternative to coercive detention when interpreting national procedural law. In other words, the Court endorsed the position of the Advocate General. But it does it *sotto voce*, without discussing the matter explicitly.

6. The Implementation of the CJEU’s Judgment in Germany

The NGO *Deutsche Umwelthilfe* was not entirely successful after the preliminary ruling. Before the referring court, the action was dismissed with a judgment on 5 September 2020. The authorities

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137 Emphasis added.
139 Reference is to C-573/17, *Popławski* (n 57) paras 74, 76, 77, in C-752/18, AG Opinion, para 57.
140 C-752/18, AG Opinion, para 87.
adopted a new air quality plan for Munich in line with Directive 2008/05/E.C. The judicial imposition of the establishment of the plan with traffic bans was no longer needed.

Later, the same NGO initiated several cases in more than twenty cities in Germany, roughly replicating the same claim, in order to enforce EU law effectively. One of these was concluded successfully before the Administrative Court of Stuttgart on 20 February 2020.\textsuperscript{142} Deutsche Umwelthilfe eV requested a coercive measure against the Prime Minister of Baden-Württemberg, but the Stuttgart court imposed a penalty under Section 888 ZPO, to be paid to a third party (Deutsche Krebshilfe). The appeal proceeding before the Mannheim Administrative Court of Appeal confirmed the ruling of first instance in a judgment of 14 May 2020 and \textit{de facto} transformed the scope and the meaning of Section 888 ZPO according to the reasoned explanation.\textsuperscript{143}

What can we affirm looking at the aftermath of our \textit{affaire} in German case law? The preliminary ruling by the Court of Justice of the EU entailed significant consequences for the enforcement regime under the German Code of Civil Procedure, in a way that corresponds to the proposal of the lawyer for Deutsche Umwelthilfe before the CJEU. The administrative courts reformulated the requirements established by Section 888 ZPO in a way that transgresses the interpretation of the applicable norm. Undeniably, it makes a difference whether the money must be paid to the federal state or to a third party. Furthermore, it remains doubtful whether it is methodologically possible to implement Section 888 ZPO in the sense of imposing the transfer of public money to private entities. However, this solution lacks a clear and explicit legal entitlement. Maybe, a legal reform of the enforcement procedure would be welcome as far as relations between Section 888 and Section 890 ZPO and the enforcement regime against public authorities and public officials are concerned.

A contribution comes from comparative procedural law. German law does not foresee the renowned \textit{astreinte} typical of the French legal system and which is also widely used in Belgium and other countries. It permits penalties to be ordered against public authorities. However, the financial penalties imposed by the \textit{astreinte} are paid to the creditor and not to the state: the creditor can collect the penalty directly ‘at the source’ from the debtor. This mechanism works as a huge incentive to strategically follow this path.\textsuperscript{144} A similar instrument could also facilitate transnational enforcement.

\textsuperscript{142} Administrative Court Stuttgart, Order (20 February 2020) 17 K 5255/19.

\textsuperscript{143} Administrative Court of Appeal Mannheim, Order (14 May 2020) Neue Zeitschrift für Verwaltungsrecht 972.

\textsuperscript{144} A clearly successful example in this sense is the judgment ‘\textit{Amis de la Terre}’ pronounced on the basis of the Clean Air Directive and on the heels of CJEU’s \textit{Deutsche Umwelthilfe} case, on 10 July 2020 by the \textit{Conseil d’État} in France, which imposed on the
Indeed, the Court of Justice of the EU has already intervened in the complicated German system in the well-known and much-debated case Realchimie\textsuperscript{145} which involved the cross-border enforcement of German penalties in civil and commercial matters under the Brussels regime.

However, the structure resulting from the CJEU case law could also become a very attractive option for the NGOs if the solution implemented would be to assign the money in favour of the plaintiff-NGO itself. The Court of Appeal in Mannheim closed this door because of the risk of encouraging lawsuits filed not for public interest but instead to receive indirect public funding.\textsuperscript{146}

**Conclusions**

The uncertainty surrounding the German law of enforcement and the incompleteness of the explanatory notes used to describe the legal background of the preliminary reference did not assist the European judges in their assessment of the case. Therefore, they faced some difficulties in clearly entering the national debate as described by the referring court. Nevertheless, from an EU law perspective, the judgment is persuasive and balanced. However, it provoked a lively reaction in the domestic legal system.

The positive impact of this case must also be highlighted. It may play a decisive role in triggering a legislative reform of the German regime of enforcement in the areas described, which would be more than welcome.

Finally, it is important to underline the point at which the Charter of Fundamental Rights of the EU leads the process of constitutionalization of EU law. On one side its Article 47 reinforces the principle of effectiveness. On the other side, the Charter also bolsters the strength of the constitutional limits and of individual rights, together with Article 6 ECHR. The principle of proportionality plays a crucial role in this balance. Also, the indication by the Court to look at the complete system of remedies
offered by the Treaties invites us to think about national procedural law from a broader perspective, together with the remedies provided by EU law.
Chapter 4

The Rule of Law Discourse in the Common Foreign and Security Policy - Bank Refah Kargaran

Elisabet Ruiz Cairó*

In the Bank Refah Kargaran judgment, the Grand Chamber of the Court of Justice of the European Union (CJEU) admitted an action for damages for the harm caused by CFSP decisions on restrictive measures. The judgment constitutes another step in the normalisation of the Common Foreign and Security Policy (CFSP), an evolution that is justified, in this ruling, based on the rule of law and the principle of effective judicial protection. While this judgment does not come as a surprise considering previous case law, the broader implications of this line of reasoning are still to be fully understood. This case note recalls the relevance of Bank Refah Kargaran in the framework of the CFSP (Section 1), reviews the rulings of the General Court and of the Court (Section 2), and explores the further implications this judgment may have in the CFSP and in EU integration more generally (Section 3).

1. The CFSP as a Sui Generis Area of EU Law

Restrictive measures allow the Council to adopt sanctions against natural or legal persons, States and groups or non-State entities to promote the objectives of this policy, namely peace, democracy, human rights and international law.¹ They usually involve arm embargos, the freezing of assets, and visa or travel bans.² The adoption of restrictive measures follows a two-step procedure under EU law: first, a CFSP decision addressed to Member States is adopted on the basis of Article 29 TEU; second, an implementing regulation is adopted on the basis of Article 215 TFEU.³ Implementing regulations do

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² ibid.

not fall within the scope of the CFSP. Hence, Article 215 TFEU permits the adoption of legislation by the Council, acting by qualified majority, to give effect to restrictive measures and ensure their uniform application in all Member States.\(^4\)

The distinction between CFSP decisions and implementing regulations is essential, considering the specificities of the CFSP. The CFSP constitutes a *sui generis* area of EU law at all levels, and its procedural rules are no exception to this feature. CJEU jurisdiction on CFSP matters is indeed characterised by a complex system of principles and exceptions.\(^5\) While the CJEU is granted general jurisdiction under Article 19 TEU, special rules are provided under Articles 24(1) TEU and 275, first paragraph, TFEU for CFSP matters. Under these provisions, the CJEU has no jurisdiction, albeit in two circumstances: to monitor compliance of a CFSP measure with Article 40 TEU and to review the legality of restrictive measures in proceedings brought in accordance with Article 263, fourth paragraph, TFEU.\(^6\) The second circumstance has been subjected to a heated debate in recent years.

Article 275, second paragraph, TFEU expressly limits CJEU jurisdiction in CFSP matters to actions for annulment to review the legality of restrictive measures. The *travaux préparatoires* of this provision, and its wording under the Constitutional Treaty, argue in favour of such restrictive approach.\(^7\) Stretching such provision to include the possibility to bring other proceedings against restrictive measures can thus be considered artificial.\(^8\) And yet, recent case law confirms that the Court tends to interpret its jurisdiction to review restrictive measures in an extensive manner.\(^9\)

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\(^{5}\) Isabelle Bosse Platière, ‘Le juge de l’Union, artisan de la cohérence du système de contrôle juridictionnel au sein de l’Union européenne, y compris en matière de PESC’ (2017) 3 Revue trimestrielle de droit européen 555, 557.

\(^{6}\) Article 24(1) TEU and Article 275, para 2 TFEU.


\(^{9}\) C-72/15 *Rosneft*; C-134/19 P *Bank Refah Kargaran*. 

Electronic copy available at: https://ssrn.com/abstract=4212945
This evolution comes as no surprise if one considers the normalisation process of the CFSP. The Court has recalled the active role of the European Parliament in CFSP matters. It has also repeatedly held that Articles 24(1) TEU and 275, first paragraph, TFEU introduce a derogation from the general jurisdiction and must therefore be interpreted restrictively. Although the General Court had never admitted an action for damages against a CFSP decision on restrictive measures, both the General Court and the Court have applied rules on non-contractual liability to implementing regulations based on Article 215 TFEU. Whether such action could also be brought against CFSP decisions on restrictive measures is a question that had never reached the Court. However, following the Rosneft judgment, Bank Refah Kargaran confirms that the legal remedies available against restrictive measures adopted on the basis of CFSP provisions are broader than expected.

2. The Judgment

Before turning to an analysis of the implications of Bank Refah Kargaran in EU law, we will briefly recall the factual background to the dispute (2.1) and summarise the main findings of the General Court (2.2) and the Court (2.3) in their judgments.

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13 See T-187/11, Trabelsi and others v Council, Judgment of the General Court (28 May 2013) EU:T:2013:273; T-218/11, Dagher v Council, Order of the General Court (15 February 2012) EU:T:2012:82; T-168/12, Georgias and others v Council and Commission, Judgment of the General Court (18 September 2014) EU:T:2014:781; T-293/12, Syria International Islamic Bank v Council, Judgment of the General Court (11 June 2014) EU:T:2014:439; T-348/13, Kadhaf Al Dam v Council, Judgment of the General Court (24 September 2014) EU:T:2014:806; T-328/14, Janatian v Council, Judgment of the General Court (18 February 2016) EU:T:2016:86. Note, however, that the General Court does not deny the actions for damages because they are addressed against CFSP decisions but rather because the applicants have not proven the elements required for an action for damages (the identification of the alleged conduct, the causal link between the conduct and the damage, and the nature and extent of the damage). Only in Janatian v Council does the General Court explicitly states that ‘a claim seeking compensation for the damage allegedly suffered as a result of the adoption of an act relating to the CFSP falls outside the jurisdiction of the Court’ (para 31). In the case at hand, the harm was caused by an admission restriction provided for in a CFSP decision and not implemented by an implementing regulation; hence, the CJEU had no jurisdiction to hear the applicant's claim (para 32).

2.1. Factual Background

In 2010, Bank Refah Kargaran was included in the list of entities concerned by restrictive measures adopted against Iran. The General Court annulled the inclusion of this entity in such list in 2013, for breach of the duty to state reasons.\textsuperscript{15} Bank Refah Kargaran considered that the unlawful inclusion in the list of restrictive measures resulted in harm being caused. It brought an action for damages against the European Union in 2015 but the General Court dismissed that action in the judgment under appeal.\textsuperscript{16} Unconvinced by the reasoning of the General Court, Bank Refah Kargaran brought an appeal against that judgment, leading to the ruling of 6 October 2020.

2.2. General Court

The General Court, in the judgment under appeal, followed its traditional reasoning regarding actions for damages against restrictive measures. It confirmed that the CJEU had jurisdiction to hear actions for damages for the harm suffered by restrictive measures provided for in implementing regulations, adopted on the basis of Article 215 TFEU.\textsuperscript{17} By contrast, it stated that it did not have jurisdiction to hear actions for damages for the harm suffered by restrictive measures provided for in CFSP decisions.\textsuperscript{18} The General Court thus considered that the action for damages had been brought against the implementing regulations and not against the CFSP decisions, and examined the substance of the case accordingly.\textsuperscript{19} It dismissed the action on the substance because the breach of the obligation to state reasons did not constitute a ground for liability on the part of the Union.\textsuperscript{20}

\textsuperscript{17} ibid para 31.
\textsuperscript{18} ibid para 30.
\textsuperscript{19} ibid para 32.
\textsuperscript{20} ibid para 43.
2.3. Court

The Court did not follow the General Court’s reasoning and sided, instead, with Advocate General Hogan.21 In line with the General Court, the Court recalled the possibility to bring actions for damages against restrictive measures provided for in implementing regulations based on Article 215 TFEU.22 However, the Court also admitted the possibility to bring actions for damages for the harm caused by restrictive measures provided for in CFSP decisions based on Article 29 TEU.23 The reasoning of the Court is essentially based on two arguments.

First, the Court relies on the historical evolution of EU law with regard to CFSP matters.24 The Council referred, in its arguments, to the Gestoras Pro Amnisitia and the Segi judgments of 2007.25 Those cases concerned actions for damages against restrictive measures adopted in the fight against terrorism in the Basque country. Such restrictive measures were based on Treaty provisions on the second and third pillars. The Court ruled, at the time, that Article 35 TEU did not confer on the CJEU any jurisdiction to hear an action for damages in the area of police and judicial cooperation in criminal matters.26 In Bank Refah Kargaran, the Court considers, nonetheless, that the situation has substantially changed. The Treaty of Lisbon put an end to the distinction between the European Community and the European Union, which resulted in the integration of CFSP provisions into the general framework of EU law.27 Hence, the Council cannot rely on judgments delivered prior to the adoption of the Treaty of Lisbon to argue against CJEU jurisdiction in the present case.

Second, and most importantly, the Court relies on the rule of law and the principle of effective judicial protection. The rule of law constitutes one of the values of the Union,28 and an objective of the EU external action.29 The existence of an effective legal remedy, which is required under the principle

22 C-134/19 P, Bank Refah Kargaran, paras 30 and 37.
23 ibid para 44.
24 ibid paras 45-48.
26 C-354/04 P, Gestoras Pro Amnistia and Others v Council, para 46; C-355/04 P Segi and Others v Council, para 46.
27 C-134/19 P, Bank Refah Kargaran, para 47.
28 Article 2 TEU.
29 Article 21 TEU.
of effective judicial protection,\textsuperscript{30} is a necessary condition of the rule of law.\textsuperscript{31} Admitting actions for damages against restrictive measures based on Article 29 TEU is necessary to ensure effective judicial protection.\textsuperscript{32} Besides, the necessary coherence of the system of judicial protection provided for by EU law requires that, in order to avoid a lacuna in the judicial protection of the natural or legal persons concerned, the CJEU must also have jurisdiction to rule on the harm allegedly caused by restrictive measures provided for in CFSP decisions.\textsuperscript{33} The Court concludes that the General Court erred in law in holding that the action for damages for the harm suffered as a result of a CFSP decision on restrictive measures fell outside its jurisdiction. Yet, that conclusion does not affect the operative part of the judgment under appeal if none of the substantive grounds of appeal are successful.

On the substance, the applicants claimed a breach of the duty to state reasons. The Court recalls that inadequacy of the statement of reasons for a legal act imposing restrictive measures is not, in itself, such as to give rise to non-contractual liability.\textsuperscript{34} The Court makes a distinction between the duty to state reasons established in Article 296 TFEU, which is an essential procedural requirement, and the obligation to have a well-founded reasoning, which concerns the substantive legality of the measure.\textsuperscript{35} The ground of appeal based on the breach of the duty to state reasons is therefore dismissed, and so is the appeal in its entirety. Consequently, while the General Court and the Court disagree on their jurisdiction to hear the action for damages, they both reach the same conclusion on the substance and Bank Refah Kargaran does not obtain any compensation for the unlawful inclusion of its name in the list of entities concerned by restrictive measures against Iran.


Bank Refah Kargaran has received a great deal of attention for its contribution to broadening the number of legal remedies available against restrictive measures established in CFSP decisions. This ruling is overall consistent with Rosneft, where the Court expressly stated that the reference to Article

\textsuperscript{30} Article 47 of the Charter.
\textsuperscript{31} C-134/19 P, Bank Refah Kargaran, para 36.
\textsuperscript{32} ibid paras 35-39.
\textsuperscript{33} ibid para 39.
\textsuperscript{34} ibid para 62.
\textsuperscript{35} ibid para 64 and 103.
263 TFEU in Article 275, second paragraph, TFEU does not refer to the type of procedure under which the Court may review the legality of certain decisions but rather to the type of decisions whose legality may be reviewed.\textsuperscript{36} Yet, actions for damages are not a review of legality. Thus, even the broad reading of the Court in \textit{Rosneft} does not automatically lead to the admissibility of actions for damages against restrictive measures provided for in CFSP decisions.\textsuperscript{37} Actually, Advocate General Wathelet, in \textit{Rosneft}, considered that actions for damages against CFSP acts were covered by the ‘carve out’ provisions and not by the ‘claw back’ ones, thus excluding CJEU jurisdiction for such actions.\textsuperscript{38} Advocate General Wahl in \textit{H v Council} and Advocate General Kokott in Opinion 2/13 also considered that a more literal interpretation of Treaty provisions related with CJEU jurisdiction in CFSP matters was in accordance with the intention of the drafters of the Treaties.\textsuperscript{39} Hence, although the \textit{Bank Refah Kargaran} judgment was expected by most authors,\textsuperscript{40} it was not the only possible solution to this case and is thus noteworthy.

Beyond this initial thought, \textit{Bank Refah Kargaran} raises three questions that are worth discussing, namely the limits to the judicial review of CFSP acts (a), the position of the rule of law in EU external relations and, more specifically, in the CFSP (b), and the implications of this judgment for the current negotiations between the European Union and the Council of Europe on the EU accession to the European Convention of Human Rights (c).

\textsuperscript{36} C-72/15, \textit{Rosneft}, para 70.
\textsuperscript{37} C-134/19 P, \textit{Bank Refah Kargaran}, Opinion of Advocate General Hogan, para 59.
3.1. Limits to the Judicial Review of CFSP Acts

The Bank Refah Kargaran judgment broadens the available legal remedies against CFSP acts. In addition to the review of legality of CFSP decisions on restrictive measures through actions for annulment and preliminary references on validity, it is now possible to bring actions for damages against such decisions. The impact of this judgment needs to be nuanced, as actions for damages had already been admitted against implementing regulations on restrictive measures based on Article 215 TFEU. Besides, although actions for damages are not a control of legality, they are complementary to the possibility of contesting the validity of a CFSP decision. The outcome of this judgment is therefore not as revolutionary as it might appear at first. However, by stretching CJEU jurisdiction, it raises concerns regarding the limits to the judicial review of CFSP acts. This topic is not new, as it is raised every time the Court broadens its competence in this area. Yet, this judgment brings new elements that contribute to the discussion.

The Court has repeatedly held that Articles 24(1) TEU and 275, first paragraph, TFEU introduce a derogation from the general jurisdiction and must be interpreted restrictively. Such statement implies that there are some (increasingly limited) circumstances where the Court has no jurisdiction to rule on restrictive measures. Reaching this conclusion is essential to ensure the effet utile of the above-mentioned Treaty provisions. It remains however unclear what such circumstances are, and the Court has never explicitly ruled on that issue.

Advocates General have, on the other hand, tried to find a more systematic approach to this problem. Advocate General Bobek, in SatCen v KF, argued that the jurisdictional derogation did not cover acts formally adopted on the basis of the CFSP but which are not directly related with the definition, implementation, or execution of the CFSP. Hence, the fact that an act is formally based on CFSP provisions or adopted in that context simply is not enough to trigger the CFSP derogation. The act

41 Article 275, para 2 TFEU and C-72/15, Rosneft.
45 C-455/14 P, H v Council, para 40; C-439/13 P, Eitaliana v Eulex Kosovo, para 42; C-658/11, Parliament v Council (Mauritius), para 70; C-72/15, Rosneft, para 34; C-134/19 P, Bank Refah Kargaran, para 34.
must also have genuine CFSP content. Advocate General Bobek thus proposes to move beyond a formalistic approach and to look at the object of the measure to determine whether it should be covered by the jurisdictional derogation. This reasoning allows excluding from the CFSP derogation purely operational measures, such as staff management measures as the ones in SatCen v KF. However, Advocate General Bobek did not define what a ‘genuine CFSP content’ was. Advocate General Wathelet, in Rosneft, also looked at the object of the measure to determine whether the CFSP derogation applied or not. He affirmed that the reason for limiting CJEU jurisdiction in CFSP matters was ‘to translate decisions of a purely political nature connected with implementation of the CFSP, in relation to which it is difficult to reconcile judicial review with the separation of powers’. This view was further developed by Advocate General Hogan in Bank Refah Kargaran. However, he was more specific in defining what such political decisions include. He considered that judicial control should only be excluded in CFSP matters for decisions involving questions of ‘high-level politics or diplomacy’. Thus, only measures that are not capable of judicial review because they are not based on legal but rather on political or diplomatic tools should be comprised in the CFSP derogation. The decision to enter the name of a natural or a legal person on a restrictive measures list is susceptible of legal review and can therefore be examined by the CJEU. Advocate General Hogan’s proposal meets the French actes du gouvernement doctrine. This argument had also been followed by the European Commission in H v Council, and it is a practice that exists in several countries. Yet, this argument still raises concerns regarding the concept of ‘political’ or ‘diplomatic’ non-justiciable decisions. The specific limits to this concept can only be defined on a case-by-case basis. While the case law has so far examined staff management, public procurement, and restrictive measures, there are many other categories of CFSP acts. It remains for example unclear whether the Court could control the compatibility with EU law of an international agreement in the area of the CFSP or the validity of an act establishing a peace

47 ibid para 79 (emphasis added).
48 C-72/15, Rosneft, Opinion of Advocate General Wathelet, para 52.
49 C-134/19 P, Bank Refah Kargaran, Opinion of Advocate General Hogan, para 47.
50 ibid para 48. Note however that a similar reasoning between Advocate General Wathelet and Advocate General Hogan led to a different conclusion, as Advocate General Wathelet concluded that actions for damages which relate to a CFSP act are covered by the ‘carve out’ provision and not by the ‘claw back’ provision.
52 ibid.
53 C-455/14 P, H v Council; C-14/19 P, SatCen v KF.
54 C-439/13 P, Elitaliana v Eulex Kosovo.
55 C-72/15, Rosneft; C-134/19 P, Bank Refah Kargaran.
mission. Hence, despite the efforts of Advocates General at bringing some clarity to this area, there still are many open questions.

The question on the limits to the judicial review of CFSP acts does not only concern the nature of the acts to be reviewed, but also the types of actions that can be brought. In addition to actions for annulment, restrictive measures provided for in CFSP decisions can be subject to preliminary questions on validity and to actions for damages. Yet, it is still unknown whether other remedies could be admitted, such as an action for failure to act or a preliminary question on interpretation.

The limits to the judicial review of CFSP acts are therefore still rather unclear and future case law will have to contribute to defining and delimiting them. The case law confirms, in any event, the normalisation of the CFSP, as expressly stated by the Court in Bank Refah Kargaran. A consequence of such normalisation is the increasing relevance of general principles of EU law.

### 3.2. The Rule of Law and Effective Judicial Protection in the Common Foreign and Security Policy

Whether the CFSP is subjected to EU (and international) general principles is a question that can be confidently answered in the affirmative. The answer to this question rests in Article 23 TEU, which states that ‘the Union's action on the international scene ... shall be guided by the principles, shall pursue the objectives of, and be conducted in accordance with, the general provisions laid down in Chapter 1’. The application of general principles of EU law has also been observed in previous case law. However, recent judgments emphasise the importance, in particular, of the rule of law and the

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56 Christophe Hillion and Ramses A Wessel, ‘The Good, the Bad and the Ugly: Three Levels of Judicial Control over the CFSP’ in Steven Blockmans and Panos Koutrakos (eds), Research Handbook on EU Common Foreign and Security Policy (Edward Elgar 2018) 72-73.

57 C-72/15, Rosneft.

58 C-134/19 P, Bank Refah Kargaran.

59 Articles 265 and 267 TFEU; see Bergamaschi (n 44) 1381; Poli (n 43) 1828.

60 C-134/19 P, Bank Refah Kargaran, para 47.


62 C-658/11, Parliament v Council (Mauritius), para 81; C-263/14, Parliament v Council (Tanzania), para 47; C-455/14 P, H v Council, para 41.
principle of effective judicial protection. In *Bank Refah Kargaran*, these constitute the key elements to justify the Court’s jurisdiction.

Reliance on the rule of law and the principle of effective judicial protection in this judgment is consistent with other recent landmark rulings, which go far beyond CFSP matters. Such judgments range from anti-discrimination law to arbitration or the composition of national judiciary systems. The rule of law currently constitutes one of the key elements defining the evolution of EU law. Such development goes back to *Les Verts*, where the Court defined the then European Economic Community as ‘a Community based on the rule of law’ equipped with a ‘complete system of legal remedies’. The possibility to bring an action for annulment against acts adopted by the European Parliament was necessary to ensure an effective system of judicial protection. However, the amount of case law relying on the rule of law and the principle of effective judicial protection has increased in recent years, as Article 2 TEU now mentions the rule of law as one of the founding values of the Union.

Although the rule of law has been interpreted in all areas of EU law, it presents some particularities in the CFSP. The rule of law intervenes in two different manners in this policy. On the one hand, when conducting the CFSP, the Council might adopt restrictive measures to promote democracy and the rule of law in third States. The CJEU has therefore contributed to defining the concept of ‘rule of law’ in that context. On the other hand, the European Union is subject to the rule of law in providing a recourse system that allows entities concerned by restrictive measures to contest such measures. *Bank Refah Kargaran* falls within the second category of case law.

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63 C-455/14 P, *H v Council*, para 41; C-72/15, *Rosneft*, paras 72-76; C-134/19 P, *Bank Refah Kargaran*, paras 35-36; C-872/19 P, *Venezuela v Council*, Judgment of the Court (Grand Chamber) (22 June 2021) EU:C:2021:507, paras 48-50. Although the rule of law is not a structural principle of EU law, it is a value of the Union (Article 2 TEU) and a principle of the Union’s external action (Article 21 TEU) and can thus be considered an EU law principle for this discussion; see Wessel (n 61) 20, according to whom the rule of law could fall within the category of ‘substantive’ principles.


67 Ibid para 25.


69 Spielmann (n 64) 17.
The willingness of the Court to preserve the rule of law and ensure an effective judicial protection in CFSP matters is commendable. However, one must keep in mind the limits to this reasoning. The Court clarified in Unión de Pequeños Agricultores and Jégo Quéré that the principle of effective judicial protection does not allow the Court to go beyond its jurisdiction as defined in the Treaties. A broad interpretation of EU legal remedies is thus possible as long as it does not contradict the powers that have been attributed to the Court by the Treaties. This limit is essential in the CFSP context, where the CJEU has limited jurisdiction. The Court is aware of it and relies on several Treaty provisions to justify its jurisdiction, namely Articles 2, 21 and 23 TEU and Article 47 of the Charter.

Bank Refah Kargaran contributes to shaping the rule of law discourse in EU law. The use of this principle in CFSP rulings has the potential of redefining the procedural features of this policy. In Rosneft and Bank Refah Kargaran, the rule of law extended the legal remedies available against restrictive measures. In the Venezuela v Council judgment of 2021, it broadened the potential applicants who can contest restrictive measures. The way the rule of law is broadening CJEU jurisdiction in CFSP matters could also have major implications in the negotiation of the EU accession to the ECHR.

4. Implications for the EU Accession to the European Convention of Human Rights

Recent case law on CFSP matters could influence the negotiations on the accession of the European Union to the ECHR, which are currently ongoing. In Opinion 2/13, the Court declared that the agreement negotiated between the Council of Europe and the European Union was incompatible with EU law, due to its impact on the autonomy of the EU legal order. Among the objections raised by the Court, the accession agreement failed to have regard to the specific characteristics of EU law concerning the judicial review of acts, actions or omissions in the framework of the CFSP. The Court considered that it had not had the opportunity to define the extent to which its jurisdiction applied to

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70 C-50/00 P, Unión de Pequeños Agricultores, Judgment of the Court (25 July 2002) EU:C:2002:462, para 44; C-263/02 P, Jégo Quéré, Judgment of the Court (1 April 2004) EU:C:2004:210, para 36; C-72/15, Rosneft, para 74; Van Elsuwege (n 51) 12.

71 C-134/19 P, Bank Refah Kargaran, paras 35-36.


CFSP matters. Yet, it showed its reluctance in accepting that the European Court of Human Rights could have jurisdiction over CFSP acts, considering that it could not, itself, exercise full control over them.

With the gradual expansion of the CJEU jurisdiction over CFSP matters, the scope of measures regarding which the ECHR would have exclusive jurisdiction is getting narrower. This evolution could facilitate EU accession to the ECHR. However, there still are several CFSP acts over which the CJEU has no jurisdiction or has not had the opportunity to clarify its jurisdiction. Hence, if the European Commission were to ask an opinion to the Court on the compatibility of a new agreement on the EU accession to the ECHR, the reasoning of the Court would probably be similar to the one followed in Opinion 2/13. Yet, Article 6(2) TEU is explicit in requiring the European Union to accede to the ECHR. It can thus be wondered whether the CJEU could find a balance between the objections raised in Opinion 2/13 and the requirements of Article 6(2) TEU.

The first, and most obvious, solution to this conflict is Treaty reform. The Treaties could be modified to confer upon the CJEU a more extensive jurisdiction in CFSP matters. This solution would ensure that disputes reaching the ECHR have first been examined by the CJEU. The Treaties have however not been modified since Opinion 2/13 and it is uncertain whether any major reforms will take place in the coming years.

Second, the Court could accept the situation as it is right now and consider that it does not endanger the autonomy of the EU legal order. This position was followed by Advocate General Kokott in Opinion 2/13. She considered that, where the CJEU had no jurisdiction, judicial protection could be ensured by national courts, so the autonomy of the EU legal order was not put at jeopardy. However, the Court rejected this possibility because the invalidation of CFSP acts by national courts could harm the unity of the EU legal order and have implications similar to those evoked in Foto-Frost.

74 Ibid para 251.
75 Ibid para 252.
76 See supra Section 3.1.
77 Article 218(11) TFEU.
78 See Bergamaschi (n 44) 1371.
79 The COVID-19 pandemic has raised some calls to strengthen EU powers in certain areas, which could favour a Treaty reform, but, at the same time, there are strong discrepancies among Member States that could make any modification of the Treaties rather complex.
80 Opinion 2/13, Opinion of Advocate General Kokott, para 100.
81 Opinion 2/13, para 90; Hillion and Wessel (n 56) 84.
application of the *Foto-Frost* doctrine to the CFSP, an area where the Court does not have full jurisdiction, is however questionable. The Court itself seems to be aware of it in *Rosneft*, where it affirms that the validity of CFSP acts *for which the Treaties confer on the Court jurisdiction to review their legality* should be reserved to the CJEU. This statement seems to imply, *a contrario*, that national courts have jurisdiction to review the legality of CFSP acts over which the CJEU has no jurisdiction. However, such an explicit statement has not been made by the Court so far.

The third solution is for the CJEU to gradually broaden its jurisdiction over CFSP acts in its case law. However, and despite the expansive approach of the Court, CJEU jurisdiction is still limited for the time being. The Court has interpreted broadly the available legal remedies provided for in the Treaties, and the concept of ‘legal person’, as established in Article 263, fourth paragraph, TFEU. The European Commission has also argued in favour of an expansive interpretation of the concept of ‘restrictive measures’. It has made a distinction between acts that have binding legal effects and those that do not, and has argued that restrictive measures should include CFSP acts with binding legal effects, as they could have an impact on fundamental rights. Advocates General Kokott and Wahl do not support this interpretation, and the Court has not followed the European Commission's view so far. Thus, several CFSP acts are left outside the scope of CJEU jurisdiction, and the European Court of Human Rights could still be called upon interpreting measures that have not been reviewed by the CJEU beforehand. Although this third solution is the most realistic one, it still is a work in progress and the lack of full CJEU jurisdiction in CFSP matters would probably be problematic in a potential agreement on the EU accession to the ECHR.

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83 *C-72/15, Rosneft*, para 92 (emphasis added).
84 Hillion and Wessel (n 56) 84.
85 *C-72/15, Rosneft*; *C-134/19 P, Bank Refah Kargaran*.
86 *C-872/19 P, Venezuela v Council*.
87 Opinion 2/13, para 99. According to the European Commission, CFSP acts that do not have binding legal effects could only be subject to actions for damages, as this action is not explicitly mentioned in Article 275, para 2 TFEU.
5. Conclusions

*Bank Refah Kargaran* increases the number of legal remedies that are available to natural or legal persons concerned by restrictive measures adopted by the Council. It contributes to a line of case law that follows an expansive approach on CJEU jurisdiction in CFSP matters.

While the significance of this judgment for the evolution of the Common Foreign and Security Policy is undeniable, it is necessary to relativize its importance. Looking at the judgment in more practical terms helps to put things into perspective. Although it is the first time that the Court has admitted an action for damages for the harm caused by restrictive measures provided for in CFSP decisions, this action had already been admitted in the past for implementing regulations, which generally reproduce the content of CFSP decisions. Besides, although the Court has admitted this action for damages, its finding has not resulted in substantial changes for the complainant, as the action was dismissed in the substance. However, this judgment significantly contributes to delimiting CJEU powers in CFSP matters, and thus contributes to filling one of the gaps that had been noted by the Court in Opinion 2/13. In particular, the Court clarifies that the same remedies are available to CFSP decisions and implementing regulations, admits that actions for damages are available against CFSP decisions on restrictive measures, and recalls that the rule of law and the principle of effective judicial protection shall guide EU action in CFSP matters.

The increasingly thorough judicial control over restrictive measures might have an impact in the way the Council adopts such measures, although the action failed in the substance and the Council’s procedure was thus not deemed at fault in the case at hand. More importantly, the clarifications brought by the Court in this area might influence negotiations on the EU accession to the ECHR. As the CJEU has a broader jurisdiction to review CFSP acts than it had in the past, it might find the role of the European Court of Human Rights less problematic. However, there still seem to exist significant gaps that could make negotiations difficult. The Court has not clarified whether all EU legal remedies are available against restrictive measures. Several CFSP acts additionally stay outside CJEU judicial control. CJEU jurisdiction is therefore incomplete in this area, which could make the Court reluctant to accepting ECHR jurisdiction. We shall see how negotiations between the European Union and the Council of Europe evolve and whether an opinion on the draft agreement is asked to the CJEU. In the

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89 Opinion 2/13, para 251.
meantime, the Court will probably have other opportunities to clarify some important points on this area.
Chapter 5

The Non-Contractual Liability of the EU for Actions of the Eurogroup: Cases C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P

Chrysostomides

Menelaos Markakis*

1. Introduction

Can the EU incur non-contractual liability on the basis of the acts and conduct of the Eurogroup? Is the Eurogroup an ‘institution’ within the meaning of the second paragraph of Article 340 TFEU? What is the legal nature of the Eurogroup? These are the key questions with which the cases of Chrysostomides and Bourdouvali are concerned, the importance of which far exceeds the confines of the Cypriot financial assistance programme and perhaps of the Economic and Monetary Union (EMU) in general.¹ As was recognised by Advocate General Pitruzzella, ‘The present cases are unquestionably of constitutional significance. They afford the Court an opportunity to clarify the legal nature of the Euro Group, a body that certainly has considerable political influence, but is at the same time the body within the European constitutional and institutional framework that has perhaps aroused the most debate and is the least easy to circumscribe.’²


Electronic copy available at: https://ssrn.com/abstract=4212945
The cases originated from the Cypriot financial crisis and the losses inflicted on depositors and shareholders of Cypriot banks as a result of the restructuring of the financial sector in the run-up to the financial assistance received by the country from the European Stability Mechanism (ESM) in 2013. Effectively, the applicants at first instance challenged all actions related to the Cypriot financial assistance programme by all the institutions and bodies involved in it. They sought compensation for the damage allegedly suffered by them as a result of the decision of the European Central Bank (ECB) of 21 March 2013 relating to emergency liquidity assistance; the Eurogroup statements of 25 March, 12 April, 13 May and 13 September 2013 concerning Cyprus; Council Decision 2013/236/EU of 25 April 2013 addressed to Cyprus on specific measures to restore financial stability and sustainable growth; the Memorandum of Understanding of 26 April 2013 on Specific Economic Policy Conditionality concluded between Cyprus and the ESM; and other acts and conduct of the Commission, Council, the ECB and the Eurogroup connected with the grant of a financial assistance facility to Cyprus. Their central thesis was that the harmful measures should be attributed to the EU authorities concerned, which obliged by means of their acts and conduct the Cypriot authorities to adopt the harmful decrees.

It will be recalled that, under Article 268 and the second and third paragraphs of Article 340 TFEU, the CJEU has jurisdiction only in disputes relating to compensation for damage caused by the ECB, the institutions of the Union for the purposes of the second paragraph of Article 340 TFEU, or by their servants in the performance of their duties. As such, the Court cannot hear a claim for compensation that is directed against the EU and based on the unlawfulness of an act or conduct the author of which is not the ECB, or an institution of the EU within the meaning of the second paragraph of Article 340 TFEU, or one of their servants in the performance of its duties. The Court may also hear an action for compensation for damage caused by an act or conduct by which a national authority ensures the


4 The first instance judgments are Case T-680/13, Dr. K. Chrysostomides & Co. LLC and Others v Council of the European Union and Others, EU:T:2018:486; and Case T-786/14, Eleni Pavlikka Bourdouvali and Others v Council of the European Union and Others, EU:T:2018:487. From here onwards, all references to the General Court ruling will be from the Chrysostomides judgment.

5 Case T-680/13, Chrysostomides, paras 81, 83.
implementation of EU legislation, insofar as the national authorities had no discretion in the implementation of EU legislation vitiated by such unlawfulness.\(^6\)

The present case note is structured as follows. The discussion begins with the General Court judgment, which classified the Eurogroup as an ‘institution’ within the meaning of the second paragraph of Article 340 TFEU. The focus then shifts to the Opinion of Advocate General Pitruzzella, who argued that the Eurogroup could not be regarded as an ‘institution’. We then turn to consider the judgment of the Court, which followed the lead of the Advocate General and concluded that the actions for damages were inadmissible insofar as they related to the Eurogroup. It should be stressed from the outset that our principal focus will be on whether the EU courts have jurisdiction to hear actions for damages against the Eurogroup in respect of losses caused by allegedly harmful acts of that body.

2. The General Court Judgment

The General Court noted that the term ‘institution’ used in the second paragraph of Article 340 TFEU covers not only the institutions of the Union listed in Article 13(1) TEU, but also all other EU bodies established by the Treaty and intended to contribute to the achievement of the EU’s objectives.\(^7\) It distinguished Mallis, where the Court held that an Article 263 TFEU action against the Eurogroup was inadmissible,\(^8\) by pointing out that the jurisdiction exercised by the EU courts in disputes relating to legality under Article 263 TFEU differs both with respect to its purpose and the pleas which may be raised from the jurisdiction they exercise in disputes relating to non-contractual liability.\(^9\) Therefore, irrespective of its status as a challengeable act amenable to an action for annulment (which a Eurogroup statement is not), any act or even non-decision making conduct of an institution of the Union for the purposes of the second paragraph of Article 340 TFEU is, in principle, capable of forming the subject matter of an action for damages.\(^10\)

\(^6\) ibid para 84.
\(^7\) ibid para 106.
\(^9\) Case T-680/13, Chrysostomides, para 109.
\(^10\) ibid para 110.
Treaties, actions for non-contractual liability are intended to guarantee effective judicial protection to an individual also against acts and conduct of the institutions of the Union which cannot be the subject of an action for annulment under Article 263 TFEU.\textsuperscript{11}

The General Court went on to establish, rather succinctly, that the Eurogroup was indeed an ‘institution’ of the Union within the meaning of the second paragraph of Article 340 TFEU. To be absolutely sure, this is not meant as criticism of the General Court’s judgment; it is instead meant to indicate that, for the General Court, it was rather obvious that the Eurogroup qualified in that regard. The General Court noted that Article 137 TFEU and Protocol No 14 make provision, \textit{inter alia}, for the existence, the composition, the procedural rules and the functions of the Eurogroup.\textsuperscript{12} According to Article 1 of the Protocol, the Eurogroup is to meet to discuss questions relating to the specific responsibilities the ministers share with regard to the single currency. ‘Those questions concern, under Article 119(2) TFEU, the activities of the European Union for the purposes of the objectives set out in Article 3 TEU, which include the establishment of an economic and monetary union whose currency is the Euro.’\textsuperscript{13} It follows that the Euro Group is a body of the Union formally established by the Treaties and intended to contribute to achieving the objectives of the Union. The acts and conduct of the Euro Group in the exercise of its powers under EU law are therefore attributable to the European Union.’\textsuperscript{14} The General Court added that: ‘Any contrary solution would clash with the principle of the Union based on the rule of law, in so far as it would allow the establishment, within the legal system of the European Union itself, of entities whose acts and conduct could not result in the European Union incurring liability.’\textsuperscript{15} However, it ultimately decided that the Eurogroup did not require Cyprus to adopt the harmful measures.\textsuperscript{16}

\textsuperscript{11} ibid para 111.
\textsuperscript{12} ibid para 113.
\textsuperscript{13} ibid para 113.
\textsuperscript{14} ibid para 113.
\textsuperscript{15} ibid para 114.
\textsuperscript{16} ibid paras 115-118.
3. The Opinion of the Advocate General

The Advocate General was asked by the Court to focus on the legal nature of the Eurogroup. First of all, he agreed with the General Court that the concept of ‘institution’ is broader than that referred to in Article 13(1) TEU and that it covers all other EU bodies established by the Treaties and intended to contribute to the achievement of the EU's objectives. Consequently, actions taken by those bodies in the exercise of the powers assigned to them by EU law may be imputed to the EU. In order to determine whether or not the Eurogroup may be classified as an ‘institution’ for the purposes of non-contractual liability, he looked into the legal nature of that body and its place within the institutional framework of EMU. Due to space constraints, we will largely skip those parts of the Opinion that explicate the constitutional architecture of EMU and the inception of the Eurogroup. It is worth mentioning that the Opinion is noticeably influenced from a pioneering study on the Eurogroup, which is in fact cited by the Advocate General.

The Advocate General noted that the coordination of the economic policies of the Member States takes place in a sphere that involves three distinct operational levels: a national level; an EU level; and an intergovernmental level. The strong interrelationship between measures adopted at EU level and those adopted at intergovernmental level has engendered forms of cooperation within the framework of EMU which, being at the boundary between those two levels, were described by the Advocate General as the ‘semi-intergovernmental’ method. This is intergovernmental cooperation in the sense that it takes place outside the EU legal and institutional framework, yet it has strong links and interdependencies with both the law and the institutional framework of the EU.

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17 Opinion, para 3.
18 ibid para 39.
19 ibid para 40.
20 ibid paras 41-61 and 62-90, respectively.
21 Uwe Puetter, The Eurogroup: How a Secretive Circle of Finance Ministers Shape European Economic Governance (Manchester UP 2006).
22 Opinion, para 46.
23 ibid para 51.
General rightly noted, in a situation of this kind, it can become somewhat difficult to draw a clear boundary between actions undertaken at intergovernmental level and actions taken at EU level.\textsuperscript{24}

For the Advocate General, the reason underlying the establishment of the Eurogroup is to be found in a two-fold requirement that arose upon the introduction of the euro. On the one hand, there was the need for greater efficacy in the coordination of economic policy of those States which share the single currency, especially, but not only, from a macroeconomic perspective; on the other hand, there was the need for a connection to be made between monetary and economic policy.\textsuperscript{25} However, since the Council, as an institution comprising representatives of all Member States, could not respond effectively to those requirements for enhanced coordination and connection and since there was no intention of altering the institutional structure established by the Treaties or of diminishing the Council's role, it was decided to create an intergovernmental forum exclusive to the Member States of the Euro area. From the outset, the establishment of the Eurogroup thus reflected the intention of the Euro area Member States to address jointly matters of specific interest to them and to meet informally, outside the Council, in order to coordinate and to harmonise their positions, without threatening the integrity of the Council as the fulcrum of the EU's decision-making process in economic matters or the independence of the ECB.\textsuperscript{26} Conceived of as an instrument of intergovernmental coordination between national level and Community level, the Eurogroup swiftly acquired significant political importance as the principal mediator in the economic coordination of the Euro area.\textsuperscript{27}

The Advocate General further noted that a fundamental characteristic of the Eurogroup is its informal nature, which is connected, in his opinion, to the two-fold requirement that underlies its very creation.\textsuperscript{28} On the one hand, the requirement of informality is responsive to concerns relating to the relations between Euro area Member States and other (non-Euro area) Member States and to the intention not to diminish the powers of the ECOFIN Council, which is the fulcrum of the EU's decision-making powers in the field of economic coordination. That is why it was decided, according to the Advocate General, that the Eurogroup, as an informal body, should have no decision-making powers of its own. On the other hand, the requirement of informality is responsive to the concern to ensure

\footnotesize{\textsuperscript{24} ibid para 54. \\
\textsuperscript{25} ibid para 63. \\
\textsuperscript{26} ibid para 64. \\
\textsuperscript{27} ibid para 65. \\
\textsuperscript{28} ibid paras 84, 86.}
Informality therefore became a precondition of the dialogue between authorities responsible for monetary policy and authorities responsible for the economic policy of EMU. The Eurogroup nevertheless exerts considerable influence at all levels of EMU governance, which, according to the Advocate General, ‘remains a purely political influence’. According to him, not only does the Eurogroup have no competence of its own, but it also has no power to penalise any failure on the part of participants to implement agreed policy objectives. The national ministers remain legally free to depart from any political agreements reached within the Eurogroup when they participate in decision-making bodies at national, EU or intergovernmental level.

In order to pin down the legal nature of the Eurogroup, the Advocate General analysed the relevant provisions of the EU Treaties in the light of the role which the Eurogroup plays within the EMU constitutional architecture. He argued that ‘it is unquestionable that the Euro Group was first created as an intergovernmental body outside the institutional and legal framework of the European Union’. In his opinion, this conclusion was borne out by the fact that ‘the Euro Group was in fact instituted by means of an act outside the system of sources of EU law, by a body, the European Council, which, at the time when the Euro Group was created, was outside the institutional framework of the European Union’. As such, the goal of interpreting the relevant provisions of primary EU law would be to ascertain whether the Treaty of Lisbon merely recognised the Eurogroup or whether it sought to alter its legal nature.

The Advocate General relied on a textual, systematic, historical and teleological interpretation in his analysis. He argued that ‘from a literal point of view, it should be noted that both Article 137 TFEU and the terms of Protocol No 14 maintained the description of the body as a “group” — rather than reclassifying it as a “council” or “committee” — and, most importantly, expressly refer to meetings of

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29 ibid para 86.
30 ibid paras 88-89.
31 ibid para 89.
32 ibid para 92.
34 Opinion, para 92.
“the Ministers of the Member States whose currency is the euro” being conducted “informally” \(^\text{35}\) In his opinion, ‘the express reference to the ministers of the Member States indicates that, when they take part in meetings of the Euro Group, the participants are acting in their national capacity as ministers’ \(^\text{36}\). That reading was supported, in his view, by the second sentence of Article 1 of the Protocol, which provides that the meetings shall take place, when necessary, to discuss questions related to the specific responsibilities they share with regard to the single currency. In his opinion, ‘[t]hat wording makes it clear that the responsibilities addressed in the meetings are responsibilities which remain with the individual ministers, by reason of their national powers, rather than responsibilities which are transferred to the forum in which they are meeting’ \(^\text{37}\). This literal interpretation ‘seems to reflect an intention on the part of the drafters of the Treaty of Lisbon to acknowledge the existence of the Euro Group as an intergovernmental discussion forum, rather than to establish it as a stand-alone body of the European Union’ \(^\text{38}\).

In my opinion, this interpretation is not straightforward in textual terms. It does not follow from the wording of the provisions of the Protocol that the participants in the Eurogroup meetings are acting in their national capacity as ministers \(^\text{39}\). In my view, the finance ministers from the Euro area Member States are to meet ‘to discuss questions related to the specific responsibilities they share with regard to the single currency’ (second sentence of Article 1) because their economic policies are ‘a matter of common concern’ (Article 121(1) TFEU). This common concern becomes all the more greater by reason of the fact that they share the same currency, hence the need for intensifying economic coordination. Member States shall conduct their economic policies with a view to contributing to the achievement of the objectives of the Union, as defined in Article 3 TEU (Article 120 TFEU). \(^\text{40}\) The activities of the Member States and the Union include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States’ economic policies (Article 119(1) TFEU), and the Council is not the only forum in which this coordination is taking place. In fact, the preamble

\(^{35}\) ibid para 93 (emphasis in original).

\(^{36}\) ibid para 94.

\(^{37}\) ibid para 95.

\(^{38}\) ibid para 96.


to the Protocol refers precisely to the aim of developing ever-closer coordination of economic policies within the Euro area. To his credit, the Advocate General indeed noted that a textual interpretation is ‘certainly not decisive’ in this case, and that the responsibilities of the finance ministers overlap as a result of the creation of the single currency.\(^{41}\)

For the Advocate General, his interpretation appeared to be confirmed, from a schematic point of view, by comparing the wording used in Article 137 TFEU and the Protocol with that used in other Treaty provisions. He argued that the wording used in relation to the Eurogroup is ‘very plainly different’ from that used for the composition of the Council in Article 16(2) TEU, which provides that ‘the Council shall consist of a representative of each Member State at ministerial level. The provision concerning the Council thus refers not to ministers acting in their national capacity, but to the Council as an EU institution consisting of the representatives within that body of each Member State.’\(^{42}\) He further noted that the wording used in Article 137 TFEU and the Protocol is plainly different from that used in other Treaty provisions such as Articles 136(2) and 138(3) TFEU, which provide that ‘only members of the Council representing Member States whose currency is the euro shall take part in the vote’.\(^{43}\) This difference in wording confirmed, in his view, that when the drafters of the Treaty of Lisbon intended to refer to the representatives of the Euro area Member States within an EU institution or body they chose different wording from that used in relation to the Eurogroup.\(^{44}\)

By highlighting the differences in the wording of the aforementioned primary law provisions, the Advocate General is effectively arguing that the finance ministers are exercising their own national powers in the Eurogroup and are not acting as members of an EU body. There is no doubt that the wording used in these Treaty provisions is indeed different from those on the Eurogroup but, in reality, there would be no reason for the Treaty drafters to use similar wording in either Article 137 TFEU or the Protocol. The Eurogroup brings together only the ministers of finance from the Euro area Member States, such that no distinction or further specification of that is needed.\(^{45}\) This is subject to the caveat that the Eurogroup sometimes meets in inclusive format, thereby also comprising the ministers of finance from non-Euro area Member States, who are clearly not members of the Eurogroup. It should

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\(^{41}\) Opinion, paras 95-96.

\(^{42}\) ibid para 97 (emphasis in original).

\(^{43}\) ibid para 98 (emphasis in original).

\(^{44}\) ibid para 99.

\(^{45}\) Markakis and Karatzia (n 39) 3.
be further stressed that the very webpage dedicated to the Eurogroup refers to ‘Eurogroup members’ (or ‘Members of the Eurogroup’) when introducing the finance ministers, thus explicitly recognising that the finance ministers from the Euro area Member States are members of that body.\textsuperscript{46}

The Advocate General further argued, from a historic viewpoint, that a perusal of the acts of the Convention on the Future of Europe, which was the original source of the provisions in question, reveals no intention of including the Eurogroup within the EU institutional framework, but rather indicia to the contrary.\textsuperscript{47} He cited the ‘French-German contribution on Economic Governance’, in which a proposal was made to recognise the Eurogroup in a Protocol annexed to the Treaty; and another proposal to create an ‘Ecofin Council for the euro area’ consisting exclusively of representatives of the Member States of the Euro area.\textsuperscript{48} He noted that the second proposal, which would essentially have led to the creation within the EU of an ad hoc deliberating body for the Member States whose currency is the euro, was not taken up.\textsuperscript{49} However, the references to a Euro-ECOFIN Council, which by the way feature in both proposals, pertain to the modus operandi of the Council and the need for Euro area Member States to decide among themselves, within the Council, on matters relating to the euro. In other words, the proposal was not to either formalise the Eurogroup or permit the Euro area Member States to decide among themselves in the Council on issues arising out of the existence of the single currency. In fact, the Treaties today do both. The Treaty provisions allowing only those members of the Council representing Member States whose currency is the euro to vote on measures specific to those States approximate what would have been a Euro-ECOFIN Council (see, notably, Article 136(2) TFEU). Furthermore, the fact that the Eurogroup is not a Council configuration (or a Euro-ECOFIN Council) does not in and of itself mean that it is situated outside the EU legal order. Neither of these two documents mentions that the Eurogroup is (or should be) outside the formal confines of the EU Treaties.\textsuperscript{50} There has never been a proposal that the current author is aware of in the extensive literature on EMU reform to repatriate the Eurogroup into the EU legal order either.

Furthermore, the Advocate General argued, from a teleological viewpoint, that it was apparent from the analysis of the origins and functions of the Eurogroup within the EMU constitutional architecture that the reference to the Eurogroup in Article 137 and Protocol

\textsuperscript{47} Opinion, para 100.
\textsuperscript{48} Ibid note 66, citing CONV 470/02, ‘French-German Contribution on Economic Governance’ and CONV 391/02, ‘Contribution submitted by Mr Barnier and Mr Vitorino, members of the Convention: “Towards better economic policy coordination”, respectively.
\textsuperscript{49} Opinion, note 66.
\textsuperscript{50} See also Markakis and Karatzia (n 39) 4.
No 14 was intended as a formal recognition of a pre-existing entity outside the EU institutional framework. By means of that recognition, the Commission and the ECB were also empowered formally, by provisions of primary law, to participate in that assembly. Moreover, without any autonomous decision-making body for the Member States of the Euro area having been created, that recognition made it possible, according to the Advocate General, to preserve undiminished the Council’s fundamental role in the field of economic coordination, while meeting the requirements of the other Member States.\(^{51}\) Externality to the legal framework of the EU allowed, in the Advocate General’s opinion, the Eurogroup to maintain informality, which is an essential requirement of its operation. This allowed the Eurogroup to operate as a forum for political discussion in which complex interests may be reconciled and compromises reached between the Euro area Member States.\(^{52}\)

We have previously argued that, whatever the origins of the Eurogroup and its functions prior to the Treaty of Lisbon may have been, they do not seem to warrant the conclusion that, following the entry into force of the Treaty of Lisbon, the Eurogroup remains an entity situated outside the EU institutional framework.\(^{53}\) Whilst perhaps not constituting conclusive evidence in this regard, it is instructive that the very webpage of the Eurogroup refers to Article 137 TFEU and Protocol No 14 as the ‘legal base’ of the Eurogroup.\(^{54}\) Furthermore, it seems somewhat odd for the EU Treaties to recognise the existence of a body that is situated, according to the argument, outside the EU legal order. EMU connoisseurs would perhaps draw an analogy with Article 136(3) TFEU, which provides that ‘[t]he Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole.’\(^{55}\) This provision refers essentially to the ESM, which is also situated outside the framework of EU law. However, it is worth noting that Article 136(3) TEU does not mention the ESM. Nor does it mention who will be sitting in the ESM decision-making bodies, how the ESM Members will meet, or which EU institutions will participate in its activities. In fact, Article 136(3) TFEU does not even mention a ‘body’. It only refers to a ‘stability mechanism’. By way of contrast, Article 137 TFEU provides the legal basis for the Eurogroup

\(^{51}\) Opinion, para 101.
\(^{52}\) ibid para 102.
\(^{53}\) Markakis and Karatzia (n 39) 4.
\(^{55}\) This provision confirms the existence of a national competence: Case C-370/12, Thomas Pringle v Government of Ireland and Others, EU:C:2012:756, paras 71-75.
meetings, while Protocol No 14 sets out the practical arrangements for those meetings. We have previously argued that these nuances would preclude equating the Treaty provisions on the Eurogroup with the one on the ESM, or indeed the legal nature of the Eurogroup with the intergovernmental nature of the ESM.\textsuperscript{56}

In light of all the above, the Advocate General concluded that:

\begin{quote}
[T]he Euro Group must be considered the embodiment of a particular form of intergovernmentalism that is present within the constitutional architecture of EMU. Created as a purely intergovernmental body within the complex EMU framework for the coordination of Member States' economic policies, it provides a bridge between the State sphere and the EU sphere. The Treaty of Lisbon recognised the existence of the Euro Group outside the EU legal framework and formalised the involvement of the Commission and the ECB in its work. It did not, however, intend to alter its legal nature, which is closely linked to its function as a bridge between the Member States and the European Union.\textsuperscript{57}
\end{quote}

Consequently, the EU courts had no jurisdiction to hear actions for damages brought against it in respect of possible losses caused by allegedly harmful actions taken by it.\textsuperscript{58} That conclusion was not called into question, according to the Advocate General, by considerations relating to the rule of law and the requirements of observance of the principle of effective judicial protection.\textsuperscript{59} As the reasons provided by the Advocate General for this finding largely concur with those given by the Court in its judgment, they will be explicated in the following section.

4. The ECJ Judgment

On 16 December 2020, the Court of Justice delivered its judgment on appeal. The judgment concerns two appeals brought by the Council against the two judgments of the General Court, inasmuch as they dismissed the pleas of inadmissibility related to the actions for damages directed against the Eurogroup. The applicants at first instance also appealed, asking the Court to set aside the two

\begin{footnotesize}
\textsuperscript{56} Markakis and Karatzia (n 39) 7-8.
\textsuperscript{57} Opinion, para 106.
\textsuperscript{58} ibid para 107.
\textsuperscript{59} ibid para 108.
\end{footnotesize}
judgments. The General Court had dismissed the appellants' claims for non-contractual liability against the EU, the Council, the Commission, the ECB, and the Eurogroup. Furthermore, by its cross-appeals, the Council asked the Court to set aside those parts of the judgments in which the General Court dismissed its pleas of inadmissibility insofar as they related to the actions directed against Council Decision 2013/236, which replicated part of the conditionality attached to the financial assistance granted by the ESM.

4.1. The Legal Nature of the Eurogroup

The Court agreed with both the General Court and the Advocate General that the term 'institution' within the meaning of the second paragraph of Article 340 TFEU encompasses not only the EU institutions listed in Article 13(1) TEU but also all the EU bodies, offices and agencies that have been established by or under the Treaties and are intended to contribute to the achievement of the EU's objectives. It relied on three main arguments to conclude that the Eurogroup was not an EU body established by the Treaties for the purposes of this case law and that an action to establish non-contractual liability could not be brought against it. These will now be examined in turn.

First, the Court noted that the Eurogroup was formally established by the resolution of the European Council of 13 December 1997. It ruled, by reference to the Opinion of the Advocate General, that 'the Euro Group was created as an intergovernmental body – outside the institutional framework of the European Union – intended to enable the ministers of the [Member States whose currency is the euro] to exchange and coordinate their views on issues relating to their common responsibilities concerning the single currency. It thus provides a bridge between the national level and the EU level for the purpose of coordinating the economic policies of the [Member States whose currency is the euro].' As regards the effect (if any) of the provisions introduced by the Treaty of Lisbon, the Court ruled that ‘Article 137 TFEU and Protocol No 14 admittedly formalised the existence of the Euro Group and the participation of the Commission and the ECB at its meetings. However, they did not alter its intergovernmental nature in the slightest.'

60 Judgment, para 80.
61 ibid para 84.
62 ibid para 87.
We have argued elsewhere that the Court does not really provide an explanation as to why Article 137 TFEU and Protocol No 14 did not alter the Eurogroup's intergovernmental nature in the slightest. Instead, the Court is referring selectively to the arguments provided by the Advocate General as to why, in his opinion, the Treaty of Lisbon merely recognised the Eurogroup but did not seek to alter its legal nature. The key message flowing from those paragraphs from the Opinion cited in the judgment is that the Lisbon Treaty provisions acknowledged the existence of the Eurogroup as an intergovernmental discussion forum, rather than establishing it as a stand-alone body of the EU, in order to preserve undiminished the Council's fundamental role in the field of economic coordination, as well as the independence of the ECB. It seems that the Court is drawing specifically (though not necessarily exclusively – note the use of 'inter alia') on the literal and teleological interpretation provided by the Advocate General in his Opinion, to which the critical assessment we provided in section 3 applies. The Court further noted that it had previously held in Mallis, namely an Article 263 TFEU action, that the Eurogroup cannot be equated with a configuration of the Council, which is admittedly not so relevant for present purposes, for the reasons that were provided by the General Court in its judgment (see section 2 supra).

The second argument used by the Court is that ‘...as both the resolution of the European Council of 13 December 1997 and Article 1 of Protocol No 14 expressly state, and as the Court held in ... Mallis..., the Euro Group is characterised by its informality, which, as the Advocate General has stated in ... his Opinion, can be explained by the purpose pursued by its creation of endowing economic and monetary union with an instrument of intergovernmental coordination but without affecting the role of the Council – which is the fulcrum of the European Union’s decision-making process in economic matters – or the independence of the ECB’.

It is not clear from the judgment why the informal nature of the Eurogroup means that the latter is not an EU entity established by the Treaties for the purposes of the EU's non-contractual liability. Contrary to what the Advocate General had opined, which is nevertheless not explicitly cited in the judgment, it could be questioned whether externality from the EU legal order is a necessary precondition for informality.

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63 Karatzia and Markakis (n 40). My understanding is that 'intergovernmental' is basically used as synonymous to non-EU and therefore not in the sense that the Eurogroup is populated by Member State representatives and takes decisions—formal or informal—on the basis of agreement among these representatives (Uwe Puetter, The European Council and the Council: New Intergovernmentalism and Institutional Change (OUP 2014) 43).

64 Judgment, para 87.

65 ibid para 88.

66 Markakis and Karatzia (n 39) 4.
Eurogroup by means of primary law provisions would not affect the role of the Council, insofar as those Treaty provisions which confer powers on the Council in this area and render it the fulcrum of the EU's decision-making process in economic matters remain unchanged. It is possible to recognise the existence of an entity within the EU institutional framework which would not encroach on the powers of the Council.\(^6\)

It is equally unclear why the informal nature of the Eurogroup is necessary to preserve the ECB's independence. The Eurogroup would, as any other Union institution, body, office or agency, undertake to respect the ECB's independence and not to seek to influence the members of its decision-making bodies in the performance of their tasks (Article 130 TFEU). It is not explained in the judgment why the ECB's interaction with formal EU institutions (such as the Council or the European Parliament) does not affect its independence.\(^6\)

What is more, this judicial finding could spell bad news from the standpoint of fiscal integration in the EMU. If taken to its logical conclusion, this argument could mean that further fiscal integration,\(^6\) possibly accompanied by some degree of institutional engineering and perhaps the creation of a European finance ministry of sorts, would endanger the ECB's independence.\(^7\) Yet, it should be stressed that the relevant literature regards the lack of a counterpart in economic policy at the EU level (often termed as the ‘institutional loneliness’ of the ECB) as a danger to the ECB's independence.\(^7\)

The third argument used by the Court is that ‘...the Euro Group does not have any competence of its own in the EU legal order, as Article 1 of Protocol No 14 merely states that its meetings are to take place, when necessary, to discuss questions related to the specific responsibilities that the ministers ... share with regard to the single currency – responsibilities which they owe solely on account of their competence at national level.'\(^7\) However, various secondary EU law provisions confer powers on the Eurogroup.\(^7\) Notably, according to ‘two-pack’ legislation, the Euro area Member States submit

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\(^6\) It could be argued that the ECB's participation in hearings at the European Parliament is voluntary in nature and not obligatory (second paragraph of art 284(3) TFEU). However, the same is true in the case of the Eurogroup (fourth sentence of art 1 of Protocol No 14).

\(^6\) See generally Alicia Hinarejos and Robert Schütze (eds), EU Fiscal Federalism: Past, Present, Future (OUP, forthcoming).

\(^7\) Markakis and Karatzia (n 67) 3-4.


\(^7\) Judgment, para 89.

annually their draft budgetary plans to the Commission and the Eurogroup. The Eurogroup discusses opinions of the Commission on these plans, as well as the budgetary situation and prospects in the Euro area as a whole on the basis of the overall assessment made by the Commission. The Euro area Member States also report ex ante on their public debt issuance plans to the Eurogroup and the Commission. The Eurogroup further forms part of the accountability mechanisms in the Banking Union. More specifically, it receives a report by the ECB on the execution of its tasks in the Single Supervisory Mechanism, which is also presented to it by the Chair of the Supervisory Board of the ECB. The Chair of the Supervisory Board may be heard on the execution of its supervisory tasks by the Eurogroup, and the ECB shall reply orally or in writing to any questions put to it.

It seems that, in making this argument, the Court is only looking at primary law provisions, notably those of the Protocol. In which case, it definitely casts the net too wide, by pronouncing that the Eurogroup has no competences of its own in the EU legal order. Alternatively, the Court may be using the word ‘competence’ in a very narrow manner that excludes the powers we set out above. Unless this is the case, it is clear that the Eurogroup is given tasks in EU law. This bears the question of whether secondary EU law may confer powers or tasks to informal, non-EU bodies, especially to the point of involving those bodies in the accountability mechanisms for a formal EU institution. The existence of these provisions was also noted by the Advocate General in his Opinion, who argued however that they ‘do not, in fact, define any conferral of specific powers on the Euro Group, but

candid in their analysis: ‘Fora for discussions such as ... the Eurogroup have gradually acquired decision-making functions; so has the Euro Working Group... initially an informal, preparatory body of the Eurogroup.’ (Pierre Schlosser, Europe’s New Fiscal Union (Palgrave Macmillan 2019) 5). ‘In line with its quasi-constitutionalization function, the crisis has genuinely institutionalized the Eurogroup. From an ad hoc, informal and deliberative body, the Eurogroup has become an EMU executive and decision-making institution, overseeing the world’s largest financial firewall, the ESM’ (ibid, 175). See further ibid, especially ch 4, with further references.


75 ibid art 7(5).

76 ibid art 8(1).

77 See among others Fabian Amtenbrink and Menelaos Markakis, ‘The Legitimacy and Accountability of the European Central Bank at the Age of Twenty’ in Thomas Beukers, Diane Fromage and Giorgio Monti (eds), The ‘New’ European Central Bank: Taking Stock and Looking Ahead (OUP, forthcoming).


79 ibid art 20(4) and (6).

80 Markakis and Karatzia (n 67) 4.

81 Markakis and Karatzia (n 39) 5.
enable it to receive information and to conduct informed discussions concerning questions relating to the economic policies of the Euro area or of significance in relation to the single currency.\footnote{82}{Opinion, para 105.}

\subsection*{4.2. Effective Judicial Protection}

The Court further held that its conclusion regarding the inadmissibility of the actions brought against the Eurogroup was not called into question by the applicants’ argument regarding infringement of Article 47 of the EU Charter (Right to an effective remedy and to a fair trial).\footnote{83}{Judgment, para 91.} It ruled that, given that the Eurogroup has no competences of its own in the EU legal order and that it does not have the power to punish a failure to comply with the political agreements concluded within it, those agreements are given concrete expression and are implemented by means, in particular, of acts and action of the EU institutions. Individuals may thus bring before the EU judicature an action to establish non-contractual liability of the EU against the Council, the Commission and the ECB in respect of the acts or conduct that those EU institutions adopt following such political agreements, as is shown in this case by the actions directed against the Council in respect of specific measures laid down in Council Decision 2013/236.\footnote{84}{ibid paras 93-94.} Moreover, the \textit{Ledra} principle applies,\footnote{85}{Joined Cases C-8/15 P to C-10/15 P, \textit{Ledra Advertising Ltd and Others v European Commission and European Central Bank}, EU:C:2016:701, especially paras 55-59. See further Paul Dermine, \textit{The End of Impunity? The Legal Duties of “Borrowed” EU Institutions under the European Stability Mechanism Framework} (2017) 13(2) European Constitutional Law Review 369; Anastasia Poulou, \textit{Financial Assistance Conditionality and Human Rights Protection: What Is the Role of the EU Charter of Fundamental Rights?} (2017) 54(4) Common Market Law Review 991; René Repasi, \textit{Judicial Protection against Austerity Measures in the Euro Area: \textit{Ledra} and \textit{Mallis}} (2017) 54(4) Common Market Law Review 1123; Napoleon Xanthoulis \textit{ESM, Union Institutions and EU Treaties: A Symbiotic Relationship - Joint Cases C-8/15 P to C-10/15 P (\textit{Ledra Advertising Ltd et al}) and Joint Cases C-105/15 P to C-109/15 P (\textit{Mallis and Malli et al})} (2017) 1 Revue Internationale des Services Financiers 21; Stéphanie Lauhlé Shaelou and Anastasia Karatzia, \textit{Some Preliminary Thoughts on the Cyprus Bail-In Litigation: A Commentary on \textit{Mallis and Ledra}} (2018) 43(2) European Law Review 249; Menelaos Markakis, \textit{Accountability in the Economic and Monetary Union: Foundations, Policy, and Governance} (OUP 2020) ch 6.} meaning that the actions for damages are admissible insofar as they are directed against the Commission and the ECB on account of their alleged unlawful conduct at the time of the negotiation and signing of the MoU with the ESM.\footnote{86}{Judgment, para 95.} In fact, the Court \textit{extended} the \textit{Ledra} principle to the participation of the Commission in the activities of the Eurogroup. More specifically, it held that ‘...the Commission ... retains, in the context of its participation in the activities of the Euro Group, its role of guardian of the Treaties. It follows that any...'}
failure on its part to check that the political agreements concluded within the Euro Group are in conformity with EU law is liable to result in non-contractual liability of the European Union being invoked under the second paragraph of Article 340 TFEU.87

The Court is effectively arguing that there is a complete system of remedies and procedures, such that litigants in this area are ensured effective judicial protection, notwithstanding the fact that actions for damages against the Eurogroup are not admissible. The problems with this mantra are well known. When the agreements reached in the Eurogroup are implemented by non-EU bodies, such as is the case when an MoU with the ESM gives concrete expression to a macroeconomic adjustment programme, litigants cannot challenge them at all, as the EU courts do not have jurisdiction under the EU Treaties to review the legality of acts adopted by the ESM.88 Such jurisdiction is only granted under the ESM Treaty, pursuant to Article 273 TFEU, for very specific cases, where private litigants would not have standing to bring a challenge (Article 37 ESM Treaty). There may be no measures adopted by formal EU institutions incorporating the specific harmful measures that litigants wish to challenge. The relevant Council Decision, whether adopted on the basis of Articles 136(1) and 126(6) TFEU as was the case in Chryso­ stomides or nowadays on the basis of ‘two-pack’ legislation,89 may not include all the terms from the Eurogroup statement and/or the MoU with the ESM. Chryso­ stomides is a case in point here, as only some of the harmful measures were mentioned in the Council Decision. EU courts may or may not be able to read any terms that are not (fully) replicated into the Council Decision.90

What is more, the terms of those measures are often vague, such that the national authorities concerned have a margin of discretion for the purpose of laying down the impugned rules.91 We

87 ibid para 96.
88 Case T-289/13, Ledra Advertising Ltd v European Commission and European Central Bank, ECLI:EU:T:2014:981, paras 56-60; Case T-291/13, Andreas Eleftheriou, Ele­ni Eleftheriou and Li­lia Papachristo­fí v European Commission and European Central Bank, ECLI:EU:T:2014:978, paras 56-60; Case T-293/13, Christos Theophilou and Eleni Theofilou v European Commission and European Central Bank, ECLI:EU:T:2014:979, paras 56-60; Joined Cases C-8/15 P to C-10/15 P, Ledra Advertising, paras 52-55. This conclusion is not called into question by the Court’s ruling in Case C-258/14, Eugenia Flo­rescu and Others v Casa Jude­țeană de Pensii Sibiu and Others, ECLI:EU:C:2017:448, which qualified the MoU for balance-of-payments assistance as an act of an EU institution. See Menelaos Markakis and Paul Dermine, ‘Bailouts, the Legal Status of Memoranda of Understanding, and the Scope of Application of the EU Charter’ (2018) 55(2) Common Market Law Review 643, 654: ‘Recalling the two criteria employed by the Court in Florescu, the MoU with the ESM is not an act whose legal basis lies in EU law provisions and it is not concluded with the EU. The MoU with the ESM has its legal basis in the ESM Treaty and is concluded between the recipient Member State and the ESM (and is signed by the European Commission)’. 89 Regulation (EU) 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability (2013) OJ L140/1, art 7.
91 Markakis and Karatzia (n 67) 5.
cannot take it for granted that litigants would be able to admissibly challenge the acts and conduct adopted by other EU institutions following the agreements reached in the Eurogroup. Again, *Chrysostomides* is a case in point here. The Court agreed that one of the provisions in the Council Decision (Article 2(6)(b)) impliedly required that the Cypriot authorities maintain or continue to implement some of the harmful measures. In doing so, it even recognised that it did not matter that the Council Decision *postdated* the adoption of the harmful measure by the national authorities, since the Council had obliged Cyprus to maintain or continue to implement that measure by means of adopting that Decision.\(^92\) This is an incredibly important recognition, which effectively means that litigants can challenge, by means of actions for damages, ‘prior actions’ that were implemented by the Member State concerned prior to the formal conclusion of the MoU. Be that as it may, the Court went on to find that the impugned provision from the Council Decision merely required, in general terms, that the Cypriot authorities maintain or continue to implement the harmful measure, without defining in any way the specific rules for that operation, such that the national authorities had a margin of discretion for the purpose of laying down such rules.\(^93\) Accordingly, it set aside the judgments under appeal inasmuch as they dismissed the pleas of inadmissibility raised by the Council in relation to this provision of the Council Decision.

The extension of the *Ledra* principle to the Commission’s participation in the activities of the Eurogroup may *prima facie* appear more promising, but its scope of application remains uncertain. It seems that, following *Chrysostomides*, the Commission retains its role of guardian of the Treaties as regards *all* the activities of the Eurogroup, such that any failure on its part to check that the political agreements concluded within the Eurogroup (*any* agreements at all?) are in conformity with EU law may trigger the non-contractual liability of the Union.\(^94\) This is, admittedly, a much broader scope of application for the *Ledra* principle than the financial assistance context in which it was first elaborated.

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\(^92\) Judgment, para 112.

\(^93\) Ibid para 116.

\(^94\) For an earlier argument that all EU law applies, in principle, to the activities of the EU institutions in the ESM, see Anastasia Karatzia and Menelaos Markakis, ‘What Role for the Commission and the ECB in the European Stability Mechanism?’ (2017) 6(2) Cambridge International Law Journal 232, 243-244. To be sure, according to the Court’s case law, the ESM organs (including the Board of Governors) should be regarded as distinct from the Eurogroup.
Consequently, the Commission ... should refrain from signing a memorandum of understanding whose consistency with EU law it doubts. The *Chrysostomides* case may have arisen from the Cypriot financial crisis and the assistance provided to the country by the ESM, but there is no such caveat in the Court’s formulation. The *Ledra* case law is seemingly applied to the Commission’s participation in the activities of the Eurogroup *in globo*, without any caveats or qualifications other than the standard conditions for EU liability for damages.

It is also not clear what the Commission should do if, according to its assessment, a political agreement concluded within the Eurogroup is not in conformity with EU law. Does it suffice to check whether agreements concluded within the Eurogroup are in conformity with EU law? That should not exhaust the Commission’s obligation as guardian of the Treaties and surely would not amount to effective judicial protection for affected parties. On the other hand, as noted by the Advocate General, it does not appear that the Commission could block the process of adopting potentially infringing conduct. It may be that the Court in *Chrysostomides* was only referring to the power of the Commission to check the conformity of a political agreement after it has been concluded, and to refrain from adopting measures to implement it. However, as argued above, such implementing measures may not exist at all or they may not include the impugned terms that litigants wish to challenge. Moreover, the Commission’s actions may be taking place under the ESM Treaty, and not under EU law, in which case it would not be possible to challenge them either. *Chrysostomides* again serves as an example of this: the applicants attempted to contest *inter alia* ‘the “Commission’s findings that the measures adopted by the Cypriot authorities complied with conditionality”’ and ‘the approval, by the Commission and the ECB, of the payment of various tranches of the [financial assistance facility] to the Republic of Cyprus’. However, according to both the General Court and the Court of Justice, these were activities of the two institutions under the ESM Treaty, committing only the ESM and thus not falling within the purview of the CJEU.

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96 ibid para 59.
97 Opinion, note 85.
98 See Karatzia and Markakis (n 400).
99 Judgment, para 123.
101 Judgment, paras 131-132.
5. Concluding Remarks

*Chrysostomides* is the latest seminal ruling in the area of EMU, notably with respect to financial assistance conditionality. It concludes, for the moment, the attempts by private parties to challenge the conditions attached to bailout packages before the EU courts. We have seen that the Court ruled that the Eurogroup is not an ‘institution’ within the meaning of the second paragraph of Article 340 TFEU, such that its actions could not trigger the EU’s non-contractual liability. Following *Chrysostomides*, the Eurogroup is rendered virtually indistinguishable from the ESM’s Board of Governors, the main remaining difference being that the Commission and the ECB *may* participate in the meetings of the latter body as observers (Article 5(3) ESM Treaty), whereas they *shall* (be invited to) take part in the meetings of the Eurogroup (Article 1 of the Protocol). Overall, it seems peculiar that the future path of EMU, and sometimes of the EU more broadly, is forged in *fora* operating outside the EU’s legal and institutional framework. Whether it is an EU entity established by the Treaties or not, the Eurogroup’s central role in EU affairs is just undeniable.

We have criticised the Court’s and the Advocate General’s reasoning as to why the Eurogroup is not an ‘institution’ within the meaning of the second paragraph of Article 340 TFEU at some length. In my opinion, the better course of action would have been to recognise the Eurogroup as an EU entity established by the Treaties and intended to contribute to the achievement of the EU’s objectives, and to examine the actions for damages brought by the applicants on their merits.\(^1\) In this connection, it would have been possible for the Court to rule that one of the conditions for the EU’s non-contractual liability was not fulfilled. For example, it could be the case that the conduct alleged against the Eurogroup was lawful. It could further be the case that the applicants at first instance did not incur damages or losses. It could have perhaps also been concluded that there was no causal link between the conduct of the Eurogroup and the damage complained of by the applicants. A different argument could have been –following the Court’s formalistic logic that distinguishes the Eurogroup from the ESM Board of Governors– that the impugned measures were not adopted by the Eurogroup in the exercise of its powers under EU law,\(^2\) as required by the CJEU’s test for establishing the non-contractual liability.

\(^1\) See further Karatzia and Markakis (n 40).

\(^2\) The Commission noted at the hearing that the Eurogroup may discuss both questions that fall within the scope of EU law and questions beyond that scope: see Opinion, paras 79-82. In this connection, the General Court noted as regards certain aspects of the impugned Eurogroup statements that they were not beyond the competences granted to it by EU law: see Case T-680/13, *Chrysostomides*, paras 199-200.
liability of the Union for the actions of an ‘institution’ within the meaning of the second paragraph of Article 340 TFEU,\(^{104}\) such that they could not be imputed to the Union.\(^{105}\)

The Eurogroup is now exempted from two key mechanisms of judicial accountability in the Treaties, namely the action for annulment (\textit{Mallis}) and the action for damages (\textit{Chrysostomides}). Seeing to it that it is situated, per the Court’s ruling, outside the institutional framework of the EU, the Court applied the \textit{Ledra} case law to the Commission’s participation in its activities, such that any failure on the part of the Commission to check that the political agreements concluded within the Eurogroup are in conformity with EU law is capable to result in non-contractual liability of the Union. It remains to be seen whether applying the \textit{Ledra} logic in this manner would put more pressure on actions for damages, perhaps also as regards the other EU institutions.\(^{106}\) Furthermore, we have seen that the Court held for the first time that ‘prior actions’ carried out before an MoU is signed by the recipient country concerned may give rise to non-contractual liability of the Union, provided that the relevant Union institution (in this case, the Council) had required the maintenance or continued implementation of the harmful measures and that the national authorities concerned had no margin of discretion to escape that requirement. These judicial findings certainly help to plug some holes in the EU’s system of legal protection. We should nonetheless be cautious about subscribing to a ‘complete system of remedies and procedures’ narrative which is often used without much reflection of the particularities of EMU.\(^{107}\) We have seen that gaps in judicial protection remain in place, and these are likely to affect litigants also outside the area of EMU, in light of the important role played by the Eurogroup (and the Euro Summit\(^ {108}\)) in the EU more generally. It seems that, now that the Grand Chamber of the Court of Justice has pronounced on these matters, perhaps the only realistic proposal to close (or narrow) these gaps would be that the Eurogroup itself changes, in lieu of arguing that the

\(^{104}\) Case T-680/13, \textit{Chrysostomides}, para 82; Opinion, para 39.

\(^{105}\) See also Karatzia and Markakis, ‘Financial Assistance Conditionality and Effective Judicial Protection: \textit{Chrysostomides}’ (n 40).

\(^{106}\) I am grateful to Kathleen Gutman for this observation.

\(^{107}\) I am grateful to Carlos Bosque for raising this point. See further Markakis (n 85) 242.

\(^{108}\) See Opinion, para 81, where it is essentially argued that the Euro Summit lies outside the EU legal and institutional order. However, it could perhaps be argued that the Euro Summit is established under the EU Treaties, as the Court’s formulation for defining ‘institutions’ within the meaning of the second paragraph of art. 340 TFEU would seem to allow (para 88). In this connection, it is argued that, notwithstanding the fact that the Euro Summit was formalised by the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG), it is indeed possible to read later European Council conclusions as endorsing the provisions in the TSCG, and as mandating the Euro Summit to adopt more formal rules of procedure: see Craig and Markakis (n 2) 299. See further Karatzia and Markakis (n 40).
case law should change. What is more, the reasoning used by the Court in *Chrysostomides* is also likely to affect the application of EU norms (such as the EU's transparency regime) to the Eurogroup, thereby impacting the operation of other accountability mechanisms as well.

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109 I am grateful to Ana Bobić for bringing this point to my attention. For an interesting discussion on when the CJEU should overrule itself, see C-205/20, *NE v Bezirkshauptmannschaft Hartberg-Fürstenfeld*, Opinion of Advocate General Bobek, ECLI:EU:C:2021:759, paras 125-141.

110 This theme is explored more fully in Menelaos Markakis, *The Political and Legal Accountability of the Eurogroup* in Mark Dawson (ed), *Substantive Accountability in Europe's New Economic Governance* (CUP, forthcoming).
Section III
EU Remedies / CJEU Litigation
Chapter 6

C-542/18 RX-II and C-543/18 RX-II, Simpson

Aude Bouveresse*

A 'tribunal established by law': a new lever for enforcing the rule of law in Europe, provided it is not confused with or diluted by the criterion of independence.

The first lessons of Review Simpson

1. Introduction

1.1. What is at Stake?

The assertion that ‘The Community is based on the rule of law’ is not new and is expressly stated in Les Verts v Parliament.¹ At that time, the idea that the Member States of the Union share this value did not seem to be disputable or contested. However, its enshrinement in the Lisbon Treaty as a value of the Union shared by all Member States was not only an endorsement of a reality, but also an attempt to preserve it. The first tremors came from Austria following the coalition led by Jörg Haider and have since spread to reveal specific problems with the rule of law in some EU countries. However, a relative serenity has resulted, on the one hand, from the respect of the Copenhagen criteria imposed on States before their accession to the European Union and, on the other hand, from the infringement procedures provided for in Article 7 of the TEU, which, in its most severe version, allows for the suspension of voting rights in the event of a ‘serious and persistent breach’ of the EU’s values by an EU country.

There was a certain naivety, drawn from the European idealist essence, in thinking that once States became members of the European Union, they would continue to comply substantially with the requirements of the rule of law. The reform of the Hungarian constitutional system, which came into force on 1 January 2012, has put an end to this sweet reverie and obliged the European institutions to provide the best answers as soon as possible. Without denying the role played by the other

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European institutions, as has often in the history of European integration, the Court of Justice has made a major contribution to strengthening the guarantees offered under the rule of law.

In this perspective, notably, The European Court of Justice ('Court of Justice') seeks to reinforce the institutional position of national courts as part of the essential characteristics of the Union at the very basis of its autonomy. The ‘constitutional structure of the EU' as an essential characteristic of autonomy has been developed substantially since 2011 following Opinion 1/09 relating to the Patent Court. A decisive move towards the definition of autonomy was realised in this Opinion by including both the preliminary ruling mechanism (267 TFEU) and Article 19 TEU, not merely as elements preserving EU autonomy but also as operating directly within the essential characteristics of the EU. This institutional/constitutional dimension is crucial, as it integrates, for the first time and explicitly, national courts into the constitutional structure of the EU. The national courts are no longer merely a means for the Court of Justice to ensure the uniform application of EU law, but become an integral part, also institutionally, of its judicial system as ‘ordinary courts within the European Union legal order’. This institutional recognition within the constitutional structure of the EU not only strengthens the link between the national courts and the legal order of the Union, but also allows them to enjoy a certain degree of autonomy from their own domestic system.

To achieve the constitutional framework of the EU legal order, the Court has added few years later a substantial dimension by pointing out expressly that the concept of autonomy, based on ‘the constitutional structure of the EU', does not rely only on its institutional framework but also on common values enshrined in Article 2 TEU and, in particular, on the respect of fundamental rights being 'at the heart of the legal structure of the EU'. The addition of values, fundamental rights and principles was pivotal in giving substance to the constitutional recognition of the EU legal order. Thus, this edifice rests to a large extent, on the courts.

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2 Article 19(1) TEU stated in particular that ‘1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’.


4 ibid para 80.


6 ibid para 169.

It is difficult not to notice that these essential characteristics are not only those that underpin the autonomy of Union law, but also those that condition the rule of law. The Court of Justice will draw conclusions from this jurisprudential construction by holding that Article 19 TEU ‘has to be read as giving ‘concrete expression to the value of the rule of law stated in Article 2 TEU, [and] entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals’.

Considering the crucial role of national courts and the threatening context for their independence, the Court, in the first place, has focused on tightening the requirements for the independence and impartiality. However, this is only one aspect of what might be expected of a Court in order for it to claim this status. Article 47 of the Charter of Fundamental Rights of the European Union (Charter), entitled ‘Right to an effective remedy and to a fair trial’, states, in the second paragraph that ‘Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.’

While the Court has already carefully interpreted the independence and impartiality criterion, the requirement of a ‘tribunal established by law’ had never before been specified.

*Review Simpson* provides the first interpretations of both the prerequisites of this right resulting from the first sentence of the second paragraph of Article 47 of the Charter of a ‘Tribunal established by law’ and the control it implies. Above all, the wording of the principle in this judgment already suggested that it must take into account when assessing whether a specific national body satisfies the requirement of ‘tribunal established by law’, which any court must meet under article 47 of the Charter.

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As such, it must undoubtedly figure among the major decisions, as its scope and principles are decisive for the defence of the rule of law.

1.2. Background of Review Simpson

This judgment follows the annulment by the European Court of First Instance, on appeal, of three judgments delivered by the Civil Service Tribunal (CST) on the ground that the composition of its panel was irregular.\(^\text{12}\)

Indeed, on 3 December 2013, a public call for applications was launched in anticipation of the expiry, on 30 September 2014, of the terms of office of two CST judges for a period of six years commencing on 1 October 2014 and ending on 30 September 2020. According to article 3(4) Annex I to the Statute of the Court of Justice ‘The [selection] committee shall append to its opinion a list of candidates having the most suitable high-level experience. Such list shall contain the names of at least twice as many candidates as there are judges to be appointed by the Council.’\(^\text{13}\) The selection committee duly drew up a list containing the names of not four but six candidates having the required experience, ranked in order of merit. But, on August 2015, the term of office of a third judge at the CST came into force. As the Council did not fill the first two posts, it decided, instead of launching a new call for applications for the third post, to rely on the previous list and appoint three judges, considering that the list drawn up earlier by the selection committee contained a sufficient number of candidates.

The European Court of Justice ruled on review proceedings concerning two judgments of the General Court.\(^\text{14}\) If the Court of Justice agrees with the General Court to say that the appointment procedure has been tainted by procedural irregularities, however, it considers in substance that was not sufficient to set aside decisions of the Civil Service Tribunal.


\(^{13}\) Emphasis added.

\(^{14}\) The Court did not review the General Court’s judgment in Case C-141/18 RX, FV (19 March 2018), EU:C:2018:218. It justifies it on the ground that the First Advocate General took the view that ‘the judgment [in FV] does not … constitute a serious risk that the unity or consistency of EU law may be affected’ and that according to Article 62 of the Statute provides that the First Advocate General may (only), where he considers that there is a serious risk of the unity or consistency of EU law being affected, propose that the Court of Justice review the decision of the General Court.
It is true that the competence, independence or impartiality of the appointed judges have never been up for discussion. The irregular course of action is based on the fact that the Council, shortly before the Civil Service Tribunal was closed, decided ‘for reasons of timing’ in a decision adopted on 2016\textsuperscript{15} to appoint three, rather than two, judges from the list of candidates.

It is quite striking that the Simpson review judgment was not widely reported at the time when its sentence was issued, last year on March. The initial lack of interest could be explained by the context in which it was delivered: a review procedure destined to disappear with the jurisdictional body that had justified it.

However, there was no doubt about the scope of this judgment. The Court had already received numerous preliminary questions from national courts (notably Polish and Romanian), some of which did not hesitate to ask the Court about their status as ‘tribunal established by law’. The Court was well aware of the issues at stake and of the scope it could have within national legal orders. The context was also favourable since the Court could rely on a Grand Chamber judgment delivered on 12 March 2019 by the European Court of Human Rights (ECtHR) to guide its interpretation, the so-called ‘judgment of the Icelandic judges’.\textsuperscript{16}

Surprisingly, nevertheless, since Review Simpson, the Court still seems reluctant to address directly this issue, preferring to reason on the ground of the independent tribunal in order to conclude to a (global) violation of Article 47 of the Charter and/or Article 19 TEU. This dilution of the requirement of a ‘tribunal established by law’ into that of ‘independence’ seems to me to be prejudicial in more than one respect and could be avoid.

I would like to show that these different aspects (legal judge and independent judge) of the right to an effective remedy, differ in their conditions, their legal regimes and their consequences. This implies that I should, first, outline the lessons of Review Simpson and, then, set out the reasons for arguing in favour of preserving the autonomy of each condition in the light of the effective judicial protection ‘given a concrete expression to the rule of law’.\textsuperscript{17}

\begin{footnotesize}
\begin{enumerate}
\item Council Decision (EU, Euratom) 2016/454 (22 March 2016).
\item Portuguese judges (n 8).
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2. The Lessons of Review Simpson

2.1. The Content of the Right to a Tribunal Established by Law

At first sight, the definition of a ‘tribunal established by law’ is the result of an exemplary legal pluralism. The Grand Chamber judgment of the European Court of Human Rights ‘Icelandic judges’, on which the Court of Justice expressly relied in Simpson, itself referred to the FV judgment of the Court of First Instance, in which the Court held that the irregularity of the bench violated Article 47(2) of the Charter.

Moreover, as recalled in settled case-law of the Court of Justice ‘as the first sentence of the second paragraph of Article 47 of the Charter corresponds to the first sentence of Article 6(1) of the Convention for the Protection of Human Rights. Its meaning and scope are the same as those laid down by that Convention and the Court must therefore ensure that the interpretation which it gives to the second paragraph of Article 47 of the Charter safeguards a level of protection which does not fall below the level of protection established in Article 6 ECHR, as interpreted by the European Court of Human Rights’.18 It seems even directly informed by it, since in that respect, the Court held that:

73. According to the settled case-law of the European Court of Human Rights, the reason for the introduction of the term ‘established by law’ in the first sentence of Article 6(1) ECHR is to ensure that the organisation of the judicial system does not depend on the discretion of the executive, but that it is regulated by law emanating from the legislature in compliance with the rules governing its jurisdiction. That phrase reflects, in particular, the principle of the rule of law and covers not only the legal basis for the very existence of a tribunal, but also the composition of the bench in each case and any other provision of domestic law which, if breached, would render the participation of one or more judges in the examination of a case irregular, including, in particular, provisions concerning the independence and impartiality of the members of the court concerned ...  

74. Likewise, the European Court of Human Rights has already had an opportunity to observe that the right to be judged by a tribunal ‘established by law’ within the meaning of Article 6(1) ECHR encompasses, by its very nature, the process of appointing judges (ECtHR, 12 March 2019, Ástráðsson v Iceland, (…), interim judgment, § 98).

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Therefore, in order to qualify as a 'Tribunal established by law', it will be necessary to demonstrate, in first instance, that the Court has a legal basis that ensures that 'the organisation of the judicial system is not left to the discretion of the executive and that this matter is regulated by a law adopted by the legislative power'. In second instance, the 'law' to which this condition refers also includes the rules on the composition of the bench in each case. In third instance, and more generally, it deals also with 'any other provision of domestic law which, if breached, would render the participation of one or more judges in the examination of a case irregular', especially the provisions concerning their independence and impartiality.

Finally, the Court states that the process of appointing judges is also one of the relevant rules to be taken into account in assessing whether a tribunal is established by law. This last clarification could seem somewhat redundant with the previous one. Indeed, failure to comply with the designation process would in any case appear to render the participation of this unlawful judge in the examination of a case irregular. But, this clarification, in a separate paragraph, is not trivial. Firstly, this precision was certainly worth highlighting and is clearly aimed at those States in which the decline of the rule of law has manifested itself primarily through the procedure for the appointment and removal of judges. Secondly, such a presentation has the merit of drawing a line between the criterion of 'independence and impartiality' (mentioned in paragraph 74) and the criterion of 'established by law', which, although related, need to be distinguished.

Those checks (legal basis, rules of composition, appointment process) have in common that they involve a control of an exclusively formal nature. Indeed, it is essential, in my opinion, to stress that the objective of the review, carried out under the condition of a court established by law, is not to verify the substance of the rule, the intrinsic quality of this 'law' governing the organisation of the judiciary, but to assess its existence and conformity with the legal system concerned. This is clear from paragraph 73 of the Simpson Review, which states that the assessment of these rules must determine 'if [they have been] breached'. However, the quality control of these rules will be carried out as part of the verification of the independence and impartiality of the tribunal.

19 ibid para 73. It is worth noting that the debates surrounding the reform of the Union's judicial system could be revived in the light of this condition. The predominance of the executive and the quasi-legislative power of the Court in relation to its organisation, the totally marginal influence of the European parliament on the organisation of the European judicial system are not necessarily guarantees of a 'legal basis' as required by the European Court in Strasbourg. The Court of Justice, not surprisingly, refrained from discussing it in Simpson.

20 Simpson (n 11) para 73.
In accordance with this interpretation in *Review Simpson*, the Court’s examination is confined to assessing whether the procedure for the appointment of judges to the CST has been respected. It does not question the quality of the procedure for appointing judges, but only verifies whether due process has been followed.

It is a formal control that can be compared with the control of essential procedural requirements, where only the existence of the statement of reasons is scrutinised and not its content. Likewise, the Court considers that ‘such a check is an essential procedural requirement, compliance with which is a matter of public policy and must be verified of the court’s own motion’.\(^\text{21}\)

It seems to me that this is the only interpretation that should prevail insofar as it preserves the autonomy of each requirement.\(^\text{22}\)

### 2.2. The Requirement of a Sufficiently Serious Breach?

Any irregularity does not necessarily entail a violation of the right to a hearing by a tribunal established by law as guaranteed by Article 47(2) of the Charter. On this point, the Court of justice overturned the General Court’s judgment and considered that

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\text{75. ... an irregularity committed during the appointment of judges within the judicial system concerned entails an infringement of Article 47 of the Charter, particularly when that irregularity is of such a kind and of such gravity as to create a real risk that other branches of the State, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process and thus give rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge or judges concerned, which is the case when what is at issue are fundamental rules forming an integral part of the establishment and functioning of that judicial system.}\(^\text{23}\)
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However, this statement is particularly unclear. Firstly, not all the conditions for a finding of a legal judge may be subject to the same level of scrutiny as that described in *Review Simpson*, which only

\[^{21}\text{ibid para 57.}\]
\[^{22}\text{See infra Section 3.2.}\]
\[^{23}\text{Simpson (n 11) para 75.}\]
covers ‘irregularity in the appointment of judges’. It could certainly extend to other violations, such as a violation relating to the composition of the bench, but this remains unclear. Besides, as far as the legal basis is concerned, the review cannot be the same since, by definition, it either exists or does not exist. In the recent judgment Commission v Poland, as regards the legal basis of the disciplinary tribunal with territorial jurisdiction to hear disciplinary proceedings against judges of the ordinary courts, the Court logically limits its scrutiny to a finding that the tribunal has not been established by law in the absence of any specification in national law of the criteria to be met for such an appointment to take place.

Thus, extrapolating the criteria described above to other violations could be uncertain. Subject to this relative reservation, it also can deduced from this judgment that not all irregularities constitute a violation of Article 47(2). With certainty, by contrast, the Court considers that when irregularity is of ‘such a kind and of such gravity’ thus give rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge, it leads to an infringement of article 47(2). In addition, it also shapes a system of presumptions according to which a breach of article 47(2) is presumed if the irregularity affects ‘fundamental rules forming an integral part of the establishment and functioning of that judicial system’. Because, concerning these particular fundamental rules, the irregularity is per se of ‘such a kind and of such gravity’ to give rise to a reasonable doubt concerning the independence and impartiality.

Thus, two types of irregularities should be considered as a violation of the requirement of a court established by law. Those violating a fundamental rule forming an integral part of the establishment and functioning of the judicial system and those of such kind and of such gravity, even if they do not concern the fundamental rules of the judicial system, may nevertheless give rise to doubts about the independence and impartiality of judges. However, the violation of Article 47(2) is not limited to these irregularities, which ‘give rise to reasonable doubt in the minds of litigants as to the independence and impartiality of the judge or judges concerned’. The adverb ‘particularly’ means that other irregularities are covered by this criterion. However, these later irregularities are difficult to identify and, above all, there is no indication as to their legal regime, especially if it is necessary to demonstrate their particular nature and gravity. Finally, distinguishing what is a fundamental rule from another is not easy. For

24 See on this point: Joined Cases C-811/19 and C-840/19, FQ, Opinion Bobek (4 March 2021) EU:C:2021:175.
instance, it could be argued, contrary to the Court, that the irregularity in the *Simpson case* affects a fundamental rule (article 3 Annex I to the Statute) insofar as the Council, contrary to Article 3 of the Annex to the Statute, did not issue a new call for applications to fill the post of the third judge.\(^\text{27}\)

In any case, the criteria for determining whether the irregularity leads to a breach of article 47(2) of the charter are far from obvious. It seems that sometimes the Court attaches importance to the nature of the infringed rule (fundamental rules), sometimes to its scope (rule that could be linked to the independence or impartiality of the judge), sometimes to both (the presumption) and perhaps it would also take into account the nature of the violation (flagrant).

As a result, so far, the position of the Advocates General are vacillating\(^\text{28}\) mainly between the requirement of a ‘merely’ manifest infringement\(^\text{29}\) and the requirement of ‘to assess the manifest and deliberate character of that breach as well as the gravity of the breach’.\(^\text{30}\) Actually, the Advocate General Tanchev seems even to add a new presumption according to which ‘the deliberate and intentional infringement by the executive branch of a judicial decision, in particular a decision of the Supreme Administrative Court ... manifestly with the aim of ensuring that the government has an influence on judicial appointments – demonstrates a lack of respect for the principle of the rule of law and constitutes per se an infringement by the executive branch of ‘fundamental rules forming an integral part of the establishment and functioning of that judicial system’ within the meaning of paragraph 75 of judgment of 26 March 2020, *Review Simpson and HG v Council and Commission* ...\(^\text{31}\)

It is worthy to note that despite these differences, both Advocates General not only consider that they adopt the same approach as the ECJ, even if the Court of Justice never expressly refers to a ‘flagrant’ or ‘manifest’ or ‘deliberate’ breach. But, also, both Advocates General hold that the Court of Justice adopts the same standard of review as the ECHR. While the Court of Justice has taken a similar approach to the ECtHR, it is not clear that the comparison can be strictly maintained at this level.

\(^{27}\) However, according to the Court, the Council has committed an irregularity by using the list drawn up in 2013 to fill three post instead of two.

\(^{28}\) The Court has not yet given its ruling in the cases following *Review Simpson* where this issue was directly at stake at the moment we are writing this contribution.


\(^{31}\) ibid para 65.
Arguably, it would be clearer to adopt a more general formulation, such as that adopted by the Strasbourg Court and suggest by the Advocate General Sharpston\textsuperscript{32} according to which only 'a flagrant breach of the rules governing the organisation of justice entails a violation of the right to be heard by a tribunal established by law'.

In fact, it seems to me that the requirement of a 'serious breach' that prevails in the context of a damage action would even be more relevant for three main reasons.

First of all, it gives a unique standard of control, which would be clearer. Second, it meet the system of presumptions such as those described by the Court. In that perspective, such a standard of serious breach allows for its demonstration to use the bundled indicator method so as to take into account several factors as the deliberate one but without making it determinant, which could make the burden of proof too difficult.

Thirdly and related to the precedent remark, it should be recalled that in \textit{Brasserie du pêcheur},\textsuperscript{33} the Court required a 'sufficiently serious breach', with the aim of preserving the discretionary power of the Member States, while ensuring the effectiveness of the right to compensation. This consideration should be replicated in the context of the right to a tribunal established by law, particularly where the national judicial system is concerned as European Union does not have a specific model with regard to the organisation of the national system. From this perspective, the requirement of a 'sufficiently serious breach' preserves both the national judicial system and the effectiveness of the right to a tribunal established by law.\textsuperscript{34}

A final reason for favouring this standard arises from the need to distinguish between the requirement of 'independence' and that of a 'court established by law'. Indeed, the independence criterion implies partly an objective control and a subjective control. In contrast, the criterion of a tribunal established by law, since it is based on a formal control to determine the existence of an institutional arrangement and its respect, should remain objective. Hence, the requirement of the legal judge should not involve the search for the intention pursued by the executive or legislative power. In

\textsuperscript{32} As suggested by Advocate General Sharpston delivered in Review Simpson, Opinion AG Sharpston (12 September 2019) para 87 after a remarkable comparative law analysis. The advocate however takes the view, by contrast to the ECHR, not to require a 'deliberate factor' as sufficient to establish a flagrant breach (ibid para 85).


\textsuperscript{34} The reasons that justify the requirement of a serious or manifest violation are not clearly set out by the Court (its Advocate General suggested the presumption of legality of acts and the principle of legal certainty). The court seems to tilt in favour of the principle of legal certainty (para 50), but I believe that it deliberately and skilfully avoids presenting it as such, so as not to offer an easy escape to the States.
this sense, the intentional or unintentional nature of the violation should not be a detrimental factor. In this respect, the ‘sufficiently serious violation’ criterion allows for the consideration of intent, while putting it into perspective at an objective level of scrutiny.

2.3. The Scope of the Review

The interest of Review Simpson is obviously not limited to stress the outlines of the right to a tribunal established by the law. The Court lays down the basis for the review of this requirement in the Member State’s legal order.

Such review within the scope of the EU Charter was undisputed, but outside its scope, some doubts as to whether Article 19 TEU could be relied on directly was raising. The express recognition in the AB judgment of the direct effect of Article 19 TEU, read in conjunction with the case law of the ‘Portuguese judges’ and the recent confirmation in the Infringement action against Poland removes any concern in this regard, insofar as the national court may rule, as a ‘court’, on questions relating to the application or interpretation of EU law.

The national courts have fully understood the opportunity afforded by Review Simpson. There has been an increase in the number of references for preliminary rulings, particularly from the Polish and Romanian courts in order to obtain from the Court of justice a guideline concerning the requirement of a tribunal established by law applied to the domestic system. The scope of the review has been recently confirmed by the Court in the infringement action against Poland.

It is, however, clearer in two cases, on which the Court has not yet ruled, but which are particularly topical since it is the Polish Supreme Court which is questioning the Court of Justice on its own status as a court established by law with regard to, first, the Chamber of Extraordinary Control and Public

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35 For a contrary view see Pech (n 26).
36 ibid. The relevant arguments put forward by Laurent Pech in favour of the intentional criterion could thus find a place in this framework: ibid especially pt 3.2.2.
37 Case C-824/18, A.B (Nomination des juges à la Cour suprême), Judgment (2 March 2021) EU:C:2021:153.
38 Portuguese Judges (n 8) para 40.
39 Case C-791/19 (n 25).
40 See in this sense Leloup (n 10).
41 Case C-791/19 (n 25).
Affairs of the Supreme Court in *WZ*\(^{42}\) and, second, in *case MP*\(^{43}\) about Disciplinary Chamber of the Supreme Court.

In his opinion, the Advocate General Tanchev refers directly to the Court’s reasoning in *Review Simpson* and transposes its principles to national bodies. After noting the admissibility of the questions referred for a preliminary ruling, he went on to point out, in both cases, that the *judge a quo* has already established that in the appointment process of the Supreme Court judges, there were flagrant and deliberate breaches of Polish laws relating to judicial appointments.\(^{44}\)

Then, he examines whether the irregularities thus found are ‘flagrant’, when those rules are interpreted in conformity with Article 19(1) TEU. He concludes by considering ‘that the deliberate and intentional infringement by the executive branch, with the aim of ensuring that the government has an influence on judicial appointments – demonstrates a lack of respect for the principle of the rule of law and constitutes per se an infringement by the executive branch of ‘fundamental rules forming an integral part of the establishment and functioning of that judicial system’ within the meaning of paragraph 75 of judgment of 26 March 2020, *Review Simpson*’.\(^{45}\)

In Advocate General Tanchev’s view, both chamber may not constitute a tribunal established by law. As a result, again referring to *Simpson* judgment, he held that ‘the referring court would be able to set aside (or ignore) the decision of that chamber’ even if, according to him ‘the requirement for a tribunal to be previously established by law does not imply that the act of appointment is invalid per se’.\(^{46}\)

These examples are sufficient to realise that the scope of the requirement of a ‘tribunal established by law’, together with the requirement of ‘impartiality and independence’ will inevitably provoke profound changes in the organisation of national judicial systems. They could not be limited to State manifesting a backsliding of Rule of Law. As regards the procedures for the appointment of judges, all Member States should reflect in the near future on how to organise selection and appointment procedures, particularly at the level of their supreme court, in such a way as to meet the requirements laid down by the Court.

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\(^{42}\) Case C-487-19 (n 30).

\(^{43}\) Case, C-508/19 (n 30).

\(^{44}\) Case C-487-19 (n 30) para 40.

\(^{45}\) ibid para 65.

\(^{46}\) ibid para 103-105, see also infra Section 3.3.
This point deserves to be explored further, but as the question of the scope of Review Simpson within national legal orders is no longer under debate, it seems more relevant to focus on the relationship between the requirements of a judge established by law and an independence in order to defend the autonomy of the two concepts.

3. The Paramount Importance of Maintaining the Autonomy of the Concepts of Legal Judge and Independent Judge

3.1. The Connection between the Legal Judge and the Independent Judge

When the process of appointing judges is at stake, it seems particularly difficult to draw a watertight line between the requirements of an independent tribunal and a tribunal established by law. Indeed, the process of appointment can be measured against either requirement for effective judicial protection, and both can lead to the conclusion of a tribunal that does not meet the independence requirements.

Thus, regarding the requirement of a tribunal established by law, the Court stated ‘that an irregularity committed during the appointment of judges ... entails an infringement of Article 47 of the Charter ... when that irregularity ... give[s] rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge or judges concerned’.47 And, with regard to the requirement of an independent tribunal, the Court considers ‘[t]hose guarantees of independence require rules, particularly as regards the appointment, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors’.48

Therefore, the lack of independence of a tribunal can be found in both reviews. However, while it is a definite conclusion in one, it is only an intermediate assessment in the other that precedes the definite conclusion that the tribunal is not established by law.

47 Simpson (n 11) para 75.
48 Case C-896/19, Repubblika, Judgment (20 April 2021) EU:C:2021:311, para 57; Case C-585/18 (n 18) para 123.
Unfortunately, so far, the reasoning of the Court and its Advocates General tend to merge them and even to dilute the examination of a tribunal established by law in the sole examination of the independence of the tribunal⁴⁹, which appears to me to be prejudicial in law and in fact.

3.2. A Different Nature and Legal Regime

These requirements (independent/legal), although closely related⁵⁰, are nonetheless autonomous. It is sufficient to note that even a tribunal whose independence is not contested may, by reason of a serious breach of its rules of composition or establishment, not be regarded as established by law. Thus, the General Court in Simpson HG and FV judgments, while not questioning the independence of the judges appointed on the basis of the call for applications, nevertheless found that the panel did not meet the requirement of ‘a tribunal established by law’.

To consolidate in a definitive frame of reference the two concepts seems incorrect. The standards of control are not similar, as well as their consequences. This is even clearer when a national appointment is at stake. It highlights that the standard of review differs in each condition.

At this point, it should be recalled that the requirement of ‘a tribunal established by law’ implies, in the first instance, a formal determination of compliance with the procedures for the appointment of judges – ‘within the judicial system concerned’⁵¹, so that the reference standard for review, in the case of national appointment is the national standard. This is a purely formal check on the existence and compliance of the national rules by the national authorities during the appointment process. Only then, if a violation of the procedure, as provided for by national law, is found, will it be necessary to determine whether it is sufficiently serious to conclude that the national body cannot be considered a court established by law within the meaning of Article 47 of the Charter (and/or 19 TEU).

Advocate General Bobek in Eurobox opinion rightly notes ‘what exactly is a “tribunal established by the law” set in national law ... The analysis focuses on whether “law” (comprising of legislation and other provisions whose breach would render participation of judges in the adjudication of a case irregular) was breached. For example, where national law contains rules relating to the composition of a panel by drawing lots, then this represents one of the requirements of national law that the Court takes into

⁴⁹ See, for example, : Case C-824/18 (n 37); Case C-585/18 (n 18).
⁵⁰ Opinion AG Tanchev in WZ (case C-487/19) (n 30) para 80.
⁵¹ Simpson (n 11) para 75.
account as one of the national legal requirements to be complied with.”52 In a nutshell, ‘the definition of what is a tribunal previously established by law refers back to national law.’53

As well in FQ, he highlights the difference of standard of review holding that ‘despite the fact that the requirement of specialisation of judicial panels does not form part of the standard of protection granted by Article 47 of the Charter, where such a requirement is established by national rules, it could form part of the right to a “tribunal previously established by law”’.54

By contrast, in the context of the requirement of an ‘independent judge’, the reference standard is the European one and, more precisely, the European standard of effective judicial protection as laid down in Article 19 TEU and/or set out in Article 42(2) of the Charter. It is not a question of verifying whether the appointment procedure, as provided for by national law, has been respected by the competent national authorities, but of examining whether, in substance, the quality of the national rules relating to the procedure for appointing judges or to the composition of the court complies with the European requirements/standards of independence or impartiality (e.g. external and internal independence as defined in the ‘Portuguese Judges’ and Banco de Santander’s judgments).

In that sense, when examining the independence of a national instance, the Court holds that ‘it is important to ensure that the substantive conditions and detailed procedural rules governing the adoption of such decisions [of appointment] are such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them’.55 Or, in other words, ‘the requirement of independence derived from EU law … means that … the regime must provide the necessary guarantees in order to prevent any risk of it being used as a system of political control of the content of judicial decisions’.56

It should be noted that it is precisely these differences that make the two concepts complementary by revealing the lack of independence in two ways that guarantee effective judicial protection. Either, firstly, because the appointment process followed by the national authorities does not comply with the rules of domestic law and this serious breach may raise doubts as to the independence of the

52 Opinion of AG Bobek Eurobox (Case C-357/19) (n 29) para 139.
53 Ibid para 156.
54 FQ, Opinion Bobek (n 24) para 91 (emphasis added).
56 See Case C-791/19 (n 25) para 61 (emphasis added).
tribunal (such that the tribunal is not established by law). And/or, secondly, because the appointment process, although compliant with domestic law, does not comply with the European requirements for an independent Tribunal. However, the impairment of independence does not have the same origin. In the first occurrence (legal judge) it is a breach based on national law, in the second (independent judge), it is an infringement of the European requirements concerning the guarantees of independence that must govern the appointment process.

It seems to me, moreover, that while these two violations concern the external independence of the Court, which must be free from external pressure (executive or legislative power), the two violations do not concern the same aspect of independence. The first violation (legal judge) concerns more specifically the constitutional independence of the tribunal established, insofar as it is the national rules constituting this court that are violated and it is for this reason that the existence of the court is called into question. While, on the other hand (independent judge), the lack of independence is the result of an appointment process that complies with domestic law but, nonetheless, is contrary to the European requirement of independence. In the latter, the existence of the national tribunal is not called into question, but its functioning, which may be subject to external pressure (functional independence).

The reasoning of the Court and the Advocates General lacks of rigour.

In the AK and AB cases law, the national courts had expressed doubts and then clearly judged⁵⁷ that, since the normative changes implemented in 2017, the appointments of judges have been realised in contradiction with the domestic law and in particular constitutional law and principles. Especially, as regard to the appointment of the judges at the Supreme Court, the resolution points out that the President of the Republic appointed them in circumstances in which the legal status of KRS Resolution, which included the motion for their appointment, was not permanent. Moreover, owing to the constitutional status of the Supreme Administrative Court as a judicial body, the fact that it has been granted the statutory competence to review the compliance of KRS resolutions with the law, and given the need to respect the future outcome of proceedings before that court, the Supreme Court considers that the President of the Republic could not exercise his prerogative to appoint a person as a judge of the Supreme Court prior to the conclusion of the proceedings before that court. Thus, the

⁵⁷ See Supreme Court Resolution of the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber, Case BSA I-4110-1/20 (23 January 2020). English translation at [www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/AllItems/BSA%20I-4110-1_20_English.pdf] especially 45, pt 35. If the resolution is delivered after AK judgment, the referring court already mentions the contradiction with the constitutional law and principle (see, AK, para 41).
resolutions of the KRS provided no grounds for a motion that the President appoint the persons concerned to vacant judicial positions. As a consequence, the act of appointment as judge of the Supreme Court adopted by the President constitutes a breach of national rules. Finally, it recalls that the judgments issued by formations of judges in the Disciplinary Chamber are not judgments given by a duly appointed court.\(^{58}\)

This finding should have led the Court to examine, according to Simpson’s principles, on its own motion, whether such irregularities were sufficiently serious so that the judges thus appointed could not pretend to be established by law. However, the Court of Justice focuses only its review on the criterion of independence. This reasoning is incomplete and disappointing, especially in the advantageous context of the preliminary ruling.

While this failure can be defended in the AK judgment, given before the Simpson Review (but after the Sharpston AG’s opinion), such understanding cannot be applied to AB. The National Supreme Court had already declared that the appointment of the contested judges has been carried out in contradiction with the constitutional law and in violation of the Supreme Court’s decision. Thus, the Court of Justice could have already considered, at least in AB, that ‘this violation’ is of such a kind and of such gravity that characterised an infringement of the principle of the legal judge.\(^{59}\)

The Court also missed a real opportunity to highlight a violation of the principle of the legal judge in the case of the forum of Romanian judges.\(^{60}\) The referring court asked, in particular, whether the legislation governing the organisation of justice in Romania, such as that relating to the interim appointment to the management positions of the Judicial Inspectorate and that relating to the establishment of a Specialised Section of the Public Prosecutor’s Office(SIIJ) with exclusive competence to investigate offences committed by judges and prosecutors, comply with the requirements derived from the value of the rule of law, set out in Article 2 TEU. Admittedly, the doubts expressed by the referring court concerned above all the potential breach of the independence of the judges subject to these supervisory bodies. However, there were in fact two problems of independence: that of the independence of the judges because of the pressure that these bodies could exert on them, but also

\(^{58}\) Resolution of 23 January 2020, point 45, page 57, owing the Supreme Court Judgment of 5 December 2019 in case III PO 7/18.

\(^{59}\) This could be the finding of the Court if the Court follows the opinion of the Advocate General concerning the Disciplinary Chamber in MF (Case C-508/19) and the nomination of the judges in ‘Extraordinary Control and Public Affairs Chamber’ (Case C- 487/19, WZ).

\(^{60}\) Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, Asociația ‘Forumul Judecătorilor din România, Judgment (18 May 2021) EU:C:2021:393.
that of the independence of these supervisory bodies themselves, particularly as regards their creation and appointment. The Court merges these two aspects of the problem in the sole review of independence. In essence, it finds that such bodies, because of their rules of appointment and organisation, may exert pressure on judges, which is not compatible with the requirement of independence in accordance with EU law. Regrettably, it could have gone much further in separating the issues on the basis of the principles setting out in Review Simpson.

The Court of Justice should have found that these bodies could not be regarded as ‘courts established by law’. Indeed, with regard to both the Judicial Inspectorate and the SIIJ, the Court observed, on the basis of the indications of the referring court and the file, that the appointments were made by disregarding the ordinary law.\footnote{ibid.} Furthermore, the Court stressed that these irregularities (which concern fundamental rules of the judicial system) could give the impression of a lack of independence or impartiality of these judges. Consequently, it should have found that these irregularities were of such a nature and gravity as to entail a violation of the right to a court established by law, as guaranteed by the treaties.

Moreover, as regard to the creation of the special prosecution section, the court notes, rightly, that the rules which create such a body have to be justified by objective and verifiable requirements relating to the sound administration of justice and that ‘it is clear from the file that the explanatory memorandum to the law in question does not reveal such justification’.\footnote{ibid para 213 and 215.} Observing that, the Court should have concluded that the special section was not established by law ‘in the absence of any specification in the national legislation of the criteria to be met for such a designation to take place’.\footnote{See Case C-791/19 (n 25).} Once again, the Court preferred to stop at the intermediate conclusion that this supervisory body is not independent. But would it not have been more significant to note that these bodies have no legal existence? Consequently, none of their convictions or investigations have any legal basis. Wouldn’t it have been more salutary for the Romanian judges to have such a judgement by the Court and for the

\footnote{ibid. Regarding the interim appointments to management positions within the Judicial Inspection, the Court holds that national legislation is likely to give rise to such doubts where, even temporarily, it has the effect of allowing the government of the Member State concerned to make appointments to the management positions of the body responsible for conducting disciplinary investigations and bringing disciplinary proceedings against judges and prosecutors, by disregarding the ordinary appointment procedure laid down by national law (para 205). And, regarding the Special prosecution section, the court requires to verify that the rules on the appointment and withdrawal of prosecutors assigned to it are not such as to make the SIIJ open to external influences, having regard in particular to the amendments made to those rules by emergency ordinances derogating from the ordinary procedure provided for by national law (para 220).}
Court not to ignore its own advances, in terms of protecting the values of the rule of law, as derived from the *Simpson* judgement?

### 3.3. The Paramount Importance of Preserving Their Autonomy

It could be argued that it does not matter why a court is not recognised as independent (breach of national or European law) as long as it is found to violate Article 47 of the Charter and/or 19 TEU. I do not share this view.

Firstly, diluting the requirement of a tribunal established by law with the requirement of independence runs the risk of depriving the right of effective judicial protection of its substance and scope by limiting it to the requirement of an independent and impartial court. But, the scope of these concepts does not cover the same right, especially since the guarantee of independence does not cover all the requirements relating to the legal basis, composition and appointment process that must be monitored under the condition of ‘a tribunal established by law’.

Secondly, examining the independence of the Courts as a primary aspect of effective judicial protection is to take a somewhat outdated view of the issues at stake. For a long time, the independence of the Courts was seen above all as a condition to ensure mainly the right to an effective remedy for individuals. Which is still fundamental of course and underpinning article 47 of the Charter. But, in addition to the subjective dimension of judicial protection linked to the individual, there is now an objective dimension, given under article 19 TEU insofar as it embodies the value of the rule of law which has been recently reinforced by the principle of non-regression.\(^64\)

*Review Simpson* highlights this aspect by noting ‘According to the settled case-law of the European Court of Human Rights, the reason for the introduction of the term ‘established by law’ in the first sentence of Article 6(1) ECHR is to ensure that the organisation of the judicial system does not depend on the discretion of the executive, but that it is regulated by law emanating from the legislature in compliance with the rules governing its jurisdiction. *That phrase reflects, in particular, the principle of the rule of law*.\(^65\)

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\(^64\) Case C-896/19, *Repubblika* (n 48) EU:C:2021:311.

\(^65\) *Simpson* (n 11) para 73 (emphasis added).
From this perspective, each element of effective judicial protection becomes crucial and must be considered separately in order to preserve their complementarity and provide a legal basis for upholding all dimensions of the rule of law. The Court should never shy away from noting each breach or bringing them to the attention of the referring judge. Even more so, if it can question and/or conclude that there is no court established by law, it should never turn on the force to the independence argument or limit itself to this demonstration.

As such, the legal consequences could be particularly important since the court/judge would logically lose its legal existence and a fortiori its decisions would also be deprived of a legal basis. Relying on this ground offers national judges (the real ones) the possibility to disregard the judgments or interventions of their superior courts in their jurisdictional task, as long as they are not unequivocally recognised as such. Advocate General Tanchev unfortunately declines to go that far as regard to the act of appointment even if, nevertheless, he seems to give such effect to the act adopted by the contested judge. The reasoning remains ambiguous and could be made clearer by noting that the decision adopted by the challenged body should not be annulled because the act should be considered as never having existed. Moreover, the use of the theory of non-existence has the major advantage of not undermining the principle of res judicata or the principle of legal certainty. Moreover, this sanction corresponds to the seriousness of the violation required to lead to the infringement of the principle of the legal judge. These are all advantages that cannot be enjoyed by the decision of a court that does not meet the conditions of independence.

Finally, this approach would be consistent with the difference in nature and regime that we have demonstrated above. It also adds to the need to distinguish between them so as not to lose their complementarity, which makes it possible to defend each aspect of the rule of law.

66 See, Opinion AG Bobek FQ (Joined Cases C-811/19 and C-840/19), para 141.
67 Opinion AG Tanchev WZ (Case C-487/19) (n 30) para 105.
68 He considers ‘that as long as protection by way of such setting aside (or ignoring) of the contested order, resulting from the primacy of EU law, is ensured, it is not necessary for EU law to intervene in the sphere of judicial appointments, nor in the legal relationship between a judge and the Member State who appointed that judge’. ibid 104
69 Advocate General Hogan points out the difficulties that national judges might encounter when the independence of one of their courts or judges is found by the Court: the principle of legal certainty, the res judicata status of cases and/or the Advocate General Hogan points out the difficulties that national judges might encounter when the independence of one of their courts or judges is found by the Court: the principle of legal certainty, res judicata or the proper administration of justice. He considers that only Temporal adjustment of the effects of its interpretation is conceivable. The Court did not give the answer as far as it does not conclude at an impairment of the independence of the national Court: Case 896/19, Repubblika, Opinion of AG Hogan, para 103.
4. Final Remarks

Some other ambiguities still need to be resolved in relation to this notion. The first one is related to the 'law' that has to be taken into consideration. In the case of a revision of the national judicial system that results in a controversial organisation of justice, is it the 'previous law' or the new law underlying the reform that should be the reference standard for assessing whether the court is established by law? Furthermore, still with regard to the 'law' to be taken into account, it is not clear which standards include this notion. In that respect, the Polish Supreme Court and Advocate General Tanchev consider that a decision of the Constitutional Court falls within the scope of 'law' which has to be taken into consideration to evaluate the lawfulness of the appointment process.\(^{70}\) The Court may rely on the case law of the ECtHR, which has a particularly dynamic interpretation of this concept, but this remains to be demonstrated.

The second question concerns the authority competent to assess the precondition of non-compliance with national rules of judicial organisation. The Court does not have jurisdiction to assess the validity of national acts and it seems to me to be a delicate matter for the European judge to make this finding. Does it imply that the violation necessarily has to be established beforehand by a national court? It could not be necessary regarding that the level of scrutiny is confined to the flagrant breach. In any case, this problem must be put into perspective insofar as the national court will be the only one either to know about it or to draw the consequences of a judgment of the Court which would only declare the infringement or issue the correct interpretation of Union law.\(^{71}\)

Finally, it also remains the issue whether the criteria laid down by Simpson regarding to the requirement of a 'tribunal established by law' should be transposed within the scope of Article 267 TFEU. Such interpretation seems to be dictated by the landmark judgement of 'Portuguese Judges'. Since the Court of Justice has ruled that the criterion of independence required of a 'court or tribunal' within the meaning of the EU is given the same meaning in Article 47 of the Charter, Article 19 TEU and Article 267 TFEU,\(^{72}\) then the same reasoning should be applied with regard to the requirement of the legal

\(^{70}\) Opinion AG Tanchev WZ (Case C- 487/19) (n 30) para 65.

\(^{71}\) It could be admitted that these considerations may support the reasoning of the Court in AB judgment and in the infringement procedure (Case C-824/18 (n 37); Case C-791/19 (n 25). By reasoning from the angle of independence, it avoids both problems. In this context, it does not have to determine or rule on the conformity of the rules of organisation of justice with national law, but only to assess, from a more general point of view, whether the guarantees of independence and/or impartiality they offer meet European requirements.

\(^{72}\) Portuguese Judges (n 8) para 37 and 38 and 43; see also Banco de Santander (n 9) para 56.
judge,\textsuperscript{73} which appears as much essential for the effective judicial protection. Indeed, whereas independence and impartiality of national ‘courts and tribunals’ are considered by the Court as ‘essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism established by Article 267 TFEU ... That mechanism may be activated only by a body responsible for applying EU law which satisfies, inter alia, that criterion of independence;\textsuperscript{74} it would be quiet difficult to admit that a tribunal not established by law ensures a proper cooperation, mutual trust and participate to the effectiveness of the preliminary references. Therefore, the receivability of a question referred by such body should also be rejected\textsuperscript{75}.

Arguably, in order to keep a broad access to the Court through the preliminary ruling mechanism, Advocate General Bobek pleads in favour of a differentiated interpretations of the notion of ‘court and tribunal’ within Article 19 TEU, Article 47 of the charter and Article 267 TFEU, assuming that these article pursue a different function. This approach is not convincing for many reasons. Such a conceptualisation effort is commendable but doomed to failure if it completely ignores the ‘Portugues Judges’ case law from its demonstration. Above all, consistency and the guarantees attached to the rule of law dictate a uniform approach. Any other interpretation would undermine the creative construction of the Court to concretise the concept of the rule of law and to uphold it. Beside, as the Court underlined, the purpose is also ‘the proper working of the judicial cooperation system’. It is unlikely that admitting the admissibility of the question put by a ‘fake judge’ will promote the effectiveness of cooperation and the EU law.

To conclude, if the recognition of the direct effect has enabled national courts to become autonomous from their State, effective judicial protection now tends to enable them to become autonomous from their own judicial system when it deviates from the principle of the rule of law. In any event, this judgment is remarkable in all respects and is part of this major development in the rule of law.

\textsuperscript{73} Leloup (n 10) 1157; M Bonelli and M Claes, ‘Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish judiciary’ (2018) 14 European Constitutional Law Review 622-643, 637.

\textsuperscript{74} Portuguese Judges (n 8); Banco de Santander (n 9) para 56.

Chapter 7
How Independent Must a Lawyer Be?

Dirk Arts*

1. Introduction

The European Union is a union governed by the rule of law1. Judicial review of acts of Union institutions or Member States by the Union Courts in the context of direct actions is triggered by the applicants who, in principle, determine its scope by the pleas and arguments raised in their application. The Union courts have only a limited competence (and [sometimes] obligation) to raise legal concerns of their own motion2.

The representation of parties in judicial proceedings before the Union Courts, alongside the indispensable independence and expertise of the Union judiciary,3 is, therefore, of crucial importance for ensuring that, in practice, the rule of law is preserved in the framework of judicial protection of the Union.

The rules related to the representation of parties in direct actions before the Union Courts are laid down in Article 19 of the Statute of the Court of Justice (the Statute)4.

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1 See TEU art 2 and art 19(1), para 1; C-294/83, Les Vert v European Parliament, Court of Justice (23 April 1986) ECLI:EU:C:1986:166, pt 23 and most recently C-791/19, Commission v Republic of Poland, Court of Justice (15 July 2021) ECLI:EU:C:2021:596, pt 51.

2 For instance, the Court of Justice and the General Court are bound (and have the competence only) in the context of an action for annulment (TFEU art 263) to raise pleas related to the lack of competence and infringement of an essential procedural requirements in light of the facts submitted See C-235/92 P, Montecantini v Commission, Court of Justice (4 November 1992) ECLI:EU:T:1992:108, pt 107.

3 See TEU art 19(2), para 3 and the related implementing rules laid down in Statute of the Court of Justice, Title 1. See also TFEU art 253 (with regard to the Court of Justice) and art 254 (with regard to the General Court).

4 With regard to the representation in preliminary ruling procedures, the Rules of Procedure of the Court of Justice art 97 (4) provides that ‘as regards the representation and attendance of the parties to the main proceedings, the Court shall take account of the rules of procedure in force before the court or tribunal which made the reference. In the event of any doubt as to whether a person may under national law represent a party to the main proceedings, the Court may obtain information from the referring court or tribunal on the rules of procedure applicable’. 

Electronic copy available at: https://ssrn.com/abstract=4212945
Article 19, first paragraph of the Statute provides that, in proceedings before the General Court and the Court of Justice, Member States and Institutions of the Union shall be represented by an agent, who may be assisted by an adviser or by a lawyer.

By contrast, Article 19, third paragraph of the Statute stipulates that ‘other parties must be represented by a lawyer’ and Article 19, fourth paragraph, of the Statute provides that such lawyer can ‘only (be) a lawyer authorised to practise before a court of a Member State or of another State which is a party to the Agreement on the European Economic Area’.

In the joined cases *Uniwersytet Wrocławski v Research Executive Agency* (C-515/17 P) and *Poland v Research Executive Agency* (C-561/17 P), the Court of Justice was called upon to further clarify the concept of ‘lawyer’ within the meaning of Article 19, third paragraph of the Statute.

2. The Judgement

On 26 July 2010, Uniwersytet Wrocławski entered into a grant agreement with the Research Executive Agency (REA) in connection with a research programme.

The agreement stipulated that the researcher, who was employed on a full time basis in connection with the subsidised activity, was not authorised to receive any other income. Following an OLAF investigation, which revealed that the employee who had been engaged by the university had benefited from other sources of income, the REA terminated the agreement, required the university to reimburse part of the subsidy and to pay damages.

The university brought an action on the basis of Article 272 of the Treaty on the Functioning of the European Union (TFEU) against the REA decisions.

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5 Statute of the Court of Justice art 53, para 1 provides that the procedure before the General Court shall be governed by Title III of the Statute. Article 19 is part of the provisions of Title III of the Statute and therefore applicable to the procedures before the General Court.

6 Statute of the Court of Justice art 19, para 2 provides that States other than the Member States, which are parties to the Agreement on the European Economic Area and the EFTA Surveillance Authority shall also be represented by an agent.

7 Statute of the Court of Justice art 19, para 2.

The General Court found that the action was manifestly inadmissible as it had been lodged on behalf of the university by a representative who could not be regarded as a lawyer within the meaning of Article 19, third paragraph of the Statute as he did not have the requisite independence from his principal that would enable him to represent that principal in proceedings before the Courts of the European Union.

The representative, who had been employed by the University as an assistant and researcher for a period of time prior to the initiation of the application, had entered into an agreement under Polish civil law for the provision of lecturing services and the fulfilment of other adjacent academic tasks. The university claimed that this agreement did not constitute an employment relationship in the absence of any subordination and that the lawyer, therefore, could act in full independence.

The General Court, nevertheless, held that the concept of lawyer, as laid down in Article 19, third paragraph of the Statute, must be interpreted autonomously and emphasized that the lawyer's role is intended to be to collaborate in the courts' administration of justice and to provide, in full independence and in the overriding interest of that cause, such legal assistance as the client requires.

Referring to the case law holding that the requirement of independence of a lawyer implies that there must be no employment relationship between the lawyer and his or her client, it held that that reasoning applies with the same force in a situation such as in this case as there was a risk that the representative's professional opinion would, at least partly, be influenced by his working environment.

The Court of Justice set aside the order of the General Court.

The Court confirmed that the concept of a lawyer referred to in Article 19, third paragraph of the Statute must be given an autonomous and uniform interpretation, by reference to its wording, context and purpose.

As far as the wording of the third paragraph is concerned, the Court underlined that the non-privileged parties referred to in that provision, in particular because of the use of the term

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11 ECLI:EU:C:2020:73 (n 8) pt 57.
'represented', are not authorised to act on their own behalf, but that they must be represented by a third party. This finding is, in the Court's view, confirmed by the context to the third paragraph of Article 19 of the Statute as it is clear from that provision that non-privileged applicants (natural and legal persons) must be represented by a lawyer, whilst privileged applicants in direct actions (i.e. institutions and member states), referred to in the first two paragraphs, may be represented by an agent. Finally, the Court also referred to the objectives pursued by this provision, which are to prevent private parties from acting on their behalf before the Courts without using an intermediary and to ensure that legal persons are defended by a representative who is sufficiently distant from the legal person which he or she represents.

Whilst the Court found that the task of representation by a lawyer before the EU courts must be carried out in the interests of the sound administration of justice, it emphasised that the objective of that task is, above all, to protect and defend the principal's interests to the greatest possible extent, acting in full independence and in line with the law and professional rules and codes of conduct.

The Court concluded that the lawyer's duty of independence is to be understood not as the lack of any connection whatsoever between the lawyer and his or her client, but the lack of connections which have a manifestly detrimental effect on his or her capacity to carry out the task of defending his or her client while acting in that client's interests to the greatest possible extent.

The Court found that, as the legal adviser was simply connected to the university by a contract for the provision of lecturing services at that university, such a connection was not sufficient for a finding that he was in a situation that had a manifestly detrimental effect on his capacity to defend his client's interests to the greatest possible extent, in full independence.

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12 ibid pt 58-61.
13 ibid pt 62.
14 ibid pt 64.
3. Comments

3.1. What Is a Lawyer?

The importance of the Court’s judgement in Uniwersytet Wroclawski lies, first, in its express acknowledgement that the representation of non privileged applicants by a lawyer must not only be carried out ‘in the interests of the sound administration of justice’, but, ‘above all’, it must pursue the objective ‘to protect and defend the principal’s interests to the greatest possible extent’.15

Until Uniwersytet Wroclawski, the Court’s rulings on the interpretation of the notion of a lawyer under Article 19, third paragraph of the Statute were based on the conception of a lawyer’s role ‘as collaborating in the administration of justice by the courts and as being required to provide, in full independence, and in the overriding interest of that cause, such legal assistance as the client needs’16.

Whilst the Court recognized that both the public interest of the administration of justice to which a lawyer contributes when representing a client, as well as the private interest of ensuring the protection and defence of the natural or legal person concerned, must be taken into consideration when defining the concept of a lawyer, the public interest of being a collaborator of the court prevailed over the private interest of the client’s defence.

In Uniwersytet Wroclawski, the Court, inspired by advocate-general Bobek’s18 opinion, reversed that hierarchy. It is now clear that the primary purpose of the legal representation of a non-privileged party in a direct action lodged with the Union courts is, first and foremost, to act as the guardian of the interests of the principal.

15 ibid pt 62.
17 In the case AM & S v Commission (which dealt with the issue of legal privilege) the Court found that in some Member States the legal privileged is based on ‘a recognition of the very nature of the legal profession, inasmuch as it contributes towards the maintenance of the rule of law’.
19 In para 62 of the judgement the Court describes that task as ‘the protection and defence’.
Equally important, though not surprising, is that the Court confirmed that a representative can only be regarded as a lawyer if he or she acts in ‘full independence and in line with the law and the professional rules of conduct’\textsuperscript{20}.

Both elements, namely the objectives pursued by the legal representation of a non-privileged applicant and the representative’s duty of independence, are closely intertwined and inevitably affect the interpretation of the concept of a lawyer under Article 19, third paragraph of the Statute.

3.2. The Duty of Independence

Let us first focus on the duty of independence. That concept is not expressly referred to in Article 19, third paragraph of the Statute, yet it is at the heart of understanding the notion of a lawyer. At first sight, Uniwersytet Wrocławska does not seem to clarify further what this duty of independence entails. Nevertheless, the following observations can be made.

First, it is clear from the Court’s ruling, in line with its established case law, that a non-privileged applicant must call upon the services of a third party. As indicated above, the Court, referring to the wording, context and objective of Article 19, third paragraph of the Statute, confirmed that a private party cannot act on its own behalf and that a legal person must be defended by a representative who is sufficiently distant from the legal person he or she represents\textsuperscript{21}. The third party requirement, as articulated by the Court, implies that a lawyer must not be connected to the applicant in such a way that it would affect, or could be assumed to affect, the representative’s independence. Whilst this requirement can easily be established for natural persons to the extent that it is clear that they cannot represent themselves, it might be more difficult to establish whether a representative of a natural or legal persons is ‘sufficiently distant’. This notion does not provide for a clear criterion to distinguish those representatives who are too closely connected to the applicant (and, therefore, cannot be regarded as a ‘third party’ and, hence, act as a lawyer) from those whose connection is sufficiently distant for them to qualify as a third party.

\textsuperscript{20} ECLI:EU:C:2020:73 (n 8) pt 62.
\textsuperscript{21} ibid recital 61
Second, the Court regrettably does not elaborate any further on what this duty of independence of the third party precisely entails and fails to explain why this duty is so crucial to lawyers' ability to fulfil their tasks. It merely reiterates its established case-law that the concept of independence of lawyers is not only determined positively – by reference to professional ethical obligations - but also negatively, by the absence of an employment relationship.

The combination of a positive element, the reference to the professional rules, and a negative element, the absence of a relationship of employment, finds its origin in the case law related to determining the scope of the protection of the legal privilege of written communications between a lawyer and his or her client in the context of the Commission's competence of investigating competition law infringements. In those cases, the Court required that, for a written communication to benefit from legal privilege, it must be made for the purposes and in the interests of the client's rights of defence and must emanate from '...independent lawyers, that is lawyers who are not bound to the client by a relationship of employment.' The Court found that the benefit of legal privilege, therefore, does not attach to a written communication by a lawyer who, whilst a member of the bar (and required to adhere to the bar's professional rules, which are likely to include an obligation to act and advise in full independence), nevertheless is bound by an employment agreement.

Thus, for a representative to qualify as a lawyer under Article 19, third paragraph, of the Statute, it is not sufficient to establish that he or she is a member of the bar of one of the Member States (which is already required under Article 19, fourth paragraph of the Statute). He or she must also be able to establish that there is no connection with the applicant, such that would significantly affect his or her independence.

That might be challenging in the absence of any concrete indication of what the Court exactly understands by the notion of independence, as the representative in Uniwersytet Wrocławski experienced. It is, indeed, difficult to determine whether the connection between the representative and the applicant is sufficiently distant in the absence of a precise and clear notion of independence that may serve as benchmark for such an assessment.

Admittedly, the Court expressly refers to the 'professional ethical obligations' and, in AM & S, the court indicates that the requirement of independence by a lawyer (whose written communications

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22 The wording of Article 19, para 3 of the Statute does not refer explicitly to the duty of independence. In the case, T-664/16, Pf v EUIPO, General Court (30 May 2018) ECLI:EU:T:2018:517, pt 18, the General Court found that the fact that the requirement of independence are not expressly

can benefit from legal privilege) ‘...reflects the legal traditions common to the Member States and is also to be found in legal order of the [Union]...as is demonstrated by Article 17 of the Protocols on the Statutes of the Court of Justice of the EEC and the EAEC, and also by Article 20 of the Protocol on the Statute of the Court of Justice of the ECSC’. However, from the Court fails to articulate the substantive content of the notion any further.

The Charter of Core Principles of the European legal profession (Charter), to which the opinion of advocate-general Bobek refers, defines the requirement of independence as follows: ‘a lawyer needs to be free politically, economically and intellectually in pursuing his or her activities of advising and representing a client. This means that the lawyer must be independent of the state and other powerful interests, and must not allow his or her independence to be compromised by improper pressure from business associates’. In the absence of clear guidance from the Court, the Charter, which was adopted by the CCBE, might serve as an appropriate source of inspiration when identifying the material notion of independence.

3.3. The Primary Importance of the Objective of Protecting and Defending the Principal’s Interests to the Greatest Possible Extent

Whilst the Court has not attempted to give any meaningful substantive guidance on how the notion of independence should be interpreted, it, nevertheless, confirmed that the duty of independence is not to be understood as the lack of any connection whatsoever between the lawyer and his or her client. Rather, it only requires a lack of connections that would prevent a lawyer from properly fulfilling the tasks her or she is entrusted with.

This would mean that the assessment of whether the representative is sufficiently distant from his non-privileged client must be made in light of the objectives pursued by the required (independent) legal representation.

As already indicated above, prior to the Uniwersytet Wroclawski ruling of the Court of Justice, as the General Court highlighted in its judgement in the same case, the representative’s ‘role of collaborating in the administration of justice’ constituted the central (and most important) element in

24 ibid pt 24.

25 CCBE stands for the Council of Bars and Law Societies of Europe, representing the bar and law societies of 45 countries (for more information see [https://www.ccbe.eu/] accessed 5 February 2022)
that assessment. In Uniwersytet Wrocławski the Court clarified that ‘the task of defending his or her client while acting in that client’s interests to the greatest possible extent’ prevails and it should primarily in light of this be determined whether the representative is able to act in full independence.

However, it is difficult to see how this change of perspective in defining the role of the lawyer could have any substantive impact on how problematic connections with a client are distinguished from those that are still acceptable. Indeed, one wonders whether there is any material difference between the level of independence (to the extent it is possible to define any gradation of independence) that is required for a lawyer to act as a collaborator of the judicial process (the public interest served by a lawyer’s independence) compared to the level of independence necessary for defending his or her client’s interests to the greatest possible extent (the private interest served by a lawyer’s independence).

Surely, it is in the interest of both the proper functioning of the judicial process, as well as the private interest of the applicant, that all relevant and credible pleas which could potentially prevail in the judicial review of the contested act are raised and that all relevant arguments and facts are properly presented to the Union Courts.

It is also in the interest of both objectives pursued that no time and resources are spent on frivolous claims, which manifestly have no chance of success. In both instances, the independence of the lawyer guarantees that his or her expertise and professional opinion can be fully relied upon, rather than being hampered by any influence or connection which may undermine the effectiveness of the judicial process, the scope of the judicial review and the chances of the applicant to prevail in case an unlawful act was adopted, an institution unlawfully omitted to act or the EU should be held liable for an act or failure to act which can be attributed to its institutions or agencies.

It is, therefore, unlikely that this shift in perspective when defining the role a lawyer is entrusted with in the EU judicial process will have any material impact on determining the required level of independence. It might, indeed, be challenging to distinguish a connection that would be detrimental to the public interest of ensuring the effectiveness of the judicial process, from a connection that would prevent a representative from defending the interests of an applicant to the greatest extent. Moreover, whilst Uniwersytet Wrocławski might have altered their order of importance, both objectives must still be served by the lawyer’s duty of independence.
3.4. A Change in the Scope of Judicial Review?

By contrast, this shift is likely to affect the scope of judicial review of the applicant’s choice of representative under Article 19, third paragraph of the Statute.

It is submitted that Uniwersytet Wrocławski announces, albeit indirectly, that the Union Courts will exercise restraint when reviewing whether the legal adviser of the applicant qualifies as a lawyer under Article 19, third paragraph of the Statute. Indeed, not only did the Court identify that protecting and defending the principal’s interests to the greatest possible extent should be regarded as the prime objective pursued by a lawyer’s representation. It also emphasized that the Union Courts will only find that the required level of independence is lacking if it can be shown that the connections with the applicant have a manifestly detrimental effect on the representative’s capacity to defend his or her client’s interests to the greatest extent.

This requirement constitutes a justifiably high threshold.

It is a high threshold as it establishes that not any connection between the applicant and the representative will suffice for a Union Court to disqualify the applicant’s choice. A remote possibility that a representative’s link with the applicant would prevent him or her to defend the applicant’s interests to the greatest extent is not enough. The court must reach the conclusion that such connection has a ‘manifestly’ detrimental effect.

Whilst formulating an arguably new and more restrained approach, the Court, nevertheless, illustrated the boundaries of its judicial review by reference to previous case law. It highlighted EREF v Commission,26 a case in which it found that a lawyer who has been granted extensive administrative and financial powers, which place his or her function at a high executive level within the legal person he or she is representing, is not sufficiently independent from that legal person. It mentioned PITEE v Commission,27 a case in which it ruled that a lawyer who holds a high-level management position within the legal person he or she is representing is not sufficiently independent, and also referred to ADR Center v Commission,28 a case in which it reached the same conclusion in relation to a lawyer who holds shares in, and is the president of the board of administration of the company he or she is representing.

Yet, in all these cases, the scope of the Court’s review appears to be limited to examining the question whether the connection of the representative with the applicant was such that it could no longer reasonably be claimed that the representative was an (independent) third party.

In none of these cases did the Court assess whether the relevant connections would have prevented the lawyers concerned from representing the interests of their clients to the greatest extent or from fulfilling their role as a collaborator of the judicial process. That is arguably a more complex and difficult assessment to be made.

Also, in Uniwersytet Wrocławski, the Court refrains from exploring this in detail. It only states that the connection of the representative (the applicant was simply connected by a contract for the provision of lecturing services) ‘is not sufficient for a finding that the legal advisor was in a situation that had manifestly detrimental effect on his capacity to defend his client’s interests to the greatest possible extent, in full independence’. The judgement lacks any reasoning which might have substantiated this finding. It does not explain why such connection is not (manifestly) detrimental to the lawyer’s capacity to serve that interest.

One might deplore this approach by the Court but it is also indicative of the reduced scope of its judicial review. In reality, the Court appears to limit its assessment to examining whether the representative is sufficiently distant from the applicant, such that he or she can still be regarded as a ‘third party’. If that is the case, the Court seems to assume that the connection will not have a manifestly detrimental effect on the representative’s capacity to defend his or her client’s interests to the greatest extent possible and, hence, on the lawyer’s independence.

In any event, such high threshold for disqualifying a representative as a lawyer under Article 19, third paragraph of the Statute is also justified for the following reasons.

First, the choice of a legal representative is primarily a private matter and ‘any intervention in that relationship should be founded on serious reasons which reveal a clear and imperative need to “protect the applicant from his lawyer”’. Judicial restraint appears, therefore, to be appropriate. It is primarily the applicant’s prerogative to select his or her lawyer. There must be strong and overriding interests of a public nature to overrule the applicant’s personal choice.

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29 ECLI:EU:C:2020:73 (n 8) pt 67.
30 ECLI:EU:C:2020:73 (n 18) pt 111.
Second, a finding by the court that the legal representative cannot be regarded as a lawyer constitutes a non-remediable defect sanctioned by the manifest inadmissibility of the application. Article 51(1) of the Rules of procedure of the General Court provides that a ‘party must be represented by an agent or a lawyer in accordance with the provision of Article 19 of the Statute’ and article 51(4) of the Rules of procedure of the General court does not seem to provide for any means to remedy a finding that the representative chosen by the applicants lacks the necessary independence. The severity of this potential sanction calls for the Union Courts to exercise their competence with restraint in finding a non-compliance and enforcing its procedural rules.

Third, it must also be taken into consideration that the assessment whether the duty of independence under Article 19, third paragraph of the Statute is complied with is, in principle, only undertaken for a representative who is ‘... a lawyer authorised to practise before a court of a Member State or of another State which is a party to the Agreement on the European Economic Area may represent or assist a party before the Court’ as required under Article 19, fourth paragraph of the Statute.

One would expect that any lawyer who is authorised to practise before a court of a Member State is bound by the professional rules provided for under the Member State's legislation and the codes of conduct of the bar association of which the lawyer is a member. These professional rules are likely to require full independence, including strict conflict of interest rules, the compliance of which is enforced by the competent national authorities.

The independence of a lawyer representing a non-privileged party in direct actions before the Union Courts should, therefore, already be guaranteed by his or her adherence to the national mandatory professional rules. Admittedly, the notion of a lawyer under Article 19, third paragraph of the Statute, is an autonomous concept of EU law ensuring the necessary uniformity in determining who is authorised to act before the Union Courts. However, one would expect that the duty of independence under EU law is not significantly different compared to similar requirements of independence under the applicable national law rules. It should, therefore, be rather exceptional that a lawyer who is authorised to practise before a national court and has to respect mandatory

\[\text{31} \quad \text{Article 119(1) of the Rules of Procedure of the Court of Justice provide that a party may be represented only by his agent or lawyer.}\]

\[\text{32} \quad \text{See ECLI:EU:C:2020:73 (n 18) pts 58-78, at which Bobek explores this issue in detail. See also the wording of Article 119(4) of the Rules of Procedure of the Court of Justice.}\]
professional rules, does not comply with the duty of independence under EU law as required under Article 19, third paragraph of the Statute.

Finally, the Court’s expected restraint in finding that a lawyer lacks the required independence and is not a sufficiently distant third party, should not have any negative impact on the proper administration of justice. The Union Courts are entitled to exclude ‘an agent, advisor or lawyer from the proceedings’ if the relevant Court considers ‘that the conduct of the lawyer before the Court is incompatible with the dignity of the Court or with the requirements of the proper administration of justice[33]. The potential sanction of excluding a lawyer from the proceedings should on its own be sufficient to alleviate any concern that the lawyer chosen by the applicant does not comply with his or her duty of independence. There is no need to interpret the concept of lawyer authorised to represent a non-privileged applicant too restrictively. It seems, indeed, more appropriate to sanction vexatious or other behaviour demonstrating that the lawyer representing a party fails to act with sufficient detachment and independence and, by doing so, harms the proper administration of justice on the basis of actual and established improper acts, rather than declaring an application or request to intervene manifestly inadmissible based on the assumption that the representative’s connections with the party will prevent him or her from acting independently and might, therefore, have a negative, but not yet demonstrated, impact on the proper administration of justice.

3.5. Are Agents Sufficiently Independent?

Article 19 of the Statute allows for Member States and institutions of the Union to be represented by an agent. They are not obliged to call upon the services of a lawyer.

Agents are bound by an employment agreement with the Member State or institution they represent. Such employment relationship would prevent a lawyer from representing a non-privileged

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[33] See Rules of Procedure of the Court of Justice art 46 under the heading ‘Exclusion from the proceedings’ and Rules of Procedure of the General Court art 55 under the same heading. See for instance F-58/13, Marcuccio v Commission, European Civil Service Tribunal (22 May 2014) ECLI:EU:EF:2014:114, pt 19 in which case the Civil Service Tribunal excluded the lawyer acting for the applicant finding that ‘it is sufficiently established that, by his conduct, Mr A, has heedlessly contributed in the present case to the applicant’s vexatious conduct, which, taking account of the particularly high number of actions brought by the latter before the Courts of the European Union — of which a lawyer exercising ordinary care must have been aware — has proved to be especially prejudicial to the proper administration of justice’. 

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applicant under the current case law\textsuperscript{34}. It does not prevent agents from representing the Member State or the institution they are working for.

The contracting parties of the Treaty establishing the European Coal and Steel Community already operated a distinction between ‘the States and institutions of the Community’ and ‘undertakings and all other natural and legal persons’. Article 20, first paragraph of the Statute of the Court of Justice annexed to the European Coal and Steel Treaty stipulated that the States and institutions ‘shall be represented before the Court by an agent appointed for each case’ whilst ‘undertakings and all other natural and legal persons must be assisted by a lawyer entitled to practice before the court of a Member State’\textsuperscript{35}.

Nevertheless, the Contracting Parties must also have assumed that an agent acts independently (and probably has a similar duty of independence) as Article 20, fourth paragraph, of the ECSC Statute provided that they shall ‘enjoy the rights and immunities necessary to the independent exercise of their duties’. Arguably, it is indeed equally important for the good administration of justice and the defence of the Member States’ and institutions’ interests that, not only lawyers, but also agents comply with a duty of independence.

If an employment relationship does not prevent agents from properly representing Member States and institutions, it is only appropriate for the Court, as it did in Uniwersytet Wroclawski, to show restraint when assessing whether the connections between a lawyer and non-privileged parties are such that he or she would no longer be sufficiently independent to properly defend his or her clients’ interests and contribute to the proper administration of justice.

\textsuperscript{34} See the case law mentioned above.

\textsuperscript{35} The contracting parties might have found their inspiration in the French Code de justice administrative. Article R431-7 of the Code currently provides that ‘L’Etat est dispensé du ministère d’avocat soit en demande, soit en défense, soit en intervention’.

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Chapter 8

Case C-457/18 Slovenia v Croatia

Isabelle Van Damme*

Introduction

The judgment of the Grand Chamber in Case C-457/18 Slovenia v Croatia¹ raises a number of procedural issues regarding jurisdiction and admissibility of evidence as well as broader questions regarding the Court of Justice as a court of international law and the EU accession process.

A maritime and land border dispute between Croatia and Slovenia existed prior to Croatia's accession to the European Union. Slovenia joined in 2004; Croatia joined in 2013. In anticipation of Croatia's accession, an arbitration agreement between both parties was concluded on 4 November 2009 and entered into force on 29 November 2010. The arbitration agreement was a condition for Slovenia's acceptance of the accession of Croatia.² This is made clear in Article 9(1) of that agreement ('The Republic of Slovenia shall lift its reservations as regards opening and closing of negotiation chapters where the obstacle is related to the dispute'). The European Union had offered its good offices to both parties to help resolve their border dispute. The Presidency of the Council of the European Union signed the agreement, as a witness. The fourth recital in the preamble to the arbitration agreement refers to the facilitation offered by the European Commission. Pursuant to Article 7(2) and (3) of the arbitration agreement, the award is to be binding on the parties, constitute the definitive settlement of their dispute and require the parties to 'take all necessary steps to implement the award ... within six months after the adoption of the award'.

Arbitration proceedings duly started.³ However, a procedural incident involving ex parte communications between an arbitrator and a Slovenian agent caused Croatia to argue that there had been a material breach of the arbitration agreement, which therefore had to be considered as

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3 Judgment of 31 January 2020 (n 1) paras 26-31.

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terminated. According to Croatia, the absence of a valid arbitration agreement meant that there was no longer a basis for the jurisdiction of the arbitral tribunal. Croatia withdrew from the proceedings, the two party-appointed arbitrators resigned and the tribunal was recomposed with two new and independent members.\(^4\)

Croatia nonetheless argued that the arbitral tribunal should terminate its work with immediate effect.\(^5\) In particular, Croatia considered that the tribunal lacked jurisdiction to decide on the termination of the arbitration agreement, that instead the procedure under the Vienna Convention on the Law of Treaties (VCLT)\(^7\) applied and that the agreement was terminated because of a material breach. Slovenia disputed the application of Articles 60 and 65 of the VCLT and argued that the tribunal enjoyed the inherent power to decide on its own jurisdiction.\(^8\)

In a partial award of 30 June 2016, the arbitral tribunal agreed that there had been a violation of the confidentiality provisions but found that the proceedings could continue.\(^10\) The tribunal confirmed that ‘in the absence of any agreement to the contrary, an arbitral or judicial tribunal has, under general international law, jurisdiction to determine its own jurisdiction’.\(^11\) It further ruled that Article 21(1) of the arbitration agreement established its jurisdiction ‘to rule on any objection to the Tribunal's jurisdiction “with respect to the existence or validity of the Arbitration Agreement”’.\(^12\) This also meant that its jurisdiction was not affected by Article 65 of the VCLT.\(^13\) In examining whether the breach of the standards of independence and impartiality that had occurred precluded the continuation of the proceedings and the protection of the integrity of the arbitral process, the tribunal found it material that no award had been rendered and the tribunal had been properly re-composed.\(^14\) Finally, the

\(^{4}\) ibid para 31.
\(^{5}\) ibid paras 29-36.
\(^{6}\) ibid paras 63 and 141, see also paras 88-101.
\(^{8}\) Partial award (n 10) paras 88-89, 95-97.
\(^{9}\) ibid paras 102, 105, 108. Article 60 of the VCLT relates to the termination or suspension of the operation of a treaty as a consequence of its breach. Article 65 of the VCLT sets out the procedure to be followed with respect to the invalidity, termination, withdrawal from or suspension of the operation of a treaty.
\(^{10}\) PCA, In the matter of an arbitration under the arbitration agreement between the Government of the Republic of Croatia and the Government of Slovenia (signed on 4 November 2009, partial award of 30 June 2016) at [https://pcacases.com/web/sendAttach/1787](https://pcacases.com/web/sendAttach/1787) accessed 19 September 2021 (‘partial award’).
\(^{11}\) ibid para 157; see also paras 162, 168.
\(^{12}\) ibid para 160, see also para 162.
\(^{13}\) ibid para 160, see also para 167.
\(^{14}\) ibid para 160, see also para 196.
tribunal assessed the validity of the termination of the arbitration agreement and whether Croatia was justified in invoking a ‘material breach’ of that agreement, entitling Croatia to terminate it under Article 60 of the VCLT. Given the remedial action taken as well as the purpose of the arbitration agreement, the tribunal concluded that Slovenia’s violation of that agreement ‘do[es] not render the continuation of the proceedings impossible and, therefore, do not defeat the object and purpose of the Agreement’. The tribunal therefore found that Croatia was not entitled to terminate the arbitration agreement, which remained in force. In its final award, the tribunal decided on the land and maritime boundary.

Croatia refused to accept the validity of the final award and to comply. This caused Slovenia to initiate infringement proceedings, pursuant to Article 259 of the Treaty on the Functioning of the European Union (TFEU), against Croatia. Article 259 is the legal basis for an action by a Member State which considers that another Member State has failed to fulfil an obligation under the Treaties. Before this dispute, only a limited number of actions had been brought under Article 259.

Before the CJEU, Slovenia argued that Croatia had violated EU primary and secondary law, notably because it placed Slovenia in a position precluding it from complying with its EU law obligations. In particular, Slovenia claimed that Croatia failed to fulfil its obligations under:

- Article 4(3) TEU, in that Croatia has jeopardised the attainment of the objectives of the European Union, in particular peace building and establishing an ever closer union among the peoples of Europe, and has prevented Slovenia from complying with its obligation to implement EU law fully throughout its territory;
- the principle of the rule of law, enshrined in Article 2 TEU, which is an essential condition of membership of the European Union and obliges Croatia to respect the territory of Slovenia as determined by the final award, in accordance with international law;

15 ibid para 160, see also para 225.
16 ibid para 160, see also para 225.
17 PCA, In the matter of an arbitration under the arbitration agreement between the Government of the Republic of Croatia and the Government of Slovenia (signed on 4 November 2009, final award of 29 June 2017) [https://pcacases.com/web/sendAttach/2172] accessed 29 August 2021 (final award).
18 See Case 58/77, Ireland v France (withdrawn); Case 141/78, France v UK, Judgment (4 October 1979) EU:C:1979: 225; Case C-349/92, Spain v UK (withdrawn); Case C-388/95, Belgium v Spain, Judgment (16 May 2000) EU:C:2000: 244; Case C-145/04, Spain v UK, Judgment (12 September 2006) EU:C:2006:543; Case C-364/10, Hungary v Slovakia, Judgment (16 October 2012) EU:C:2012:630; Case C-591/17, Austria v Germany, Judgment (18 June 2019) EU:C:2019:504.
19 Judgment of 31 January 2020 (n 1) para 1.
– Article 5(2) of Regulation (EU) No 1380/2013 and Annex I thereto, in that Croatia has refused to implement the reciprocal access regime laid down by Regulation No 1380/2013, has not recognised the effect of the legislation that Slovenia has adopted to implement that reciprocal access regime, has refused Slovenian nationals the right to fish in the Slovenian territorial sea and has prevented Slovenia from enjoying rights, such as the adoption of measures for the conservation and management of fish stocks, provided for by that regulation;
– the system of control, inspection and implementation of the rules as provided for by Council Regulation (EC) No 1224/2009, and by Commission Implementing Regulation (EU) No 404/2011, in that Croatia has prevented Slovenia from carrying out the task assigned to it under that system, as well as the monitoring, control and inspection of fishing vessels and, when inspections reveal any breaches of the rules of the common fisheries policy, procedures and enforcement measures against the persons responsible for the breach, and in that Croatia has itself exercised the rights which those regulations grant to Slovenia as the coastal State;
– Articles 4 and 17, read in conjunction with Article 13, of Regulation (EU) 2016/399; and
– Articles 2(4) and 11(1) of Directive 2014/89/EU, in that Croatia has adopted and implemented the ‘Spatial planning strategy of the Republic of Croatia’.

Croatia argued that the case was inadmissible.

1. The Court Found that the Infringements of EU Law Were Ancillary and Therefore It Lacked Jurisdiction

The essence of Croatia's admissibility objection was that the dispute between both parties primarily concerned the validity and legal effects of the arbitration agreement and the arbitral award. It argued that 'the infringements of EU law pleaded are ancillary to the alleged failure by ... Croatia to comply with the obligations arising from a bilateral international agreement to which the European Union is not a party and whose subject matter falls outside the areas of EU competence.' The CJEU agreed.
The starting point of the Court’s assessment was its judgment in Case C-132/09 Commission v Belgium.\(^{21}\) That infringement proceeding concerned Belgium’s alleged failure to fulfil its obligations under the 1962 Establishment Agreement concluded between the Board of Governors of the European School and Belgium (Establishment Agreement). In that case, the Commission had alleged an infringement of Article 10 EC but not as a self-standing ground.\(^{22}\) The Court found that alleged infringement to be ancillary to the infringement of the Establishment Agreement (in the sense that Belgium’s failure to observe its obligations under the Establishment Agreement resulted in a breach of Article 10 EC).\(^{23}\) In that judgment, the Court held that it lacked jurisdiction to rule on the interpretation of an international agreement concluded by the EU Member States that does not form part of the EU legal order, despite the fact that that agreement is linked to the European Union and the functioning of its institutions.\(^{24}\)

Taking into account that case law, the Court in Slovenia v Croatia found that all of the six Slovenian complaints either resulted from Croatia’s alleged failure to comply with the arbitration agreement and the arbitration award deciding on the border between Croatia and Slovenia or depended on the premise that the land and sea border between both Member States had been determined by the arbitration award in accordance with international law. In other words, all of Slovenia’s complaints concerned violations of EU law that, in essence, would have not occurred if not for Croatia’s failure to give effect to the arbitration agreement and the arbitration award.

The Court considered that the arbitral award was made by an international arbitral tribunal established under a bilateral arbitration agreement governed by international law. According to the Court, the subject matter of that award does not fall within the scope of the European Union’s competences.

The link between the border dispute and the condition of arbitration for Croatia’s accession to the European Union was deemed insufficient to make the arbitration agreement and the award an integral part of EU law. In particular, the Act of Accession could not be interpreted to mean that the obligations under the arbitration agreement, including the obligation to observe the border established in the


\(^{22}\) ibid para 41.

\(^{23}\) ibid para 40.

\(^{24}\) ibid para 44.
award, became part of EU law. This meant that the infringements of EU law were ancillary. Therefore, the Court concluded that it lacked jurisdiction.

The Court added that it is for each Member State to determine the extent and limits of its own territory in accordance with the rules of public international law. The territorial scope of the Treaties is defined by reference to national territories. To respect its competences as well as the powers of the Member States, the Court considered that it would not decide the question of the extent and limits of both parties’ territories by applying directly the border determined by the award to verify the existence of the infringements of EU law at issue.

Finally, in paragraph 109 of its judgment, the Court offered an afterthought. The Court noted that its conclusion on inadmissibility was without prejudice to any obligation arising from the principle of sincere cooperation under Article 4(3) TEU to bring about a definitive legal solution consistent with international law, as suggested in the Act of Accession, that ensures the effective and unhindered application of EU law in the areas concerned, and to bring the dispute between Slovenia and Croatia to an end by using one or another means of settling it. The Court expressly mentioned the possibility of submitting the dispute to the Court pursuant to Article 273 TFEU. That is the provision establishing ‘jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties’.

This article will address three questions relevant to the development of EU procedural law. First, was the Court correct in adopting the premise that deciding on Slovenia’s pleas involved interpreting and applying the arbitration agreement (and examining the border established in the award issued pursuant to that agreement) and was the Court correct in its analogy with Commission v Belgium? Second, what does this judgment tell us about the Court’s position as a court of international law? Third, what is the contribution of the Court’s ruling on the inadmissibility of a legal opinion filed as evidence to the law on evidence before the Court? A separate question relates to the impact of this judgment on the accession of new EU Member States, including the importance of finding a definitive settlement of any territorial dispute between the acceding country and any EU Member State prior to accession. The assessment of that question has been addressed in other case notes.

25 Article 273 TFEU states that ‘[t]he Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties’. Article 273 TFEU was first invoked in Case C-648/15, Austria v Germany, Judgment (12 September 2017) EU:C:2017:311.

2. The Premise that Addressing Slovenia’s Pleas Involved Interpreting and Applying the Arbitration Agreement and the Analogy with *Commission v Belgium*

It was not contested that Croatia had failed to implement the arbitration award. Under international law, including the arbitration agreement between Croatia and Slovenia, there was an obligation to comply with the award provided that the arbitral tribunal's jurisdiction was validly established. Moreover, it is well-recognised that a court or tribunal has jurisdiction to determine its own jurisdiction. In the present case, there was a partial award that examined, and rejected, Croatia’s jurisdictional objection and invocation of a material breach of the arbitration agreement to justify its termination. Another award settled the border dispute between both countries. Thus, it could be argued that, as a matter of international law, those matters were settled by an award of the arbitral tribunal established pursuant to the arbitration agreement.

The Court refused to resolve a territorial dispute between EU Member States on the basis of international law because that matter falls outside the scope of EU law. That conclusion is correct. It is also uncontested that the parties had agreed to refer their territorial dispute to binding third party adjudication other than the CJEU.

However, the question arises of whether deciding on Slovenia’s application (or at least certain of its pleas) would have required the Court to resolve such a dispute for which it has no competence? Possibly not. In essence, the arbitral tribunal settled, in its award, that territorial dispute as well as the dispute about its jurisdiction and the termination of the arbitration agreement. Or, as the Advocate General put it, that award ‘constitutes a legal fact for this Court’. The problem was that Croatia refused to comply with the tribunal’s resolution of the dispute. The essence of Slovenia’s application was that Croatia violated EU law because of its failure to comply with the award and respect the border defined in that award. Thus, if any underlying question of international law had to be addressed, it was not the question of title to territory. That question had been settled by an international tribunal which found it had jurisdiction to decide that matter. Instead, arguably the relevant question was whether Croatia was justified in refusing to implement the award and terminating the international arbitration agreement. This would have involved interpreting the arbitration agreement but applying customary


international law governing the law of treaties to determine whether Croatia was justified in invoking a material breach of that agreement as a basis for terminating it. Thus, any rules of international law that required application by the CJEU was customary international law instead of the arbitration agreement itself.\(^{28}\) The Advocate General did consider that option, noting that ‘the European Union must respect the rules of customary international law ... only where the European Union exercises its powers’.\(^{29}\) Alternatively, the CJEU could have simply taken the border as settled by the arbitral tribunal, which had also addressed the question of material breach, as a fact relevant to especially the pleas in respect of secondary EU law.\(^{30}\) This is possibly the first basis for distinguishing the present case from Case C-132/09 Commission v Belgium.

A second basis for distinction is that the grounds of infringement included violation of primary and secondary rules of EU law rather than the arbitration agreement itself.\(^{31}\) Furthermore, the arbitration agreement did not fully stand outside of the EU legal order. The terms of Croatia’s accession altered some parts of secondary law\(^{32}\) but stated that those changes must apply from or until ‘the full implementation of the arbitration award resulting from the Arbitration Agreement’. That condition thus concerned the interpretation and application of EU law, taking into account customary international law.

A third basis for distinction concerns the manner in which the ‘ancillary criterion’ became relevant in either case. The essence of the ancillary criterion is that the infringement of EU law is claimed to obtain performance of obligations under other areas of law, such as an international agreement to which the European Union is not a party, falling outside of the European Union’s competences. Put differently, any violation of EU law necessarily follows from a violation of, for example, an international agreement to which the European Union is not a party. In Commission v Belgium, the alleged violation of Article 10 EC was ancillary, in the sense of a consequential finding fully dependent on the violation


\(^{29}\) Opinion of 11 December 2019 (n 27) para 125.

\(^{30}\) As the Advocate General noted, the complaints based on secondary law were ‘based on the premiss that the boundary between ... Croatia and ... Slovenia has been determined by the arbitration award at issue, with the effect that the refusal to implement it constitutes an infringement of those provisions by ... Croatia’. ibid para 119.

\(^{31}\) See also E Kassoti, ‘Between a Rock and a Hard Place: The Court of Justice’s Judgment in Case Slovenia v Croatia’ (European Forum, 28 October 2020) 1-10, 5.

of the Establishment Agreement for which the CJEU had no jurisdiction. In Slovenia v Croatia, as already mentioned, it is less evident that the CJEU had to apply the arbitration agreement to which the European Union was not a party (though its conclusion was facilitated through the Council). It seemed at least relevant to consider the final and partial awards as facts or to interpret the parts of secondary law referring to the full implementation of the arbitration agreement and the conditions under which, as a matter of EU law as well as customary international law which binds the European Union, such implementation might not be possible or required.

In sum, although the ancillary criterion is valid in assessing jurisdiction and there is no basis to question the principle established in Commission v Belgium, the premise underlying the judgment, namely that the main question put before the CJEU was the resolution of the territorial dispute or the application of the arbitration agreement and that therefore the questions of EU law were ancillary, ignores that an international tribunal with the required jurisdiction had resolved those matters.

3. The Position of the CJEU as a Court of International Law

The judgment has resulted in some confusion about whether the Court is consistent in deciding when to venture into questions of international law, or at least when to give effect to the outcome of international dispute settlement proceedings in international fora. The Court sought to avoid deciding a matter falling outside the scope of EU law. At the same time, it did not recognise the border, set by the arbitral award, as a fact relevant to assessing all or some of Slovenia’s pleas. The existence of the partial and final awards seemed irrelevant to the Court’s reasoning.

In other judgments, the Court, as it were, ‘runs’ to the questions of international law, even if there are binding international fora of dispute resolution with the required jurisdiction or to the contrary such fora are lacking. 33 An example is the judgment in Commission v Hungary, where the Court reviewed whether Hungary, as a WTO Member, had complied with its GATS obligations. The main justification for that review was to avoid the responsibility of the European Union under WTO law.

On balance, the judgment in *Croatia v Slovenia* indicates that the Court might be more receptive to international law than to final decisions of international courts and tribunals.

4. **Admissibility of Evidence**

Finally, an overlooked procedural issue in the discussion of this judgment is the Court's consideration of a question relating to the admissibility of evidence.

Slovenia had filed an internal Commission document relating to an opinion of the Commission's legal service issued during the pre-litigation stage of the proceedings and addressed to the Commission President's Head of Cabinet. It was publicly accessible via a hyperlink in a media article. Croatia objected to the admissibility of that evidence. It had not been publicly disclosed by the Commission under Regulation No 1049/2001. The admissibility of a legal opinion of one of the EU institutions has previously been addressed by the Court as well as the General Court.

The Advocate General proposed that the legal opinion be removed from the record, drawing especially on an order of the Court in Case C-445/00 *Austria v Council*. Although the Advocate General recognised that past cases primarily involved decisions regarding the validity of an EU decision, he considered that ‘removal of the legal opinion at issue is justified in the light of [the Commission’s] interest in seeking and receiving frank, objective and comprehensive advance from its Legal Service’. He added that deciding otherwise would also result in a risk of circumventing the procedure envisaged under Regulation No. 1049/2001. The fact that the legal opinion had been published in the press did not alter that conclusion. In that respect, the Advocate General deemed it sufficient that Slovenia had not obtained the document through an access to documents request under Regulation No. 1049/2001. The Court agreed with Croatia and the Advocate General that the evidence had to be removed from the record.

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37 ibid para 94.
38 ibid para 95.
39 ibid para 95.
The starting point of the Court’s assessment was that it is in the public interest that institutions should be able to benefit from the advice of their legal service given in full independence. That public interest means that those internal documents may not be produced in proceedings before the Court unless either the institution has authorised its production or the Court has ordered it. In this case, neither of those conditions was met. The Court therefore considered that allowing the document to remain on the record would ‘effectively permit ... Slovenia to circumvent the procedure set up by Regulation No 1049/2001’. The fact that the document was invoked in proceedings against a party other than the Commission was deemed immaterial. The Commission had not delivered a reasoned opinion. Nor had it intervened in support of either party. The Court nevertheless placed that consideration in the specific context of this dispute because it deemed that ‘there is a foreseeable ... risk that the Commission ... will consider itself to be compelled, on account of the unauthorized production ... of the document ... , to take a position publicly on advice that was quite clearly intended for internal use’.

According to the Court, that ‘would inevitably have negative consequences for the Commission’s interest in seeking legal advice and in receiving frank, objective and comprehensive advice’. Those considerations were not called into question by the fact that the document was publicly available via a hyperlink in a media report.

This case can be contrasted with certain previous judgments of the General Court. The General Court has accepted the admissibility of internal reports that were made available in the public domain in judicial proceedings before it. In a case involving the request that exhibits containing a version of an opinion of the OLAF Supervisory Committee and an OLAF report, which had previously been published in a newspaper, be removed from the case-file, the General Court rejected that request. It took into account ‘the nature of the documents in question, ... the fact that they have already been disclosed in the press and ... the circumstances of the case’.

In reaching that conclusion, the General Court considered it relevant that ‘there is no provision that expressly prohibits evidence obtained unlawfully from being taken into account’, ‘the Court of Justice has not ruled out the possibility that even internal documents may, in certain cases, lawfully be placed on the case-file’, and that it was not established...

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40 Judgment of 31 January 2020 (n 1) para 68.
41 ibid para 70.
42 ibid para 70.
44 ibid para 47.
45 ibid.
that the party relying on the evidence had unlawfully obtained the documents considering that version of the documents had been published in the press and therefore the confidentiality of those documents had, in any event, been compromised.\textsuperscript{46} Likewise, in another case, the General Court held that diplomatic cables, which had been published on publicly accessible websites, could be admitted as evidence considering that ‘since the applicant was not involved in the disclosure of the diplomatic cables, the possibly unlawful nature of the disclosure cannot be held against it’.\textsuperscript{47}

In certain other jurisdictions, the admissibility as evidence of an internal advice or confidential document that has been made available in the public domain has already been addressed. For example, in a 2018 judgment, the UK Supreme Court ruled, in respect of the inviolability of documents and the admissibility of their use in a domestic court, that protection should be maintained provided that ‘its contents must not have become so widely disseminated in the public domain as to destroy any confidentiality or inviolability that could sensibly attach to it’. In that case, because ‘the cable has been put into the public domain by the Wikileaks publication and the newspaper articles which followed, in circumstances for which the appellant has no responsibility’, ‘the cable has as a result lost its inviolability, for all purposes including its use in cross-examination or evidence in the present proceedings’.\textsuperscript{48}

In this judgment, the Court did not focus on the manner in which the legal opinion has been disclosed. It simply dismissed the relevance of this factor. For future disputes, it might be necessary to focus in greater detail on the circumstances in which the evidence was made public and whether there are conditions under which any protection granted by EU law has irrevocably affected the confidentiality of the evidence.

\textsuperscript{46} ibid paras 49-51.

